Shollei & another v Judicial Service Commission & another (Petition 34 of 2014) [2018] KESC 42 (KLR) (3 July 2018) (Ruling)

Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR

Neutral citation: [2018] KESC 42 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 34 OF 2014

DK MARAGA, CJ & P, PM MWILU, DCJ & V-P, MK IBRAHIM, JB OJWANG & NS NDUNGU, SCJJ

JULY 3, 2018

BETWEEN

GLADYS BOSS SHOLLEI ..... 1ST PETITIONER

GLADYS BOSS SHOLLEI ..... 2ND PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

COMMISSION ON ADMINSTRATIVE JUSTICE ..... 2ND RESPONDENT

Recusal of a Supreme Court Judge who is a member of the Judicial Service Commission in a case where the Judicial Service Commission is a party

The Judicial Service Commission filed the application seeking among other orders that most of the court's judges, in the full seven-judge bench recuse themselves from the hearing of the petitioner's appeal. The court dismissed the application. The court noted that the matter was not one calling for the recusal of any judge of the court. The court held that committed to the judges' oaths of office, the court would pronounce itself unbiased and ready and willing to own up to Kenya's constitutional mandate of dispensing justice in matters falling within its jurisdiction.

Reported by Kakai Toili

Judicial Officers *- judge – recusal of a judge of the Supreme Court – application for the recusal of a judge of the Supreme Court – grounds for recusal – membership to the Judicial Service Commission – where the Judicial Service Commission was a party to a case - whether a judge of the Supreme Court who was a member of the Judicial Service Commission had to recuse himself or herself from a case in which the Judicial Service Commission was a party – Constitution of Kenya, 2010, article 163 and 171(2): Public Officers Ethics Act, section 10(1).*

Judicial Officers *- judge – doctrine of the duty of a judge to sit - what was the scope of the doctrine of the duty of a judge to sit.*

Judicial Officers *- judge – recusal of a judge – application for recusal of a judge – what was the purpose of an application for the recusal of a judge and whether an application for recusal of a Supreme Court Judge could be determined in a similar manner as that of a judge of other superior courts.*

Constitutional Law *– superior courts – Supreme Court – quorum of the Supreme Court – effect of lack of quorum - what was the effect of failure of the Supreme Court to determine a matter due to lack of quorum.*

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to fair hearing - when balancing the rights of different claimants before a court over the same right - what parties were to be given priority in the enforcement of the right to fair hearing when balancing the rights of different claimants before a court over the same right - Constitution of Kenya, 2010, article 19 (3)(a) and 21(1).*

Judicial Officers *– judges – removal of judges from office - what was the procedure of removal of a judge from office - Constitution of Kenya, 2010, article 168.*

Brief facts

The petitioner's case had been referred to the Employment and Labour Relations Court, which upheld her claim that the 1st respondent, the Judicial Service Commission (JSC) had violated her fundamental rights and freedoms in removing her from office without a basis in law. The Court of Appeal reversed the decision of the Employment and Labour Relations Court leading to an appeal pending before the instant court. The petitioner prayed for judgment setting aside the Court of Appeal's decision.

The JSC filed the instant application seeking orders that the time-span for filing the application be extended beyond the limit earlier prescribed, that most of the court's judges, in the full seven-judge bench recuse themselves from the hearing of the petitioner's appeal and that the costs of the application be provided for.

The JSC proffered the following justifications for seeking the recusal of the court's judges:

1. Chief Justice as Chairperson of JSC and the Deputy Chief Justice as the court's representative in JSC, had been involved in JSC's deliberations which JSC took the decision to file the application.
2. Lady Justice Njoki had active pending litigation against the JSC.
3. Justice JB Ojwang had 3 pending disciplinary proceedings with the JSC.
4. Justice Lenaola recused himself from hearing the appeal, having been a member of the JSC at the material time that the petitioner's case was before the JSC.

Issues

i. Whether a judge of the Supreme Court who was a member of the Judicial Service Commission had to recuse himself or herself from a case in which the Judicial Service Commission was a party.
ii. What was the scope of the doctrine of the duty of a judge to sit?
iii. What was the purpose of an application for the recusal of a judge?
iv. What was the effect of failure of the Supreme Court to determine a matter due to lack of quorum?
v. What parties were to be given priority in the enforcement of the right to fair hearing when balancing the rights of different claimants before a court over the same right?
vi. Whether an application for recusal of a Supreme Court Judge could be determined in a similar manner as that of a judge of other superior courts.
vii. What was the procedure of removal of a judge from office?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 22

1. *Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

Held

1. The court had a special constitutional mandate which could not be delegated to any other forum in the entire governance set-up. The court was guided by certain precious values, which provided the context within

which it took ultimate responsibility for matters of dispute settlement in accordance with the law. The instant matter was not one calling for the recusal of any judge of the court. Committed to the judges' oaths of office, the court would pronounce itself unbiased and ready and willing to own up to Kenya's constitutional mandate of dispensing justice in matters falling within its jurisdiction.

