



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 22 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF THE SECTIONS 1, 1A, 10, 30, 41, 42(A), 44, 47, 85, 104 AND 123(8)**

**OF THE FORMER CONSTITUTION OF KENYA AND ARTICLES 20, 21, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS SECURED AND GUARANTEED UNDER SECTIONS 70(A), 75, 71, 74, 77 AND 82 OF THE FORMER CONSTITUTION AND ARTICLES 27, 28, 40, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE DISBANDMENT OF THE ELECTORAL COMMISSION OF KENYA AND REMOVAL OF ITS MEMBERS OF STAFF PURSUANT TO SECTION 41(14) OF THE CONSTITUTION OF KENYA (AMENDMENT) ACT (NO. 10 OF 2008)**

**AND**

**IN THE MATTER OF THE ROLE OF THE ELECTORAL COMMISSION AND THE REPORT OF THE INDEPENDENT REVIEW COMMISSION ON THE GENERAL ELECTIONS HELD IN KENYA ON 27<sup>TH</sup> DECEMBER 2007**

**AND**

**IN THE MATTER OF THE JURISDICTION OF THE HIGH COURT UNDER ARTICLES 162 AND 165(3) TO DETERMINE WHETHER THE PETITIONERS WERE LAWFULLY REMOVED FROM THEIR OFFICES PURSUANT TO THE CONSTITUTION OF KENYA (AMENDMENT) ACT (NO. 10 OF 2008)**

**-BETWEEN-**

**DAVID GACHINI MOKO.....1<sup>ST</sup> PETITIONER**

**KENNEDY OWINO.....2<sup>ND</sup> PETITIONER**

**JOHN M. MATOLO.....3<sup>RD</sup> PETITIONER**

JUSTUS K. KIMATU.....	4 <sup>TH</sup> PETITIONER
ELIOT NG'ENO.....	5 <sup>TH</sup> PETITIONER
JOAN MUDINDI VWAMU.....	6 <sup>TH</sup> PETITIONER
STEPHEN NJOGU.....	7 <sup>TH</sup> PETITIONER
ISAYA MATORE.....	8 <sup>TH</sup> PETITIONER
JOYCE MUTETE.....	9 <sup>H</sup> PETITIONER
PAULINE WANDAMBWA.....	10 <sup>TH</sup> PETITIONER
FREDRICK MUGAMBI.....	11 <sup>TH</sup> PETITIONER
MICHAEL OWINO ANGUMBA.....	12 <sup>TH</sup> PETITIONER
DAVID KATAMA.....	13 <sup>TH</sup> PETITIONER
JAMES SANGALE VUGIGI.....	14 <sup>TH</sup> PETITIONER
COSMAS IKUNYUA.....	15 <sup>TH</sup> PETITIONER
JOB MUSOMI KIILU.....	16 <sup>TH</sup> PETITIONER
EPHAIM LAWRENCE WALWENGE.....	17 <sup>TH</sup> PETITIONER
JUSTIN MAINA KAMAU.....	18 <sup>TH</sup> PETITIONER
THOMAS STEPHEN.....	19 <sup>TH</sup> PETITIONER
KINYUA STEPHEN.....	20 <sup>TH</sup> PETITIONER
JONATHAN AKOTO MULINDI.....	21 <sup>ST</sup> PETITIONER
MANI LEMAYIAN.....	22 <sup>ND</sup> PETITIONER
BUBBA NZAU MUIMI.....	23 <sup>RD</sup> PETITIONER
JOSHUA MUTUMA LAICHENA.....	24 <sup>TH</sup> PETITIONER
MATHEW MWANIKI KURIA.....	25 <sup>TH</sup> PETITIONER

(Suing on their own behalf and on behalf of all other former

Electoral Commission of Kenya (ECK) staff members on payroll as at December, 2008)