2. The concept of fundamental rights was a subject of constitutional safeguard and a core pillar upon which the court's mandate was founded. The rights in question were inherently and expressly attributed to citizens as the legatees of good governance and democratic process. On that account, all rational and tenable perception of the question of access to the judicial dispute-resolution process, had to be placed on balancing scale ensuring the entitlement of the citizen to justice, fair trial and constitutional safeguard. The cause of the individual who came knocking on the doors of the Judiciary was the very first consideration in determining whether or not a hearing fell due.

Per MK Ibrahim, SCJ (Concurring)

3. The doctrine of necessity was more pronounced in the matter and it was amplified by the Constitution. The preamble to the Constitution was unequivocal that it was the people of Kenya who gave unto themselves the Constitution. They gave unto themselves the Constitution in its entirety. At article 163 of the Constitution, the people of Kenya established the court, consisting of 7 justices (the Chief Justice, the Deputy Chief Justice, and five other Judges). The Constitution also established the JSC, with its membership composition clearly stipulated under article 171(2) of the Constitution. A scrutiny of that membership showed that at any given time 2 members of the court had to be JSC Commissioners.

4. Among the court's judges, the court would or could have former JSC commissioners. It could not therefore be stated in general terms that any judge of the court who sat in the JSC would, as a matter of cause, not adjudicate in a matter where the JSC was a party. Such a pronouncement would be a total mockery of the sovereign will of the people of Kenya who established the two institutions in the Constitution and willed that they carried out their various functions simultaneously.

5. The doctrine of the duty of a judge to sit, though not profound in Kenya's jurisdiction, every judge had a duty to sit in a matter which he duly should sit. Recusal should not be used to cripple a judge from sitting to hear a matter. That duty to sit was buttressed by the fact that every judge took an oath of office: to serve impartially and to protect, administer and defend the Constitution. The doctrine recognized that having taken the oath of office, a judge was capable of rising above any prejudices, save for those rare cases when he had to recuse himself. The doctrine also safeguarded the parties' right to have their cases heard and determined before a court.

6. There was a criticism of the doctrine of the duty of a judge to sit for being subject of abuse by judges, so as to sit in matters when it was blatantly clear that they were biased and ought not to have sat. However, where judiciously invoked, the doctrine was a key component of constitutionalism. All judges of the court, members of the JSC or former members, had a duty to sit in the matter so as to affirm constitutionalism.

7. Judges too, as individual persons, enjoyed all the rights in the Bill of Rights. They too enjoyed the protection provided by article 22 of the Constitution to approach the High Court where they felt their rights had been violated. A person did not waive the protection of article 22(1) when he/she became a judge. Consequently, a judge who pursued his/her constitutional rights protected by the Bill of Rights could not have that used against him/her as a ground for recusal. Membership in the JSC by a judge in the court or any other court was a constitutional imperative and as such it could not be used without very good and valid reasons to exclude such a member of JSC from sitting in a matter where the JSC was involved.

8. An application for recusal should not seek to affirm the decision of the court/tribunal whose decision was subject of appeal. An application for recusal was a shield to protect the applicant's interest so that his/her matter was heard by an impartial court. It was not a sword to be wielded by an applicant to steal a match and deny a chance to the other party. Hence by praying that the effect of the application would be the affirmation of the Court of Appeal decision, the applicant sought to go beyond the genuine province of a recusal motion.

9. The fact that 3 judges recused themselves from hearing the matter in *Kalpana H. Rawal, Philip Tunoi and David A. Onyancha v Judicial Service Commission and the Judiciary,* (2016) eKLR did not by itself affirm the decision of the Court of Appeal on the retirement age of judges appointed before the promulgation of the Constitution. That was clear and certain from the final orders of the court in that matter. As the matter before the court was an interlocutory application, the recusal and inability of the five-bench to determine the applications meant that, *de facto*, the Court of Appeal judgment remained in force. The applications in the court were not spent or determined but remained in abeyance until another bench was empaneled.

Per NS Ndungu (Concurring)

10. Pursuant to article 25(c) of the Constitution, the right to a fair trial was non-derogable. All persons who came to the court were entitled to a fair hearing whether the matter instituted was criminal or civil in nature. The right to a fair trial set out in article 50(1) and (2) of the Constitution were the same and were both non-derogable by the provisions of article 25 of the Constitution. As such, when an individual citizen petitioner rightly approached the court, seeking to assert their constitutional rights, the court would be hard-pressed to turn them away on the basis of claims of bias by a respondent State organ.

11. There was a positive duty by the State to ensure that every Kenyan had the right to fair hearing which involved the right of appeal where conferred by the law or the Constitution. That obligation included the Judiciary's own participation as a State organ. The obligation equally applied to the JSC that stemmed from article 21(1) of the Constitution. Article 19(3)(a) of the Constitution was categorical that the rights and fundamental freedoms in the Bill of Rights belonged to each individual.

12. In the course of enforcement of the right to fair hearing, when balancing the rights of different claimants before the court over the same right and because of the personal nature of rights, priority had to be given to:

a. The parties that were directly affected by the violation of that right.
b. Other parties to the suit that were indirectly affected, such as interested parties.
c. The general public.
d. The interests of the State.

In the instant matter the court ought to have regard to the right to fair hearing of the petitioner first.

13. JSC was a State organ which was defined in article 260 of the Constitution as a commission, office, agency or other body established under the Constitution. JSC was established under article 171 of the Constitution. It was also listed in Chapter 15 of the Constitution which pertained to commissions and independent offices. Under that chapter, pursuant to article 249 of the Constitution, JSC was supposed to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles and promote constitutionalism. It was unclear what prejudice JSC would suffer if the court heard the instant matter. The petitioner herself had not raised the issue of an impartial bench, bias or any prejudice that would arise if the bench as constituted sat on her matter. It therefore baffled the mind how JSC could claim bias in the face of an individual's right to a fair hearing.

14. JSC could not claim prejudice or bias when an individual citizen was seeking to exercise her constitutional right to be heard. That flew in the face of securing democratic values and principles and promoting constitutionalism. In addition, JSC had not sufficiently demonstrated the nexus between the interest and the resulting apprehension of bias. There was no nexus established between the facts of the relevant matter between the court and the JSC and the instant matter. To find that membership of a judge in the JSC, automatically disqualified him or her on the basis of perceived bias from hearing and determining any matter relating to the JSC would be to stretch the perception of bias too far. That would inevitably mean that matters involving the JSC would, more often than not, be determined by the Court of Appeal as the final court; an absurdity and outright contravention of the Constitution.

15. A party was entitled to be heard by a court before which he or she appeared even though it was perceived to be conflicted, if there was no other court to which he or she could go. The doctrine of necessity and the duty to sit would have to apply.

16. There was a presumption of impartiality of a judge. They would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters. The role of a judge was to ensure that cases were determined in accordance with the Constitution and the law. An application for recusal of a Supreme Court Judge could not be determined in a similar manner as that of a judge of the other superior courts due to the special consideration that had to be given to its quorum. The court was the final bastion in the architectural design of Kenya's Constitution that protected and defended the rights of every citizen and enforced the obligations of the State towards them. Its intervention, when rightly invoked, as in the instant case ought to be available to the citizens of Kenya.

17. The court had previously dealt with matters in which the JSC had been a party and no issue of conflict of interest had arisen. The fact that the JSC did so in the instant case raised an eyebrow and might even be construed as cherry–picking an adjudication fora or forum shopping which the law frowned upon. Article 168 of the Constitution concerned removal of a judge from office. That removal could be initiated by the JSC on its own motion or upon petition by any person to the JSC. If satisfied that the petition was merited, the JSC sends the petition to the President. Within 14 days after receiving the petition, the President must suspend the judge from office acting in accordance with the recommendation of the JSC and appoint a tribunal.

18. Article 168(8) of the Constitution allowed a judge who was aggrieved by a decision of the tribunal appointed by the President, to appeal against the tribunal's decision to the court within 10 days after the tribunal made its recommendations. The court would not have to down its tools merely because the JSC could be a party to such cause. If the court downed its tools in an article 168(8) petition, merely because the JSC was a party to that suit, that would be tantamount to the court abdicating its constitutional duty. It would be equivalent to violating both the Judicial Code of Conduct which revered the oath of office taken by judges and section 10(1) of the Public Officers Ethics Act which required judges of the superior courts as public officers to carry out their duties in accordance with the law.

Application dismissed.

Orders

i. *Petitioner's appeal to be fixed for hearing on priority basis.*

ii. *Costs of the application to abide the determination of the main cause.*

RULING

A. Background Facts

1. This Court has considered certain basic facts: the petitioner's case had been referred to the Employment and Labour Relations Court, which upheld her claim, that the 1st respondent had violated her fundamental rights and freedoms, in removing her from office without a basis in law.