**VERSUS**

**HON. ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

The Petitioners who were employees of the defunct Electoral Commission of Kenya (ECK) filed their petition on 28<sup>th</sup> April 2014 and an Amended Petition on 29<sup>th</sup> September 2009 in which they allege that the Constitution of Kenya (Amendment) Act (No. 10 of 2008) was invalid as it was inconsistent with the Constitution as it illegitimately led to the disbandment of the Electoral Commission of Kenya. The Petitioners therefore seek the following Orders:

- a) That a declaration be issued to declare that the Constitution of Kenya (Amendment) Act 2008 was unconstitutional to the extent that it provided for the removal of the Petitioners from their offices as staff members of the Electoral Commission of Kenya.

- b) That a declaration be issued to declare that the removal of the Petitioners from their respective offices as members of staff of the Electoral Commission of Kenya through Section 41 (14) of the Constitution of Kenya (Amendment) Act, 2008 was unconstitutional.
- c) That a declaration be issued to declare that Section 41 (14) of the Constitution of Kenya (Amendment) Act, 2008 was a legislative judgment against the Petitioners contrary to Section 60 of the former Constitution.
- d) That a declaration be issued to declare that the removal of the Petitioners from their respective offices as members of Staff of the Electoral Commission of Kenya pursuant to Section 41 (14) of the Constitution of Kenya (Amendment) Act, 2008 violated their right to protection of law and fair hearing under sections 70 and 77 of the former Constitution.
- e) That a declaration be issued to declare that pursuant to Section 41 and 104 of the former Constitution, the Petitioners are entitled to payment of all salaries and allowances payable to each of them during the remainder of their respective terms as members of staff of the Electoral Commission of Kenya and also for the period they were on leave as from January, 2009 to 31<sup>st</sup> March, 2009.
- f) That a mandatory injunction be issued to compel the Government of Kenya to pay the Petitioners all salaries and allowances in paragraph 31 above payable to each of them during the remainder of their respective terms as members of staff of the Electoral Commission of Kenya amounting to Kshs.1,309,768,705/-.
- g) That a declaration be issued to declare that all the members of staff appointed by the Electoral Commission of Kenya and who were on payroll as at December ,2008 are entitled to payment of their full salaries, allowances and other benefits payable to each of them under their respective terms of contract or employment.
- h) That a declaration be issued to declare that pursuant to implementation of the provision to Section 41 (14) of the Constitution of Kenya (Amendment) Act, 2008 or their redeployment in the Public Service the electoral officials and staff appointed by the Electoral Commission of Kenya were entitled to remain in office under their respective terms of employment.
- i) That a declaration be issued to declare that the removal of the Petitioners from their respective offices as members of staff of the Electoral Commission of Kenya and/or termination of their tenure of office was discriminatory of itself and in its effect within the meaning of section 82 of the former Constitution of Kenya.
- j) That a declaration be issued to declare that the National Assembly had no power under Sections 30,46,47,54 and 56 of the former Constitution to derogate, curtail, violate or otherwise compromise the Petitioner's contracts of employment with the Electoral Commission of Kenya as it purported to do through the Constitution of Kenya (Amendment) Act 2008.
- k) That a declaration that the Petitioners be entitled to damages as redress in respect of each of the above rights that have been violated by the promulgation of the Constitution of Kenya (Amendment) Act, 2008.
- l) That an order consequential to the above declarations quantifying the amount of damages in respect of each and every declaration and orders granted.
- m) Costs.

The Petition was supported by the Affidavit of David Gachini Moko sworn on 27<sup>th</sup> September 2009.

### **Petitioners' Case**

The Petitioners aver that they are former members of staff of the Electoral Commission of Kenya having been appointed under section 41 of the Constitution, now repealed, as read with section 3 of the National Assembly and Presidential Elections Act (now repealed).