2. The Court of Appeal had reversed the decision of the Employment and Labour Relations Court, leading to an appeal now pending before this Court. The petitioner prays for Judgment, setting aside the Appellate Court's decision.

B. An Individual's Appellate Cause -versus- Public- Agency Quest For Bench-disqualification

3. In the meantime, the 1st respondent has, at this stage, moved this Court by application, by way of notice of motion dated 24 May 2017, seeking Orders as follows:

   (a) that the time-span for filing such an application be extended beyond the limit earlier prescribed, as from 17 May 2017, so as to cover the belated date of lodgement of the application;

(b) that most of the Supreme Court Judges, in the full seven-Judge bench of that Court – namely, Maraga, C.J. & P., Mwilu, DCJ. & V-P, Ojwang and Njoki, SCJJ – should recuse themselves from the hearing of the petitioner's appeal;

(c) that the costs of the application be provided for.

4. In the quest for such Orders, which if granted would leave only two Judges available for service (contrary to the terms of Article 163(2) of the Constitution of Kenya, 2010 which stipulates that "[t]he Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges") – with the effect that the petitioner's cause would stand technically declined – the applicant proffers the following justifications:

(a) Chief Justice Maraga as Chairperson of 1st respondent, and Lady Justice Mwilu as Supreme Court representative in 1st respondent [a public agency], had been involved in 1st respondent's deliberations of 16 May 2017 at which 1st respondent took the decision to file the instant application – and so "they are conflicted and should not sit [on] the bench to determine this appeal";

(b) Both Lady Justice Njoki and Justice J.B. Ojwang "are conflicted" and "there is real likelihood of bias in their hearing and determining the appeal," for the following reasons:

(i) "Lady Justice Njoki has active pending litigation against 1st respondent in Petition No. 218 of 2016. In this petition, she is challenging the disciplinary mandate of 1st respondent. This petition is pursuant to a complaint filed by advocate Apollo Mboya on 9 October 2015";

(ii) "Justice J.B. Ojwang has 3 pending disciplinary proceedings with 1st respondent, namely: a petition filed by Nelson Oduor Onyango on 29 January 2016 in respect of Supreme Court Misc. application No. 49 of 2014; a petition filed by advocate Apollo Mboya with respect to Supreme Court Applications No. 11, 12 and 13 of 2016 (judge-retirement cases), and another petition filed by [advocate Apollo Mboya] on 9 October 2015";

(iii) "On 3 May 2017 Justice Lenaola recused himself from hearing the appeal, having been a member of the 1st respondent at the material time that the appellant's case was before the [1st respondent]."

5. What is the factual material given to support such averments? The 1st respondent's registrar, Ms. Winfrida Mokaya, on 25 May 2017, swore an affidavit stating, in effect, that all the Supreme Court Judges now sought to be disqualified from the mandate of resolving the petitioner's appellate cause, are "conflicted," and ought not to be part of the final appellate bench to entertain and adjudicate upon the petitioner's quest for justice under the Constitution. The applicant resorts to Ms. Mokaya's depositions in aid of the proposition that the Supreme Court is an inappropriate forum to answer to the petitioner's pursuit of justice – and for the contention that the Court of Appeal's Judgment which reversed the trial Court's decision in favour of the petitioner, should now stand as the final edict of the Kenyan Judiciary.

C. Public Agency Claim, And The Supreme Court's Time-scheduling

6. Of the statement by 1st respondent's counsel – that at an earlier scheduling for the hearing of the petitioner's case, on 3 May 2017, one of the Judges (Lenaola, SCJ) had recused himself – it is to be noted that the Court had then ruled that the said Judge would be replaced at the hearing by Lady

Justice Mwilu, DCJ & VP. The Court had on that occasion also directed that the 1st respondent do file a formal application on the issue of Judge-recusal, within 14 days. This was not done as directed; and the 1st respondent is now asking that its procrastination be overlooked.

D. Public-agency Interests -versus- Individual's Quest For Justice In The Apex Court

7. Learned counsel for 1st respondent submits that his client is moved by bona fides, in asserting that public agency's "right to fair hearing", as proclaimed in Article 50(1) of the Constitution of Kenya, 2010 which thus stipulates:

> "Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

Counsel urges that his client was not at all questioning the integrity of any of the Judges claimed to be "conflicted" and ought not to be part of the bench entertaining the petitioner's appeal. However, learned counsel states his apprehensiveness that the said Judges being "conflicted", his client – the public agency (1st respondent) faces the risk of not being accorded "a fair hearing", and that a "real likelihood of danger or bias" exists.

8. In his quest for recusal by most members of the Supreme Court bench, counsel for the 1st respondent urged that there was indeed precedent for such recusal – the effect of which was to render the Supreme Court a lame duck judicial forum, with the Court of Appeal appearing as the ultimate Court of the judicial system. He cited the situation represented by the case, Kalpana H. Rawal, Philip Tunoi and David A. Onyancha v. Judicial Service Commission and the Judiciary [2016] eKLR.

E. Supreme Court, Recusal, And Ends Of Appellate Justice: Petitioner's Submission

9. Learned counsel for the petitioner contested the public agency's prayer for Judge-recusal, in his submissions of May 2018. He urged that recusal of a Judge of the apex Court, the ultimate recourse in the citizen's quest for justice, ought not to be invoked, but for good cause – and certainly, not so as to impede access to justice by the individual-citizen appellant, in the terms of Article 50(1) of the Constitution. Counsel urged that the right to fair hearing, for his client as for other citizens, is an absolute right which cannot be limited, in view of the terms of Article 25 of the Constitution:

> "Despite any other provision of this Constitution, the following rights and fundamental freedoms shall not be limited –
>
> (a) ....
>
> (b) .....
>
> (c) the right to a fair trial....."

10. In further demonstration of the Supreme Court's obligation in regard to the instant matter, learned counsel cited the terms of Article 20(3) of the Constitution:

> "In applying a provision of the Bill of Rights, a court shall –
>
> (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

11. Within the foregoing context of constitutional imperatives bearing upon the Courts of law, and in this regard bearing upon this Supreme Court, learned counsel submitted that the right to a fair trial must be viewed in the context of the slender numerical span of the bench: with only seven members, and with the prescribed quorum of five Judges.

12. Learned counsel called upon the Supreme Court to discern a mischief in the quorum-deficit scheme of the instant application: that the Court may be rendered inadequate to its prescribed constitutional function as the ultimate appellate Court, with the last word in the safeguarding of the petitioner's fundamental rights, secured by the express terms of the Constitution. Were the instant application to be allowed, counsel urged, the Supreme Court would have improperly taken leave of its obligation to ensure that every person enjoys the right to fair trial.

13. Learned counsel urged it to be an unsound proposition, that the Supreme Court, merely for having two of its members attending at any moment, meetings of the 1st-respondent public agency, will constantly be unable to perform its constitutional mandate of dispensing justice, whenever the 1st respondent is a party to a dispute. The effect of such an impugned prospect, it was urged, would be that in many causes meriting final determination by the Supreme Court, the constitutional rights of fair trial for the parties, would have been drastically abridged and negated.

14. Learned counsel called for an objective view of some of the broad claims made in limitless numbers of cases, in petitions against serving Judges of the Supreme Court, before the public agency which is the 1st respondent. It was urged that, in this regard, the Court may address its mind to such objective impressions as must guide the perceptions of the ordinary reasonable person; and that it may reflect upon its standing as a proper judicial body, or perhaps, a body of irrational Judges who lack the capacity to render justice as necessitated by the situations, needs and deserts of the parties who come calling!

15. The appellant invoked an earlier, precedent-setting decision of the Supreme Court, Jasbir Singh Rai and Another v. Tarlochan Singh and 4 Others [2003] eKLR, in which this Court had formally proclaimed the application of the doctrine of necessity – which ought to apply in this instance, to avert a real danger of miscarriage of justice coming in the shape of Judge-recusal. On those submissions the appellant urged us to dismiss this application.

F. Analysis

16. We have considered the above rival submissions. The Supreme Court has a special constitutional mandate which cannot be delegated to any other forum in the entire governance set-up. The Court is firmly guided by certain precious values, which provide the context within which it takes ultimate responsibility for matters of dispute settlement, in accordance with the law. This scenario is objectively depicted by the late Lord Denning (1899-1999) of England who thus spoke of the candour and trust associated with the judicial appointment:

> "[E]very Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges" [see Allan C. Hutchinson, Laughing at the Gods: Great Judges and How they made the Common Law (Cambridge: University Press, 2012), p.156.

17. Benefiting from such profound observations, we conscientiously take the stand that the instant matter is not one calling for the recusal of any Judge of the Supreme Court. Committed to our oaths of

office, we would pronounce ourselves unbiased, and ready and willing to own up to our constitutional mandate of dispensing justice in matters falling within our jurisdiction.

18. It is our conviction that the concept of fundamental rights, is a subject of constitutional safeguard, and a core pillar upon which the Supreme Court's mandate is founded. The rights in question are inherently and expressly attributed to citizens, as the legatees of good governance and democratic process. On this account, all rational and tenable perception of the question of access to the judicial dispute-resolution process, must be placed on balancing scale ensuring the entitlement of the citizen to justice, fair trial, and constitutional safeguard.