They aver that after the highly contested 2007 elections and pursuant to the Committee of Eminent African persons chaired by Kofi Annan H. E President Kibaki appointed the Independent Review Commission (IREC) under the Chairmanship of Judge Johan Kriegler to examine amongst others the organizational structure, composition and management systems of the electoral Commission of Kenya and assess its independence, capacity and functioning during the preparation of the 2007 elections.

The Petitioners contend that IREC's mandate was to recommend electoral reform in Kenya with a view to improving future electoral processes in the broader context envisaged review of the constitution that would provide for a new electoral system. On 17<sup>th</sup> September 2008, IREC presented its Report to then President H.E Kibaki which Report recommended inter alia the consolidation of statutes on the operation management of elections and the establishment for an Electoral Dispute Resolution Court. According to the Petitioners, politicians and activist groups demanded the disbandment of the ECK despite this being a distortion of the IREC's Report. However, on 30<sup>th</sup> October 2018 the Petitioners learnt that the Ministerial Committee that had been appointed to study the IREC's Report had resolved to force the Petitioners out of office and to disband the ECK.

The Petitioners aver that the defunct ECK and its Commissioners filed High Court Petition No. 689 of 2008 Samuel Kivuitu & 23 Others v Hon. Attorney General seeking an interpretation of the Constitution and a Conservatory Order was issued, that the Ruling delivered by Nyamu J. underscored the fundamental question raised in the Petition. However, on 27<sup>th</sup> November 2008 the Speaker to the National Assembly stated that the conservatory order did not prevent Parliament from carrying out its legislative function.

The Petitioners aver that in a letter dated 24<sup>th</sup> December 2008 from the Secretary to the Cabinet and Head of Public Service and addressed to

the ECK's Secretary/CEO directed that all ECK staff should proceed on leave with immediate effect and on 24<sup>th</sup> March 2009, he notified specific ministries of the dissolution of the ECK.

The Petitioners allege that they were never paid their remuneration, allowance and benefits from the period between 1<sup>st</sup> January 2009 to 31<sup>st</sup> March 2009, which was in violation of their rights under section 70 and 75 of the Constitution. They further aver that the Petitioners have not been paid their retrenchment Benefits as per the 2002 Rules of the Electoral Commission of Kenya Staff Retirement Benefits Scheme and lost earnings due to the disbandment of the ECK including benefits such as house and leave allowance. Their computed loss of earnings are as follows:

- a) Unpaid 3 months' salary from 1<sup>st</sup> January 2009 – 31<sup>st</sup> January 2009.
- b) Unpaid pension balances as at 31<sup>st</sup> December 2008 in the sum of Kshs.291,317,655.
- c) Unpaid salaries and unpaid salary differences from 1<sup>st</sup> January 2009 to expected age of retirement amounting to a total of Kshs.932,515.703/-.
- d) Unpaid Annual leave in the sum of Kshs.85,935,347/-.

The Petitioners contend that they were to be seconded to the Public Service under inferior terms of service in that they were treated as new employees or given jobs without respect to their contract of employment with ECK, they were to be paid lower salaries and they suffered loss of benefits like medical insurance and pension. They also contend that they were never furnished with Certificates of service.

It is the Petitioner's case that by dint of section 30, 46 and 47 of the former constitution, Parliament had no power to validly pass a constitutional amendment to disband the ECK Commissioners and remove its staff from office.

### **Respondent's Case**

The Respondent filed grounds of opposition to the Amended Petition on 24<sup>th</sup> January 2018. The respondent avers that the substance of the instant Petition is moot by dint of the promulgation of the 2010 Constitution reason being the Repealed Constitution and in particular the 2008 Amendment ceased to have force of law in Kenya and any determination on its constitutionality will therefore be academic.

It avers that the impugned 2018 Amendment was enacted by the National Assembly pursuant to its amending powers under Section 47 of the Repealed Constitution and the threshold for securing the amendment were met thus the purpose of the impugned 2008 Amendment was to facilitate the exercise of the constitutional power of the people through conduct of a referendum and thereafter promulgation of the Constitution.