19. In the circumstances, we decline the applicant's call, and declare the undoubted principle that, in all cases of this nature, the cause of the individual who comes knocking on the doors of the Judiciary, is the very first consideration in determining whether or not a hearing falls due.

20. For these reasons, we are disinclined to grant this application.

G. The Concurring Ruling Of Justice M. K. Ibrahim

21. I have had the advantage of reading the composite Ruling of my Brother Judges and the concurring opinion of my Sister Judge. I wholly agree with the reasoning and arguments therein, and would like to add further reasons for reaching the same conclusion.

22. In the Jasbir Singh Rai and Another v. Tarlochan Singh and 4 Others, PARA 2003] eKLR case, the Court alluded to the doctrine of necessity in the concurring opinion and the numerical challenge of the Supreme Court, more so as there was a vacancy. That doctrine is even more pronounced in this matter and it is amplified by the Constitution itself.

23. First, the preamble to the Constitution is unequivocal that it is the People of Kenya who give unto themselves the Constitution. They give unto themselves the Constitution in its entirety. In this Constitution at Article 163, the People of Kenya have established the Supreme Court, consisting of seven Justices (the Chief Justice, the Deputy Chief Justice, and five other Judges). In this same Constitution, the People of Kenya have also established the Judicial Service Commission (hereinafter referred to as 'JSC'), with its membership composition clearly stipulated under Article 171 (2). A scrutiny of this membership clearly shows that at any given time, two (2) members of the Supreme Court shall be JSC Commissioners.

24. Another truth, which is a reality now, is that among the Supreme Court Judges, we shall/may have former JSC Commissioners. It cannot therefore be stated in general terms that any Supreme Court Judge who sits/sat in the JSC will, as a matter of cause, not adjudicate in a matter where the JSC is a party. Such a pronouncement will be a total mockery of the Sovereign will of the People of Kenya who established the two institutions in the Constitution and willed that they carry out their various functions simultaneously.

25. Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.

26. In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

> "A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason" (emphasis mine)

27. In the case of Simonson –vs- General Motors Corporation U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-

> "Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."

28. It is useful to refer to the case from the New Zealand Court of Appeal Muir -v- Commissioner of Inland Revenue PARA 2007] 3 NZLR 495 in which the Court stated as follows:-

> "the requirement of independence and impartiality of a judge is counter balanced by the judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against maneuvering by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in JRL ex CJL (1986) 161 CLR 342 "it is equally important the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion of appearance of bias encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

29. From my readings, it is not lost to my mind that there is a criticism of this doctrine for being subject of abuse by judges, so as to sit in matters when it is blatantly clear that they are biased and ought not to have sat. However, where judiciously invoked, this doctrine of the duty to sit is a key component of Constitutionalism. I will invoke that doctrine in this matter and hold that all Judges of the Supreme Court of Kenya, members of the Judicial Service Commission or former members, have a duty to sit in this matter so as to affirm Constitutionalism.

30. Another issue raised is that some of judges have matters pending in the High Court against the Judicial Service Commission. It is beyond peradventure that judges too, as individual persons, enjoy all the Rights in the Bill of Rights. They too enjoy the protection provided by Article 22 to approach the High Court where they feel their Rights have been violated. Article 22(1) is emphatic that: "[E]very person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened". A person does not waive the protection of Article 22(1) when he/she becomes a Judge. Consequently, a judge who pursues his/her constitutional rights protected by the Bill of Rights cannot have that used against him/her as a ground for recusal. Also membership in the JSC by a judge in the Supreme Court or any other Court is a constitutional imperative and as such it cannot be used without very good and valid reasons to exclude such a member of JSC from sitting in a matter where the JSC is involved.

31. It is also my considered opinion that an application for recusal should not seek to affirm the decision of the court/tribunal whose decision is subject of appeal. An application for recusal is a shield, to protect the applicant's interest so that his/her matter is heard by an impartial court. It is not a sword to be wielded by an applicant to steal a match and deny a chance to the other party. Hence by praying that the effect of the application will be the affirmation of the Court of Appeal decision, the Respondent (applicant) seeks to go beyond the genuine province of a recusal motion.

32. The 1st Respondent referred to the case of Kalpana H. Rawal, Philip Tunoi and David A. Onyancha v Judicial Service Commission and the Judiciary, (2016) eKLR, as the basis or authority for this argument. With respect, the 1st Respondent has all its facts on the above case wrong. The fact that three (3) judges recused themselves from hearing the matter did not by itself affirm the decision of the Court of Appeal on the "retirement age of Judges appointed before the promulgation of the Constitution 2010". This is clear and certain from the final orders of the Supreme Court in that matter thus:

> "These are the Orders of the Court:
>
> 1. The Preliminary Objection by the interested party (Mr. Omtatah) together with the application No. 13 is hereby allowed.
>
> 2. The ex parte Orders granted by the Duty Judge, on 27th of May, 2016, are hereby vacated.
>
> 3. The Judgment of the Court of Appeal shall stand until it is either affirmed, or reversed by a competent Bench of this Court.
>
> 4. In view of the fact that 2 members of this Bench were minded to allow preliminary objections No. 11 and 12, while 2 others were equally minded to disallow the said preliminary objections, and the 5th member has recused himself from making a finding on the objections, there is no determination that has been made regarding preliminary objection No. 11 and 12."

33. As the matter before the Court was an interlocutory application, the recusal and inability of the five-Bench to determine the applications meant that, de facto, the Court of Appeal judgment remained in force. The Applications in the Supreme Court were not spent or determined but remained in abeyance until another Bench was/is empaneled. For these reasons I concur with the final orders in the main ruling.

H. The Concurring Ruling Of Njoki Ndungu, SCJ

34. I have read the decision of the majority. While I am in agreement with the final decision and orders in this matter, I wish to add the following to reinforce my learned sister's and brothers' decision.

(a) Right to a fair trial

35. It is important to note from the onset that pursuant to Article 25 (c) of the Constitution, that the Right to a fair trial is non-derogable.

36. In my concurring opinion in Evans Kidero & 4 others v Ferdinand Waititu & 4 others, Sup. Ct. Petition No. 18 & 20 of 2014, [2015] eKLR, I examined the scope of fair hearing and concluded that it is trite law that all persons who come to the Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature.

37. Accordingly, this settled the question as to whether the right to fair hearing set out in Article 50(1) and the right to a fair trial set out in Article 50(2) of the Constitution are different. The two rights are the same and they are both non-derogable by the provisions of Article 25 of the Constitution.

38. As such, when an individual citizen petitioner rightly approaches this Court, seeking to assert their constitutional rights, this Court will be hard-pressed to turn them away on the basis of claims of bias by a respondent State organ.

39. There is a positive duty by the State to ensure that every Kenyan has the right to fair hearing which involves the right of appeal where conferred by the law or the Constitution. This obligation includes the Judiciary's own participation as a State organ.

40. The obligation equally applies to the Judicial Service Commission which is the 1st respondent. This stems from Article 21(1) of the Constitution which provides that "It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights."

41. Article 19 (3) (a) of the Constitution is categorical that the rights and fundamental freedoms in the Bill of Rights belong to each individual.

42. In my considered opinion, in the course of enforcement of the right to fair hearing, when balancing the rights of different claimants before the Court over the same right, and because of the personal nature of rights, priority must first, be given to the parties that are directly affected by the violation of that right, for instant the accused person, plaintiff, applicant, appellant, defendant, respondent, etc.; secondly, other parties to the suit that are indirectly affected, such as interested parties; thirdly, the general public; and lastly, the interests of the State.

43. In the present matter therefore, this Court ought to have regard to the right to fair hearing of the petitioner first.

(b) The question of bias

44. It is the 1st respondent's case that it will not be accorded a fair hearing as there is a real likelihood or danger of bias. The first thing to note here is that the 1st respondent is a State organ. 'State organ' is defined in Article 260 of the Constitution as "a commission, office, agency or other body established under this Constitution."

45. The 1st respondent is established under Article 171 of the Constitution. It is also listed in Chapter fifteen of the Constitution of which chapter pertains to commissions and independent offices.

46. Under this chapter, pursuant to Article 249 of the Constitution, the 1st respondent is supposed to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles and promote constitutionalism.

47. Bearing this in mind, it is unclear to me, what prejudice the 1st respondent will suffer if we hear this matter. The petitioner herself, who instituted this matter has not raised the issue of an impartial bench, bias or any prejudice that would arise if the bench as currently constituted sits on her matter. It therefore baffles the mind how the 1st respondent can claim bias in the face of an individual's right to a fair hearing.

48. It is my considered opinion that the State organ (the 1st respondent) cannot claim prejudice or bias when an individual citizen is seeking to exercise their constitutional right to be heard. This flies in the face of securing democratic values and principles and promoting constitutionalism.

49. In addition, the 1st respondent has not sufficiently demonstrated the nexus between the interest and the resulting apprehension of bias. For my part and my learned brother Prof. Ojwang, there is no nexus established between the facts of the relevant matter (s) between us and the 1st respondent and the instant matter before this Court.