The Respondent contends that by the promulgation of the Constitution of Kenya 2010 Kenyans in exercising their sovereign power effectively abolished the Electoral Commission of Kenya and as such the instant Petition cannot purport to resurrect the now defunct Commission. In addition, power to create an office under the law generally includes the power to modify or abolish it thus under the repealed Constitution the amending and altering powers as provided by Section 47 rested with Parliament.

It is the Respondent's case that fundamental human rights and freedoms can be abridged or abrogated in accordance with the Constitution and the abolishment of the Electoral Commission of Kenya and the consequential termination of the Petitioners was as a result of a valid and constitutional operation of the law in pursuit of the will of Kenyans. Further, that employment rights are subject to limitations including limitation by operation of the law as is the case of the Petitioners' employment.

The Respondent avers that fair labour practices connote fair remuneration for work done. Therefore, the Petitioners are not entitled any pay for the months of January, February and March 2009.

### **Petitioners' Submissions**

The Petitioner submitted that they were duly appointed to their respective offices and had signed employment agreements with the ECK until they were illegally and unprocedurally terminated. It is their submission that the Constitution of Kenya (Amendment) Act No. 10 of 2008 was invalid and void ab initio for being inconsistent with the Constitution to the extent that it served as an instrument to exercise judicial power to remove the Petitioners alongside the Commissioners from office and that it purported to terminate the Petitioners employment contrary to the law.

The Petitioners submitted that a Constitutional body can not be disbanded by any other body outside a new constitutional order. They argue that in considering whether a constitutional body can be disbanded by another body it is important to call to mind 2 key principles which are the principle of the constitutional supremacy and the principle of separation of powers.

The Petitioners submitted that the principle of supremacy of the Constitution was provided under Section 3 of the former constitution and Article 3 of the Constitution 2010. The Petitions cited the case of **Trusted Society of Human Rights Alliance v Attorney General and Others [2012] eKLR** and submitted that there is no supremacy of parliament but only supremacy of the Constitution.

On separation of powers the Petitioners submitted that parliament's action in disbanding the ECK was illegal and in breach of sections 41 and 104 of the Constitution and disregarded the principle of separation of powers. The Petitioners relied on the decision in **Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR** that:

*“We have found that judicial intervention by the High Court is not in violation of the doctrine of separation of powers insofar as the court is performing its solemn duty under Article 165(3)(d)(ii) of the Constitution in inquiring into alleged constitutional violations.”*

The Petitioners submitted that the actions of the government violated the rules of natural justice that ought to be accorded to them. They relied on the decision in **Justice Amraphael Mbogholi Msagha v The Hon. Chief Justice & 7 Others [2006] eKLR** that:

*“We observe firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days of the British Empire. Secondly we recognize and observe those principles apply wherever there is no statutory or constitutional law to the contrary. Under the Judicature Act (Chapter 8 Laws of Kenya), the High court, the Court of Appeal and all subordinate Courts are enjoined to exercise their jurisdiction in conformity with-*

*(a) the Constitution,*

*(b) subject thereto, all other written laws, including Acts of Parliament of the United Kingdom cited in Part 1 of the Schedule to the Act, modified in accordance with Part II of that Schedule;*

*(c) subject thereto and so far as those written laws do not extend and apply, the substance of the common law and doctrines of equity....”*

The Petitioners submitted that the process of the removal of ECK staff embodied in Section 41 of the former Constitution as read with Section 3 of the National Assembly and Presidential Elections Act embodied the right to fair hearing, due process and protection of the law enshrined in sections 70 and 77 of the former Constitution. The Petitioners aver that no clear charges were given to the Petitioners to explain the need for going on leave.

They argue that it was against international labour practice to have then seconded to the Public Service under inferior terms of service.

In respect of whether the Petitioners are entitled to the reliefs sought they relied on the decision in **Musili Kivuitu and 22 others v Attorney General and 2 Others** and submitted that their removal from employment was unlawful and they are entitled to compensation for unlawful loss of office.

The Petitioners further submitted that under section 84 of the former constitution the High Court could give any appropriate order or declaration to redress proven breach of constitutional rights and freedoms.

### **Respondent’s Submission**

The Respondent submitted that after promulgation of the 2010 Constitution the former constitution and in particular the 2008 Amendment ceased to have force of law in Kenya and rendering a decision as to its constitutionality will therefore be engaging in an academic exercise which is not the business of the Court. Further, that the passage of the 2008 Amendment complied with the provisions of the repealed Constitution in particular section 47 thus, this Court has no jurisdiction to consider the matter.

The Respondent argued that under the former Constitution a Certificate of the National Assembly then was conclusive evidence about the proceedings in Parliament could not be challenged in any Court. The Respondent relied on the decision in **The Republic v The Judicial Commission of Inquiry into the Goldenberg Affair, HC Misc. Application No. 102 of 2006** to the effect that the court had no authority to intervene in the business of Parliament.

The Respondent submitted that the constitutionality of the 2008 Amendment was constitutional since an amendment to the constitution can only be invalidated if the procedure for its enactment has been disregarded as was observed in Lenaola J in **Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others [2013] eKLR**.

The respondent urged the Court that when determining the constitutionality of the impugned 2008 Amendment Act to apply the historical, prudential and harmonious interpretation of the Constitution bearing in mind that the Constitution is a living tree. The Respondent relied on the decision in **Dennis Mogambi Mongáre v Attorney General and Others Petition No. 146 of 2011** where the Court held –

*“The question we must ask ourselves is this; Is it open to this Court to question the sovereign will of the people and decide that one part of their Constitution is null and void , and not another?”*

The Respondent argued that the Petitioners allege that their fundamental rights and freedoms had been breached but this is baseless since the power to create an office under the law generally includes the power to modify or abolish it and that such power was provided for under section 47 of the Constitution. The Respondent relied on the decision in **Eckerson v City of Des Mines 137 IOWaA452**.

The Respondent submitted that employment rights are subject to limitation including limitation by operation of law as in the present case. The Respondent therefore submitted that the Petitioners are only entitled to gratuity payment in accordance with their contracts of service for the period served. The Respondent therefore urged the Court to dismiss the Petition as it lacked merit.

### **Determination**

The Petitioners herein were employed as staff of the then Electoral Commission of Kenya under section 3 of the National Assembly and Presidential Elections Act Cap 7 (now repealed) to assist the Commission discharge its function under both the Constitution (now repealed) and under the Act. However, upon the enactment of the Constitution of Kenya (Amendment) Act No. 10 of 2008 the ECK was disbanded. Consequently, the Interim Independent Electoral Commission of Kenya (IIEC) was established and all the rights, liabilities, duties, obligations, assets and liabilities of the ECK were transferred to the IIEC.

It is the enactment of the Constitution of Kenya (Amendment) Act No. 10 of 2008 that led to the termination of the Petitioner's employment necessitating the filing of this suit. The main issues for determination are:

- a) Whether the Constitution of Kenya (Amendment) Act No. 10 of 2008 was unconstitutional.
- b) Whether the Petitioner's termination from employment as a result of the enactment of Constitution of Kenya (Amendment) Act No. 10 of 2008 was unconstitutional.
- c) Whether the Petitioners are entitled to the reliefs sought.

**Whether the Petitioner's termination from employment as a result of the enactment of Constitution of Kenya (Amendment) Act No. 10 of 2008.**

The disbandment of the ECK was attributed to the contentious election in the country in the year 2007. In *Ayub Juma Mwakesi V Mwakwere Chirau Ali & 2 Others [2010] eKLR* Warsame J. as he then was summed up the situation in the county as follows:

*"Our young democracy in Kenya committed suicide during the elections of 2007 after its aftermath. Unseen – violence, murder permanent injuries destructions of property and other criminal activities bringing the country to its knees. It was by the Grace of God that we did not annihilate ourselves leading to collapse of the Republic of Kenya. This case is now proof that ECK deserved to be disbanded, as it was the mother of the chaos and may-hem that followed the elections of 2007."*

The elections resulted in the appointment of the Independent Review Commission Chaired by Johan Kriegler to look into the management and conduct of the 2007 elections. Consequently, upon the recommendation of the Commission, Amendment Act. No. 8 of 2008 was enacted which aimed at not only improving the electoral process in Kenya but also culminated in the process which led to the promulgation of the Constitution of Kenya, 2010.

The issue on whether the Amendment Act No. 10 of 2008 was invalid was exhaustively dealt with by the High Court in a decision of a three Judge Bench in *Priscilla Ndululu Kivuitu & Another (suing as the Personal Representatives of Samuel Mutua Kivuitu & Kihara Mutu (deceased) & 22 others v Attorney General & 2 others [2015] eKLR* which held:

*"On the face of it, it would therefore appear that the 2008 Amendment was unconstitutional. However, the circumstances surrounding the 2008 Amendment must be interrogated before a determination can be reached as to whether the amendment was unconstitutional... However, although Parliament was informed by the imperative to have in place a functional electoral body, the manner in which the 2008 Amendment was effected, in so far as it impacted on the positions of the commissioners of ECK, did not meet the basic standards of fairness. At the very least, the petitioners were entitled, if they were to be removed, to be subjected to a process that accorded with the basic tenets of natural justice, in particular, the right to be heard. The rules of natural justice required that they should have been served with the allegations against them and given a chance to respond to them. See *De Souza v Tanga Town Council [1961] E.A. 377*. More importantly, the right to a hearing was inbuilt into Section 41 of the Constitution which was amended by the 2008 Amendment. A perusal of the Kriegler Report shows that the petitioners were not given the opportunity to explain their individual roles in the 2007 general elections... In our view, whatever irregularities which might have been committed in the process of the enactment of the 2008 Amendment were, unless the same could be sustained under the current Constitution, cured by the enactment and promulgation of the 2010 Constitution. It is not and it cannot be contended that the 2010 Constitution, which was itself a product of the 2008 Amendment was unconstitutionally enacted and promulgated. Further, the said Constitution at section 28 of the Sixth Schedule expressly recognised the existence of the IIEC, the successor to the ECK... That being the position, it would be a constitutional aberration to hold that the ECK which was replaced by the IIEC, a body recognised as valid under the current Constitution, was unconstitutionally disbanded and its Commissioners unlawfully bundled out of office."*

As much as I agree with the above decision, I do not think the petitioners herein have demonstrated the unconstitutionality of the Amendment of the Constitution that resulted in The Constitution of Kenya (Amendment) Act No. 10 of 2008. The petitioners have not demonstrated that the process of the enactment of the Amendment Act was unprocedural or faulty in any manner. The mere fact that the Amendment disbanded the Electoral Commission of Kenya hounding the petitioners out of their lucrative jobs is not a ground to render the process unconstitutional.

In my view, the amendment was necessary at the time it was done. The Electoral Commission of Kenya had carried out an election that led the country into a state of lawlessness. The very rule of law was overthrown as a consequence of the announcement of the results of the Presidential Elections. The legitimacy of the ECK was questioned by the manner in which it had conducted the elections. There was lack of confidence in the ECK, its Commissioners, its staff, and the manner in which it was constituted and it became necessary to reconstitute it with persons who were not tainted with the old order. It was therefore a political reaction to the manner in which the ECK had conducted the elections that led to its disbandment through the constitution of Kenya (Amendment) Act No. 10 of 2008. A political question is not a justiciable issue. Neither the supremacy of the constitution, nor separation of powers, can explain, justify or redress what transpired.

As submitted by the respondent, Parliament properly exercised its powers under the Repealed Constitution by enacting the 2008 Amendment as was stipulated in Section 56 of the Repealed Constitution that Parliament may make standing orders regulating the Procedure of the

Assembly. In accordance with that Section, the National Assembly (Powers and Privileges) Act (Cap 12) had been enacted. Section 12 therein barred any challenge to the proceedings or the decisions of the Assembly.

The impugned 2008 Amendment was enacted by National Assembly pursuant to its amending powers under Section 47 of the Repealed constitution and all threshold for securing the amendment were met thus the purpose of the impugned 2008 Amendment was to facilitate the exercise of the power of the people through conduct of a referendum and thereafter promulgation of the Constitution.

In the case of ***Commission for Implementation of the Constitution –V- National Assembly of Kenya and 2 Others (2013) eKLR***, Lenaola J. (as he then was) observed –

*“In the case of Premier of Kwa Zulu Natal v President of the Republic of South Africa 0996) 0) (SA) 769, the Court dealt with the issue whether a constitutional amendment could possibly violate the spirit of the Constitution. The Court stated that:*

*“There is a procedure which is prescribed for amendments to the constitution and this procedure has to be followed. If that is properly done, the Amendment is constitutionally unassailable.”*

In the case of ***Musili Kivuitu (suing as the personal representative of Samuel Mutua Kivuitu (deceased) and 22 others –V- Attorney General***, a three Judge bench of the High Court held as follows –

*“182. The power to constitute a frame of Government for a community, in our view, encompasses the power to provide for the process and the players in the said process. It therefore follows where people have directly enacted unto themselves a Constitution which recognises existing or past institutions, this Court cannot under the guise of constitutional interpretation or application, undo that which the people have decided. Similarly, where the people in the exercise of their sovereign power, constitutionally exercised, have unreservedly done away with or discarded existing or past institutions, this Court cannot in the purported exercise of judicial authority breathe life into or resurrect such institutions.*

*183. It follows that this Court cannot find that the IIEC which is expressly recognised under the 2010 Constitution was unlawfully established. That being the position, it would be a constitutional aberration to hold that the ECK which was replaced by the IIEC, a body recognised as valid under the current Constitution, was unconstitutionally disbanded and its Commissioners unlawfully bundled out of office.”*

In my view, this decision is applicable herein as it is the same subject matter of this petition.

It is for these reasons that I find that the petitioners have not demonstrated the unconstitutionality of the Constitution of Kenya (Amendment) Act No. 10 of 2008.

The second issue is whether the resultant termination of the employment of the petitioners was unconstitutional. My response is that it was not, the reason being that the removal was sanctioned by the very constitution that the petitioners impugned. The constitution provided for the disbanding of ECK and the posting of all staff of the disbanded ECK into the civil service. The petitioners allege that they were posted to the Public Service under inferior terms but have not demonstrated the same. According to the documents on record, the petitioners were paid all their dues by ECK. They have further not justified their demand for full compensation as provided in their contracts under ECK yet they did not lose their employment having been transferred to the public service.

This case can be distinguished from the case of ***Priscilla Ndululu Kivuitu Musili Kivuitu and 22 Others –V- Attorney General and 2 Others*** where the petitioners were Commissioners and were not redeployed upon the disbanding of ECK.

#### **Awarding the petitioners their salaries to date of retirement.**

The petitioners all received their retirement benefits under the Electoral Commission of Kenya Staff Retirement Benefits Scheme while at the same time they were retained in employment.

Having considered all the evidence and the submissions before the court, I find that the petitioners have not proved that the Constitution of Kenya (Amendment) Act, No. 10 of 2008 was unconstitutional. I further do not find their transfer to public service to be tantamount to termination of their employment with the result that they are not entitled to the payment of salaries and benefits to the date of retirement as this would constitute an unjust enrichment.

The upshot is that the petition is dismissed. Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**