50. Additionally, to find that membership of a Judge in the 1st respondent, automatically disqualifies him or her on the basis of perceived bias from hearing and determining any matter relating to the 1st respondent would be to stretch the perception of bias too far.

51. This would inevitably mean that matters involving the 1st respondent would, more often than not, be determined by the Court of Appeal as the final Court; an absurdity and outright contravention of the Constitution.

(c) Recusal

52. I am conscious that the majority and my learned brother judge Ibrahim have expressed themselves on this issue. I will only add the following. In my view, it is undisputable that a party is entitled to be heard, by a Court before which he or she appears even though it is perceived to be conflicted, if there is no other Court to which he or she can go. The doctrine of necessity and the duty to sit would have to apply.

53. It must always be remembered that there is a presumption of impartiality of a Judge. In The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others, (CCT16/98) [1999.

    the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters.

54. The role of a Judge is to ensure that cases are determined in accordance with the Constitution and the law. I am persuaded by the opinion of Justice Scalia (as he was) in Cheney v. U.S. Dist. Court, 541 U.S. 913, 915 (2004) that an application for recusal of a Supreme Court Judge cannot be determined in a similar manner as that of a Judge of the other superior Courts due to the special consideration that must be given to its quorum.

55. This court is the final bastion in the architectural design of our Constitution that protects and defends the rights of every citizen and enforces the obligations of State towards them. Its intervention, when rightly invoked, as in the instant case ought to be available to the citizens of this county.

(d) The Court adjudicating on matters where the 1st respondent has been a party.

56. In as much as the 1st respondent submits that members of this Court have recused themselves in previous proceedings in Kalpana H. Rawal, Philip Tunoi & David A. Onyancha v Judicial Service Commission & Judiciary [2016] eKLR, this can be cited as the exception thus far.

57. This Court has previously dealt with matters in which the 1st respondent has been a party and no issue of conflict of interest had arisen. For instance, in the Judges and Magistrates Vetting Board and Others v Centre for Human Rights and Democracy and Others Supreme Court Petition No. 13A, 14 and 15 of 2013; [2014] eKLR, this Court heard and determined a matter that involved the 1st respondent as one of the respondents.

58. Pertinent to note is that the former Chief Justice (Willy Mutunga) and Smokin Wanjala SCJ were part of the bench that heard and determined that matter despite being members of the 1st respondent at the time.

59. Interestingly, the 1st respondent in this matter did not claim that this Court was conflicted and incapable of rendering an impartial decision. The fact that the 1st respondent does so now raises an eyebrow and might even be construed as cherry –picking an adjudication fora or forum shopping which the law frowns upon.

(e) Jurisdiction of the Supreme Court under Article 168 (8) of the Constitution; how will it be affected?

60. Article 168 of the Constitution concerns removal of a Judge from office. This removal may be initiated by the 1st respondent on its own motion or upon petition by any person to the 1st respondent.

61. If satisfied that the petition is merited, the Judicial Service Commission (JSC) sends the petition to the President. Within fourteen days after receiving the Petition, the President must suspend the judge from office acting in accordance with the recommendation of the JSC and appoint a tribunal.

62. Article 168(8) of the Constitution allows a judge who is aggrieved by a decision of such tribunal to appeal against the tribunal's decision to the Supreme Court within ten days after the tribunal makes its recommendations.

63. This then begs the question; would this Court have to down its tools merely because the 1st respondent (JSC) may be a party to such cause? The answer must be a resounding no!

64. I am of the view that if this Court downed its tools in an Article 168 (8) petition, merely because the 1st respondent is a party to this suit, this would be tantamount the Court abdicating its constitutional duty.

65. In addition, it would be equivalent to violating both the Judicial Code of Conduct which reveres the oath of office taken by Judges and Section 10(1) of the Public Officers Ethics Act which requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law.

66. I conclude by stating that I have no doubt that my learned sister and brothers are able to determine the instant matter objectively, while nurturing transparency and accountability.

I. Final Orders

67. In the result, it is the unanimous decision of this Court that:

    (a) This application be and is hereby dismissed.

    (b) The petitioner's appeal shall be fixed for hearing on priority basis.

    (c) The costs of this application shall abide the determination of the main cause.

    Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JULY, 2018

.....

D.K. MARAGA

CHIEF JUSTICE/PRESIDENT OF THE SUPREME COURT

.....

P.M. MWILU

DEPUTY CHIEF JUSTICE/VICE PRESIDENT OF THE SUPREME COURT

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a

true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA