



UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**ADVOCATES SERVING AS JUDICIAL SERVICE COMMISSIONERS: A POSSIBLE
CONFLICT OF INTERESTS?**

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G62/12872/2018

*A Research Project submitted in partial fulfilment of the requirements for the award of the
degree of master Laws of the University of Nairobi.*

NOVEMBER 2019

DECLARATION

I declare that this is my original work and that it has not been presented or is currently being presented to any other university for the award of a degree.

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DEDICATION

Dedicated to our daughter Neema.

ACKNOWLEDGEMENTS

I firstly glorify the Almighty God, by whose hand I have come this far. He has granted me health, strength and wisdom to accomplish this task.

I wish to express my sincere gratitude to each and every one who assisted in ensuring the success of this enormous exercise. I am indebted to my supervisor, Dr. Evelyne Asaala, without whose guidance and suggestions, this project would not have been successful. To Dr. Nkatha Kabira, her final reshaping of this work gave it the scholarly content with which it is presented.

I am most thankful to Hon. Justice William Ouko (President of the Court of Appeal), Hon. Tim Wanyonyi advocate, and all key informants for their valuable experiences and opinions which enriched the content of this work. Special thanks to my colleagues Eric Walala and Esther Nyasani for their earnest effort in retrieving and sharing judgments with me, and to Grace Mugira together with all librarians at the University of Nairobi law campus, my sincere gratitude for their kind assistance in availing the necessary information materials.

I wish to recognise our sons Barusi and Satsiru for their invaluable technical assistance that saw the formatting of this work. My sincere gratitude goes to Peter Lavatsa for his unwavering support and generous funding of my studies, to our children and aunt Inviolata for enduring my diverted focus and long absence from home. Their support gave me the peace to concentrate on my studies. The Lord bless you abundantly.

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ABBREVIATIONS AND ACRONYMS

ABA	American Bar Association
BIA	Brunei Investment Agency
BSB	Bar Standard Board
CAJ	Commission on Administrative Justice
CIC	Commission for the Implementation of the Constitution
CJC	Canadian Judicial Council
COK	Constitution of Kenya
CRC	Convention on the Rights of the Child
DCI	Director of Criminal Investigations
EACC	Ethics and Anti- Corruption Commission
FIDA	Federation of Women Lawyers
FLSC	Federation of Law Societies of Canada
FORD	Forum for Restoration and Democracy
ICCPR	International Covenant on Civil and Political Rights
ICIJ	International Consortium of Investigative Journalists
IEBC	Independent Electoral Boundaries Commission
KNCHR	Kenya National Commission of Human Rights
KRA	Kenya Revenue Authority

LSK	Law Society of Kenya
PCSC	Public Complaints Standing Committee
RPC	Rules of Professional Conduct
SRA	Solicitors Regulatory Authority
TCC	Tax Compliance Certificate
UDHR	Universal Declaration of Human Rights
UNBPIJ	United Nations Base Principles on the Independence of the Judiciary

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ABSTRACT

Conflict of interests results into biases, intimidations, and undue advantage against those affected by it and so diverse laws both local and international, safeguard against conflict of interests. The constitution of Kenya 2010 (COK) in Chapter six, lays the basis of the existing policy, legal and institutional frameworks which outline guiding principles on the integrity of public officers. The chapter requires that persons exercising public authority should render selfless service with regard to public interest and avoiding conflict of interests.

The purpose of this study is fourfold. It seeks to find out whether personal interests of practicing advocates serving as commissioners of the JSC in Kenya, manipulate their official responsibilities. It examines the historical evolution of the JSC, the role of advocates, and the origins of the concept of conflict of interests. The study appraises the policy and legal frameworks in Kenya, explores international best practices that would serve as good examples in preventing conflict of interests of advocates in JSC, and finally recommends appropriate legal reform and propose strategies

The study establishes that the existing legal framework in Kenya that prohibit public officers from engaging in instances that occasion conflict of interests is not well suited to address the problem of conflict of interests occasioned by practicing advocates serving at the JSC. Although these laws impose an obligation on public officers to disclose their personal interests which may diverge with public duties, and to refrain from activities that may result in conflict of interests, nevertheless advocates serving as JSC commissioners appear in court prosecuting cases in which they seek judges and magistrates to give verdicts. This is because both the Advocates Practice Rules and Code of Standards of Professional and Ethical Conduct (Code of Conduct), fail to articulate the issue of conflict of interests in an explicit manner to cover all instances in which conflict of interests may arise, resulting in malpractice and injustices. This omission occasions tensions in the relationship between advocates

servicing at the Judicial Service Commission (JSC) and judicial officers. The tensions arise in view of the fact that advocates serving at the JSC are employers and bosses of judicial officers and staff, thus their official duties conflict with their personal interests in these examples. The outcome of these tensions includes; undue influence and intimidation of judicial officers, favouritisms in rendering court services to advocates serving at JSC, unfair competition in handling cases, and abuse of power by the commissioners in punishing dissenting judicial officers.

To alleviate the problem of conflict of interests relating to practicing advocates serving at JSC, the relevant provisions in the Advocates Practice Rules and Code of Conduct have to be reviewed to capture all scenarios which lead to conflict of interests, advocates seeking to be elected as commissioners of JSC have to relinquish practice of law in courts for the duration of their appointment, and advocates be excluded from the role of appointing and disciplining judicial officers.

CHAPTER ONE

INTRODUCTION

1.0. Background

This study interrogates effects of the relationship between practising advocates who serve as commissioners at the Judicial Service Commission (JSC), and Judicial officers and staff, in regard to the dispensation of justice in Kenya. It contents that whereas COK 2010 declares autonomy of the judiciary in its exercise of judicial authority, advocates at JSC infringe on that independence when they appear in courts to represent cases before judges and magistrates, resulting in conflict of interests of the advocates. The conflict of interests arises because JSC commissioners as a whole are employers and hence bosses of judicial officers and staff.

Conflict of interests results from the divided loyalties of a person. It arises when activities compromise the independent judgment of individuals who are charged with undertaking certain duties.¹ Conflict of interests is a legal concept that is used as a practical tool to regulate conduct.² It is rooted in the law which regulates conduct of fiduciaries, who are esteemed as persons with highest legal standards of conduct and who are entrusted to serve the interest of other persons or to serve a designated mission. Avoidance of conflict of interests is a fundamental ethical rule upon which the legal profession is based³. In certain situations, fiduciaries have the potential to betray their trust and therefore the law bars them from undertaking such activities that would arouse conflicts. In that regard fiduciaries are not allowed to promote their personal interests or interests of third parties but are obliged to

¹Marc A. Rodwin, 'Attempts to Redefine Conflicts of Interest' (2018) 25 SALS 68.

²Marc A. Rodwin (n1).

³R.S. G Chester and Others, 'Conflict of Interest, Chinese Walls and the Changing Business of Law' [2008] BLI p35.

exhibit loyalty to the people they serve, act prudently and diligently, and account for their conduct.⁴

Article 171 of the constitution 2010 establishes and provides for the structure of JSC. JSC is charged with the function of promoting and facilitating the independence and accountability of the Judiciary, and the efficient, effective and transparent administration of justice.⁵ It accomplishes these objectives by ensuring the conduct of a judicial process that is designed to render justice to all, one that is accountable to the people of Kenya, and which is committed to the expeditious determination of disputes, among others.⁶

This study is concerned with the two advocates, representatives of Law Society of Kenya (LSK⁷) as commissioners to JSC. They are elected by secret ballot after their vetting, in compliance with provisions of the Constitution, as provided by Section 16 of the Judicial Service Act. This research examines the twin roles of the two advocates in their capacity as commissioners of the JSC and their practicing of law, in relation to their impact on the impartiality of judicial officers and staff in discharging their mandate. It is perceived that conflict of interests arise when these advocates appear in court to prosecute cases or seek other court services. This is in view of the fact that Commissioners of JSC are the employers, and hence bosses of Judges, Magistrates and other judicial officers yet they appear in courts before their employees to seek verdicts in their cases. The interaction between practicing advocates at JSC and judicial officers has led to much public concern, with Paul Mwangi critically observing that;

The case of practicing lawyers at the JSC makes nonsense of the independence of the judiciary.⁸ The two LSK representatives in the JSC have crucial say in who gets employed as a

⁴Ibid.

⁵Article 172 of the Constitution.

See also Judicial Service Act (JSA 2011) s 3

⁶JSA 3(b)(c) and (d).

⁷Art 171(2)(f)

⁸Paul Mwangi, *The Black Bar: Corruption and Political Intrigues Within Kenya's Legal Fraternity* (Oakland Media Services 2001) Foreword.

judge, what their terms of service are, supervision of the judicial officers and their discipline. They are in every respect the bosses of the judicial officers. For them to appear as advocates before the same judicial officers is a serious derogation of the independence of the bench.⁹

Roseline Ongayo considers practicing advocates at JSC to be a threat to judicial independence. She states that whereas article 160 of the constitution guarantees institutional independence of the judiciary, the judges' decisional independence is impliedly diminished by section 18 of the Judicial Service Act.¹⁰

In the same vein, Brian Wesonga says that the selection of commissioners of the JSC is shrouded with politics and special interests, leading to special schemes that determine which persons become judges, and how they decide cases.¹¹ He states that this selection of commissioners should be reconsidered, to avert the many problems that it has brought about due to competing interests, including conflict of interests.¹²

Allegations of conflict of interests in relation to the JSC display in a complex and intertwined manner, touching on various members of the Commission. Possible conflicts can occur in two respects. The first one concerns the role played by the Chief Justice and judges' representatives at JSC. The Chief Justice as president of the supreme court, doubles up as chairman of the JSC. Representatives of judicial officers include three judges, each from the supreme court, court of appeal and high court, and one Magistrate. These officers get conflicted when as arbiters, they deliberate on administrative matters such as of promotions, transfers and disciplinary actions relating to their colleagues and other judicial staff. However, this kind of conflict of interest is not the subject of this study.

⁹ibid

¹⁰Ongayo Roseline Akinyi, 'Justiciability of Justice: The Role of Judicial Service Commission in Kenya in The Decisional Independence of Judicial Officers' (LLM Thesis, University of Nairobi 2014) pp 1-2.

¹¹Brian Wesonga, 'Rethink Judicial Service Commission Selection' *Standard Newspaper* (28th December 2018)17.

¹²Ibid.

The second type concerns the two practicing advocates representing the LSK to the JSC. The Conflict of interests is said to arise owing to the fact that practicing advocates who are employed as commissioners of the Judicial Service Commission, continue in their private practice of law and routinely appear in court before Judges and Magistrates to prosecute cases. Some observers argue that when such advocates or partners in their law firms appear either in the court rooms or court registries litigating private cases for their clients, by virtue of their position as JSC Commissioners, they are likely to be accorded exceptional attention, and they attract unfair advantage from, and also exert undue influence over judicial officers, when compared to their colleagues who are non-commissioners.¹³

The appointment of practicing advocates to the JSC therefore, has a likelihood of resulting in judicial officers being unduly influenced in their way of deciding cases in which JSC members have an interest, for fear of victimization resulting in unfair transfers, denial of promotions, and even unfounded disciplinary measures. Also, there is a tendency of people who have big briefs to stream to JSC advocates for representation, hoping for favorable outcomes because of their perceived influence over judges, hence causing unfair competition amongst practitioners.

The Judiciary is the central player in the justice system in resolving disputes. It comprises judges, magistrates, other judicial officers and staff.¹⁴ It is vested with judicial authority to resolve disputes justly, by ensuring among other things, that justice is not delayed, but is done to all, irrespective of status.¹⁵ Like other government agencies, it is entrusted with the task of implementing the new Constitution which Kenyans overwhelmingly voted for in 2010, and

¹³ Jeff Koinange, Interview with Ahmednassir Abdulai Senior Counsel, Former JSC Commissioner (Nairobi, 20th February 2019); Editorial, 'Rethink Judicial Service Commission Selection: the current selection of members of the JSC has led to a host of problems due to competing interests, including conflict of interest'. *The Standard Newspaper* (12th December 2018).

¹⁴ Constitution Article 161(1).

¹⁵ Article 159(2)

entrenched the agenda to establish a free, equal, prosperous and just social order.¹⁶ The Judiciary occupies the central place in the implementation of this Constitution. It plays the vital role of interpreting the constitution, giving it meaning where there is contestation, and safeguarding it in case of any threats. Therefore, it is imperative for the judiciary to uphold its independence and impartiality, being subject only to the constitution and the law,¹⁷ so as to discharge its constitutional responsibilities.

The recent past has seen the Judiciary similarly experience scathing attacks from the public on numerous allegations. Among the allegations were corruption,¹⁸ missing court files,¹⁹ delayed judgments,²⁰ conflict of interests,²¹ and unnecessary case adjournments. Of particular concern to this study are the allegations of conflict of interests in relation to practicing JSC members.

Chief Justice Mutunga, when launching the Judiciary Transformation Framework (JTF), decried both the prevailing decline in public confidence and trifle of internal confidence within the judiciary, coupled with contempt from other arms of government.²² He underscored the need to renew and restore the judiciary to its rightful constitutional and political place, and especially to patch up its relationship with the public which it is designed to serve.²³ To be able to maintain its image, the Judiciary has not only to strive to eliminate,

¹⁶ Judiciary Transformation Framework (2012-16)10.

¹⁷ Constitution Article 160; JSA s3

¹⁸ Petition made to the Chief Justice dated 4th October 2018, by elders from Wajir County, alleging that a judge had been involved in corrupt dealings with one of the parties, in Election Petition Appeal No. 2 of 2018, between Governor of Wajir County Hon. Mohamed Abdi Mahamud and Ahmed Abdullahi Mohamad & 3 Others.

See also Editorial, 'No, the Judiciary is not being unfairly targeted, "both Mutunga and Maraga admit to the existence of deep corruption" within the Judiciary' The Standard Newspaper (4th February, 2019).

¹⁹ Complaints made to the Deputy Registrar Kisumu Law Courts, by prisoners in Kodiaga Maximum Prison during the Court visit in February 2019.

²⁰ Corruption cases involving defrauding of colossal sums of money, of 2009 against Dr. Davy Koech former Director of KEMRI; and of 2010, against Dr. Shem Ochuodho former Managing Director of Kenya Pipeline Corporation, which are pending conclusion.

²¹ Editorial (n 15).

²² Dr. Willy Mutunga, Chief Justice of Kenya, Judiciary Transformation Framework (2012-16)2

²³ Ibid.

but also desist from, engaging in any acts or omissions that would otherwise negate the many gains duly achieved.

Therefore, this study interrogates the relationship between the official duties and private interests of practicing advocates who serve as JSC commissioners, to find out whether this influence and compromise one another. This study analyses a selection of decided cases, and instances in which it is alleged that judges, magistrates and other judicial staff have been unduly influenced and intimidated by advocates who are employed as JSC commissioners, and thus demonstrating differential treatment and favouritism towards them. The study will look at possible ways of ensuring the objectivity and detachment of such advocates, where it is clear that their interests would diverge with their obligations when performing their public duties. Therefore, this study is important because it will explore universal rules and principles that would be relevant, which can be borrowed as best practices and recommend actions that may be adopted in addressing the problem of conflict of interests in JSC, to help avert the imminent erosion of public confidence and tainting the image of the Judiciary.

1.1. Background to the Problem

The JSC is the employer of judicial officers and staff. Its core function is to promote and facilitate the independence and accountability of the judiciary, to enable the judiciary to operate as an independent and impartial arbiter of disputes. Therefore, the relationship between JSC commissioners and judicial officers is of relevance.

Every advocate whose name is on the Roll and has in force a practicing certificate is entitled to practice law in the courts, and this right correlates with the clients' right to be represented by an advocate of their choice. However, the interactions between practicing advocates serving at JSC and judicial officers has raised ethical concerns, in regard to conflict of interests of the advocates. This is notwithstanding the fact that Advocates are bound to act

with independence in the interests of justice, and to comply with the rules of conduct when carrying out their work.²⁴ This is the core object of the Advocates Act (Practice Rules²⁵), together with the Code of Standards of Professional and Ethical Conduct,²⁶ which outline various prohibitions that seek to safeguard against conflict of interests. The Advocates Act prohibits disgraceful or dishonourable conduct incompatible with the status of an advocate,²⁷ while the Rules prohibit advocates from 'acting in a matter in which they believe they would be required to give evidence as witnesses'.²⁸

These rules are also mirrored in Chapter Six of the Constitution which lists numerous principles on leadership and integrity, that require public officers to demonstrate honesty, discharge their duties with regard to the public interest and declare any personal interests which conflict with their official duties.²⁹

The advocates' Practice Rules and Code of conduct do not define conflict of interests explicitly, therefore causing a conceptual confusion of the issue and leading to policy that cannot be implemented effectively. One adverse result is that practicing advocates who are employed as JSC commissioners and therefore employers of judges and magistrates, continually appear in courts to represent their clients. In such scenarios, the judges and magistrates being apprehensive of the interests of their bosses in the cases before them, cannot render impartial decisions

²⁴ Smith & Keenan's, *English Law Text and Cases* (17th edn Pearson Education Limited 2013) 142.

²⁵ Advocates Act Practice Rules 1966.

See also Part VIII of the Act, on acts that are regarded to be offences by advocates.

²⁶ Code of Conduct 2016

²⁷ Advocates Act section 60.

²⁸ Section 8

²⁹ Article 73(2)(c)

1.2 Statement of the Problem

Although the existing laws underscore the need to safeguard against conflict of interests, nevertheless the problem of conflict of interests is prevalent and remains unresolved among advocates who are commissioners of the JSC, because the relevant laws are articulated in a way that describes conflict of interest narrowly and fail to capture all aspects of the problem, leading to malpractice and injustices.

1.3. Justification

This study is justified for three significant reasons. First, it will contribute to the reservoir of knowledge on the existing literature in regard to conflict of interests of advocates. Although there is widespread conceptual and normative consensus on the importance of avoiding conflict of interests, the literature on this topic is scant. There are no contributions such as books and articles written on the kind of conflict of interests affecting advocates at the JSC. Much of the closest literature relates to conflict of interests of medical practitioners and accountants. This research therefore seeks to broaden the literature to embrace practicing advocates who hold public offices like those who work for the JSC, an aspect that has not been adequately interrogated by scholars. The study also introduces the application of a new theme in resolving the problem of conflict of interests. It urges the adoption of the concept of ‘Chinese Walls’ in legal practice in Kenya. A Chinese Wall is an information barrier usually erected by large accounting firms as a means of protecting their clients’ confidential information from circulating around all the staff.³⁰ It involves a number of administrative arrangements such as the segregation of staff, documents and computer file servers. It is done to ensure that some staff neither undertake certain work, nor work in certain departments, or

³⁰ Andrew D Mitchell, Chinese Walls in Brunei: *Prince JefriBolkia v KPMG*, (1992)2 WLR 215 (note).

acquire certain confidential information from their counterparts. The practice of this approach even though commonly used by accountants, was held to apply equally to lawyers.³¹

Second, the study seeks to contribute to the meaning of conflict of interests by providing a conceptual definition of conflict of interests which is lacking in legal provisions in Kenya. It will place the concept in perspective so as to find a balance between theory and practice.

Third, the completed work of this study will be availed to the Judiciary to be used as a training tool for judicial officers and other staff. It will also be used to inform the LSK and policy makers on the changes required to be made in the relevant laws to appropriately address the problem of conflict of interests. The people targeted by this training information will get to learn of the broad aspects embraced by the concept of conflict of interests, as not just being tied to the advocate client confidentiality principles but also to advocates exercising public authority. They will know how to deal when faced with scenarios of being conflicted.

1.4. Research Objectives

- i. Review the history of JSC with the object of understanding the changes that have shaped its current structure. and factors that explain the vulnerability to conflict of interests of its advocates members.
- ii. Examine the constitutional and legal rules that govern conflict of interests and assess their strengths, with the aim of identifying gaps in the law.
- iii. Examine the perceived areas of conflict of interests by advocates serving at JSC

³¹ Ibid 217 Lord Hope “I consider that the nature of the work which a firm of accountants undertakes in provision of litigation support services requires the court to exercise the same jurisdiction to intervene on behalf of a former client of the firm as it exercises in the case of a solicitor”.

- iv. Identify international best practices and standards in preventing conflict of interests of advocates that can be learnt as safeguards against conflict of interests.
- v. Make recommendations for appropriate change in the legal and policy framework on conflict of interests.

1.4.1 Research Questions

- i. What is the historical development of JSC in Kenya?
- ii. What gaps exist in constitutional and legal provisions safeguarding against conflict of interests?
- iii. What factors in the relationship between the official duties of advocates serving at JSC and their practice of law, explain the advocates' vulnerability to conflict of interests?
- iv. What are the international best practices and standards in preventing conflict of interests of advocates?
- v. What should be done to avoid conflict of interests among practicing advocates who serve at JSC?

1.5. Hypothesis

This study is premised on the hypothesis that the conflict of interests prevalent among practicing advocates who serve as Judicial Service Commissioners, is occasioned by weaknesses in the provisions of the Advocates Practice Rules and Code of Conduct, which regulate the practice and conduct of advocates.

1.6. Theoretical Framework

The study is largely driven by jurisprudence of natural law, together with the concepts of social contract and justice, in response to the research questions. Natural law as firstly

propounded by the Greeks was a universal law for all mankind under which all men are equal.³² Natural law theory teaches us the idea of individual worth, moral duty and universal brotherhood.³³

1.6.1 Natural Law Theory

Natural law is variously defined as the law of nature, higher law, eternal law, and divine law.³⁴ Michael Freeman explains that there are different doctrines of natural law but its principles are constant, they provide that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason. He states that from the onset of Greek civilization natural law thinking overwhelmingly guided the realms of ethics, politics and law, and its standard of values was essentially derived from an assertion of faith. Further, he states that natural law birthed natural rights thinking in political theory which led to the American Declaration of Independence ‘that makes reference to the unalienable rights of life, liberty and pursuit of happiness and which led to the French Revolution’.³⁵

Natural law jurists were Cicero, Aristotle³⁶, Thomas Aquinas³⁷, St. Augustine³⁸, Grotius³⁹, Gaius, Christian Thomasius among others.

Cicero described in detail the tenets of natural law. He referred to it as right reason in agreement with nature, being of universal application with the same laws in Rome and Athens, unchangeable law which it was wrong to try to repeal any part of it, and valid for all

³²Ibid.

³³Ibid.

³⁴Nomita Aggarwal, *Jurisprudence (Legal Theory): Natural Law School* (9thedn) 291

³⁵Michael Freeman, *Lloyd's Introduction to Jurisprudence: Natural Law* (9thedn Sweet and Maxwell 2016) pp 83-84.

³⁶Aristotle referred to natural law as universal unwritten rules which conform to nature.

³⁷1226-1274 AD, propounded that natural law was eternal law which was revealed to men by reason. He harmonised teachings of the church with those of natural law.

³⁸354-430AD, considered natural law to be the will of God revealed to men through holy scripture, and urged that human laws which contradicted it were to be discarded

³⁹Grotius founded international law on natural law principles, to regulate affairs and warfare of rising states.

nations in all times. He said that its commands impose duties on people and its prohibitions deter wrongdoing. That no one can free people from its obligations, and people interpret and expound it by themselves. That there is one Master, God over all people, who is the promulgator and enforcer of this law.⁴⁰

According to Nomita Aggarwal, the basic feature of the theory of natural law is that what naturally is, ought to be.⁴¹ He says that there is a body of law of nature which governs all things including mankind and human relations, and anything which happens to the contrary is contrary to nature.⁴² He explains that the modern age revolution saw the renaissance, reformation and rise of the National state, which resulted in the breakdown of the medieval order, and diminishing of the supremacy of the church and the emperor. During this period political philosophers prioritized liberties of the individual. People then demanded rights to safeguard their personality and interests, and therefore principles of natural law became justifications for these claims.

He quotes the definition of natural law as adopted by Tanaka which states that;

natural law affirms the existence of common principles among the people belonging to diverse nations, races and classes and is a series of moral and juridical principles that do not undergo change in society according to space and time, its content remains the same because deducted from reason which the creator Himself gave men.⁴³

On the other hand, Brian Bix observes that the medieval and renaissance theorists incorporated arguments of individual rights and limitations of government in their assertions about natural law. That these discussions formed the basis for the principles that were later known as international law⁴⁴.

⁴⁰Brian H. Bix, *Jurisprudence: Theory and Context, Natural Law* (6thedn Sweet and Maxwell 2012) 68.

⁴¹Aggarwal, (n 40)291.

⁴²Ibid.

⁴³Ibid, at pp 291-298.

⁴⁴Aggarwal *Natural Law:Modern Period*, at p296

Natural law adherents focus on the law as it ought to be. They associate it with what is good because it is given by God the creator who designed the universe for the good of all.⁴⁵ These natural law thinking was discredited by the seventeenth and eighteenth centuries jurists whose reaction was against its relying on reason as the basis of law and believing that certain principles of universal application could be rationally derived without considering social, historical or other factors. Philosophers like Edmund Burke emphasized the importance of history, while Hegel's view was that the political consciousness of the people is what determined the state's constitution, and that institutions like law and state constituted a part of a nation's spirit, whose destiny was determined by history.⁴⁶

Laibuta⁴⁷ refers to Stone⁴⁸ in explaining that Jeremy Bentham (1748-1832) and John Austin (1790-1859) too despised natural law derivation of values and principles from instinct, which they considered to be a derailment of Bentham's concept of utilitarianism and Austin's analytical and imperative delimitation of positive law. They considered the intuitive content and nature of these immutable laws to be of little legal jurisprudence, as they could not be formulated into legislation.

Indeed, social and historical factors are important considerations in formulating principles of law as argued by the above critics of natural law. Society is however, not homogenous as it is formed by different groups having different interests. Marxists⁴⁹ say that there are dominant groups based on class structure, which cause societal differentiation.

This study applies natural law theory to illustrate that although the concepts of this law seek to advance the common good of all people, the practice has failed to promote aspects of equality and freedom of the people.

⁴⁵ Ibid, *Reaction against Natural Law Thinking* p.310.

⁴⁶ Ibid.

⁴⁷ KibayaImaanaLaibuta, 'Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks' (PHD Thesis University of Nairobi 2010)

⁴⁸ J Stone, *The Province and Function of Law* (Associated General Printers 1946)6

⁴⁹ Stone, *Marxist Theories of Law and State: Base and Superstructure* p1134.

1.6.2. Conceptual Framework

The conceptual framework explains meanings of the concepts of social contract and justice, which the study applies in reference to avoiding conflict of interests in the justice system in Kenya.

1.6.2.1 Social Contract

The Social Contract as explained by Freeman, is an analytical construct used as a means of presenting conflicting political ideals.⁵⁰ Hobbes, Bodin, and Grotius use the ideal to defend the practice of arbitrary government, while Locke supports limited constitutionalism.⁵¹ Locke indicates that the basis of this theory is that no man can be subjected to the political power of another without his own consent, thus obedience is legitimated by voluntary submission to those who exercise authority.⁵² According to Locke's thinking, in which context this study is placed, the purpose of government is to protect human entitlements.⁵³ His theory propounds that the state of man prior to the social contract was a golden age, an eden before fall, and was not of brutal horror as Hobbes states.⁵⁴ He says further that the only problem in that paradise was that property was insecure. Therefore, man remedied this by giving up his natural condition and by contract gave up part of his liberty to a sovereign⁵⁵ in exchange with the state's protection of his person and property.

Conflict of interests results into biases, intimidations and unfair competition against those who are affected by it. The concept of social contract as elaborated in the perspectives of Locke and Hobbes, obligates the state to safeguard interests of its subjects, protect their rights

⁵⁰M.D.A.Freeman, *Lloyd's Introduction to Jurisprudence: Natural Law and The Social Contract* (8thedn Sweet and Maxwell 2008)105.

⁵¹Ibid.

⁵²Ibid p106.

⁵³Ibid p107.

⁵⁴Ibid.

⁵⁵Ibid pp 105-107.

against any manner of discrimination and to ensure equality and fairness to all. This study will attempt to explore some of the fair procedures and equity in accessing justice in Kenyan courts, in light of the issue of conflict of interests relating to practicing advocates who are members of the JSC.

1.6.2.2 Concept of Justice

The concept of justice is imprecise and one needs to specify the features of justice in an attempt to understand the elements of justice, as Wacks⁵⁶says. Bix explains that Justice is a subset of morality, hence in many instances people use the words ‘right’ or ‘wrong’ when they otherwise mean to speak of justice. He says therefore, different things are said to be just or unjust, such as laws, institutions, social systems, decisions, dispositions of persons or even judgments. To him, justice refers to the application of rules and standards where right action may require treatment of either equity or mercy.⁵⁷On the other hand, Postema defines justice to be right order of rational moral persons. He says that justice is the target we set for our law, the rule by which we measure it, since it defines the standards that the law ought to achieve.⁵⁸ Therefore, justice is something that can be inherent in law, or may be contrasted with law, or may be measured for testing law, as Harris explains, when distinguishing between two forms of justice, procedural and formal.⁵⁹

Rawls theory of justice as fairness is rooted in the idea of the social contract as well. He says that the principles of justice for the basic structure of society are the objects of the original agreement. These principles are those which he explains that ‘free and rational persons concerned to further their own interests would accept in an initial position of equality as

⁵⁶Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory, Theories of Justice* (Oxford University Press 2012)212.

⁵⁷ Bix (n 48) 901.

⁵⁸ Freeman (n 58) 679.

⁵⁹J. W. Harris, *Legal Philosophies: Justice*, (2ndedn, Oxford University Press 2011)277

defining the terms of association'.⁶⁰ Accordingly, Rawls equal maximum liberty principle provides that there are rights such as freedom of speech and association, freedom of the person, right of thought and freedom from arbitrary arrest, which cannot be sacrificed but which every system must respect.

This study will make reference to two aspects of justice, substantive and procedural justice. Laibuta states that while substantive justice refers to merits of entitlements, procedural justice refers to fairness in equality of opportunity in the process of dispute resolution, distribution of rights and benefits among others.⁶¹ Laibuta further says that the notion of procedural justice is to guarantee fair procedures that ensure fair and acceptable outcomes which people will accept even if they do not like. He observes that fair procedures emphasize consistency, and that any distinctions should not reflect extraneous features of differentiating mechanisms. That in this sense decision makers should employ fair procedures in a neutral impartial manner to reach fair and accurate decisions.⁶² These sentiments are reflected in Leslie Green's thinking that justice is rule-following, so that like cases are to be treated alike, and that general rules can only exist if conformed to and applied with some consistency.⁶³

Bottoms and Tankebe explain that procedural justice means those fair procedures by which law enforcement officials treat citizens, and which require rules or procedures to be consistently followed and impartially applied.⁶⁴

Prevention of conflict of interests is concerned with the due process of law which is one of the tenets comprising rules of natural justice⁶⁵, an outcome of the principles of natural

⁶⁰ Freeman (n 66)583-85.

⁶¹Laibuta (n 55) 'Access to civil justice in Kenya: An Appraisal of the Policy and Legal Frameworks'p191

⁶²Ibid,

⁶³Leslie Green in H.L.A. Hart, *The Concept of Law:Justice and Morality*, (3rdedn, Oxford University Press) 59.

⁶⁴Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice'(vol. 102)1 JCLC available at <<https://heinonline.org/hein/journals>>Accessed on 19th March 2019.

⁶⁵Edward Coke, Chief Justice *Thomas Bonham v College of Physicians, &Co.* (1610)114, Court of Common Pleas.

law. Due process of the law denotes fair treatment through the normal judicial system.⁶⁶ Lord Denning describes it to mean those permitted legal measures that enable perfect streams of justice, ensuring fair trials, procedural arrests and searches, besides timely resolution of disputes.⁶⁷

Wade and Forsyth refer to natural justice by differentiating between what is right and wrong, that which they say is the equivalent of fairness. To them natural justice, natural law and the law of God and 'common right and reason' were all aspects of the old concept of fundamental and unalterable law.⁶⁸ They explain that rules of impartiality and fair hearings are traceable in medieval precedents, which were considered to be sovereign orders and the legislature could not alter them. They relate Dr. Bonham's case aforementioned, in which Chief Justice Coke declined to allow the claim of the college Physicians to fine and imprison Dr. Bonham for practicing in London without the licence of the College of Physicians. The college based its case on the law that required fines to be split into half, one part to the King and the other to the college. Justice Coke declared that the college was judge in its own cause, since it had a financial interest in the judgment. The Judge further held that the court could declare an Act of Parliament void if it made a man judge in his own cause or was otherwise against common right and reason. The court further asserted that rules of natural justice had to be applied when making decisions, to ensure such decisions were made in a proper way, where decision making powers were conferred by statute.⁶⁹

Rules of procedure, evidence and natural justice protect individuals from arbitrary governmental action and illegal deprivation of private rights. Kenya, like many other countries has given more scope for natural law principles by enshrining fundamental rights of the individual in its constitution, some of which will be the subject of this study.

⁶⁶Concise Oxford English Dictionary, (11thedn, Oxford University Press 2008).

⁶⁷Lord Denning, *The Due Process of Law* (London Butterworths 1980) V.

⁶⁸William Wade and Christopher Forsyth, *Administrative Law: Natural Justice in the Common Law* (11thedn, Oxford University Press) 376-77.

⁶⁹Lord Browne-Wilkinson in *R. -vs- Home Secretary exp Pierson* [1998] AC 550.

1.7. Research Methodology

This study used a combination of research methods in its methodology. It used desk-based study, case study, empirical and comparative studies. Desk based study sought to describe and analyze the behavior⁷⁰of practicing advocates serving at JSCwhen they interacted with judicial officers. Since law is a social construction,people’s manners are said to be conventional and they depend on common practice and vary from one place to another.⁷¹Desk based study collected data from primary and secondary sources. Primary sources used were Constitutions of Kenya 1969 and 2010, domestic legislation which included the Advocates Act, Ethics and Anti- Corruption Act 2011, Income Tax Act, Judicial Service Act 2011Kenya Independence Order In- Council 1963, Law Society Act 2014, Leadership and Integrity Act, Parliamentary Powers and Privileges Act 2017, and Public Officers Ethics Act. International Conventions were Bangalore Principles, Convention on The Rights of The Child (1989),I CCPR, Latimer House Principles (2003) and UDHR.Secondary sources included internet sources, textbooks in libraries, professional journals and scholarly articles, media reports, government Reports and case law. The secondary research method was found to be beneficial for providing the basis upon which the collected primary data will be compared. It provided important background information like the literature review and public text books in use. Secondary data was easily obtained from the Judiciary libraries at Kisumu and Milimani Courts, besides the library at the University of Nairobi law campus.

Case study researchsought to find out whether the official duties of advocates serving at JSC conflict with their personal interests, to ascertain the causal factors and recommend strategic interventions to reform policy and legislation. The study was carried out at the law courts in Nairobi and Kisumu.These court stations were selected for being major regional courts which range from subordinate to appellate courts, besides being the main court stations where

⁷⁰ Donald Kisilu Kombo and Delno L.A. Tromp, *Proposal and Thesis Writing:Types of Research* p9.

⁷¹71 Leslie Green in L A Hart, *The Concept of Law* (3rdedn Clarendon Law Series 2012) xvii.

advocates at JSC commonly practice. Data was collected by way of face-to-face and also online interviews. Questionnaires in the format of google forms were transmitted to executive officers, registry and court clerks, and selected advocates, these being the people who possess the relevant information required by the study. Upon the participants filling in the questionnaires, the google tool analyzed the data as per the formulated questions. See Appendix 1. The case study entailed interviewing of one judge of Appeal, one retired judge of the supreme court, a former JSC commissioner, one magistrate, one executive officer, nine advocates, one registry clerk and two advocates' clerk. Interviews conducted with judges, Magistrates and executive officer were to inquire about their work policy, by virtue of their being key informants who are involved in policy development. These interviews were to establish whether judicial officers have been subjected to intimidation and undue influence by advocates who are JSC Commissioners, as claimed by critics of the judiciary.⁷² Also, they aimed at finding out if there were any reported cases or complaints on claims of conflict of interests and undue influence affecting judicial officers. Advocates' clerks were also interviewed to find out how they interact with advocates who are JSC Commissioners and members from their law firms, and if therefore, they encounter any challenges in the course of their work. Several advocates have publicly raised diverse comments touching on the issue of conflict of interests and matters of integrity in the judiciary. The Researcher interviewed these specific advocates for insight from their points of view on the matter. In particular these interviews informed the study on the magnitude or otherwise of the problem of conflict of interests and on the possible ways of solving it.

Additionally, the study used empirical research method through direct observations made by the researcher. This was made possible by virtue of the fact that the Researcher is attached to

⁷²Paul Mwangi, 'The case of practising lawyers at JSC makes nonsense of the Independence of the Judiciary' *Nation Newspaper* (10 February 2019)29; and Brian Wesonga, 'Rethink Judicial Service Commission Selection' *The Standard Newspaper* (12 December 2019)17.

the court of appeal as a legal researcher. The researcher observed interactions between practicing advocates serving at JSC and judicial officers in the courtrooms, as well as in the court registries, with a view to eliciting first-hand information from the source in regard to conflict of interests that affects advocates serving at JSC.

The Researcher collected more information on the study by observing live interviews of renown scholars and advocates, which were then ongoing discussions conducted on television.

The study also used Descriptive research method, by way of comparative research. It examined, compared and contrasted⁷³ the laws and practices relating to conflict of interests of advocates in Kenya to that of other jurisdictions, with the aim of proposing practices that would serve as good examples. The countries of comparison are the United Kingdom, United States of America and Canada, selected because their legal systems like that of Kenya, are based on English Common law. The research examined laws and practices which are similar in some respect but they differ in some way.⁷⁴ The differences became the focus of examination, the goal being to find out reasons of their being different.⁷⁵

The Researcher will provide hard copies of the completed research work to the library at the law school of the University of Nairobi, and also post a soft copy to the University's website. Additional copies of the work will be given to both the Chief Registrar and the Director of the Training Institute of the Judiciary to be used in trainings, and another copy will be availed to the Law Society of Kenya.

⁷³ Khushal Aynalem, *Legal Research Methods* (ChilotWordpress 2009)23

⁷⁴ Comparative Research studies. Found at <www.uiah.fi/projetcs/metodi/721.htm> accessed on 19th October 2019.

⁷⁵ Ibid.

1.8.Literature Review

The research evaluated available knowledge in the area of conflict of interests, by referring to the available books, articles, case law reports and writings.

Epstein⁷⁶ explains that the conflicts of interest that are faced within a law firm are extensive and many of them are not subject to legal regulation at all. He refers to lawyers as agents whom people hire to help them in the affairs of life. He says that the rule of joint gains from the trade through contract applies to the advocate-client agency relationship, so that the services which the agent provides have a greater value to the principal than the fee that he is charged, and conversely the cost of providing the service by the agent is less than the fee that he receives. This arrangement thus ensures that both sides can benefit from the relationship. He further says that concomitantly, the parties would not content themselves with an agreement which, the principal pays the requisite fee but the agent just does what he pleases. That it is for this reason that the attorney-client contract like any other, is entitled to a high level presumptive respect, because it is 'easy to promise the moon, but tempting to deliver a slice of green cheese'. He says that performance is the ultimate concern in any contract and it becomes important to device ways to monitor the performance of an agent to ensure that he does not substitute inferior goods and services for the higher quality ones that he promises. Epstein's work is relevant to this study since it defines the advocate-client relationship, describing it to be a contractual relationship that calls on either party to perform their part of the bargain. He underscores the importance of having contractual strategies which will ensure that there are no conflicts of interest arising in the course of that relationship. He has explained the various instances in which conflict of interests occurs in law firms such as in employment relations within the firm, or control over client's private information. He however asserts that they are very extensive and may not be subject to legal regulation at all.

⁷⁶Richard A. Epstein, 'The Legal Regulation of Lawyers' Conflicts of Interest' (1991) University of Chicago Law School Journal.

On the contrary, it is common knowledge that the law does not operate in a vacuum. Just as stated by Chief Justice Barnette, ‘the law operates through the strengths and weaknesses of people, and where there are strengths, those should be built upon while the weaknesses should be worked around’.⁷⁷

Espein does not however, capture the specific issue under this study, of conflict of interest arising as a result of an advocate who is in an employer’s capacity seeking to be served by an employee.

Mitchell⁷⁸ explains that the potential for conflict between the duties owed to former and current clients has increased with the changes in legal practice. That the development of the mega firm and increases in lawyer mobility have placed enormous pressure on the existing conflict rules. He says that lawyers being fiduciaries and officers of the court, have demanding duties imposed upon them such as an absolute obligation not to disclose information of a confidential nature which has come to their knowledge by virtue of their retainer. They have a duty to put at their client’s disposal not only skill but all relevant knowledge, and if a lawyer is not willing to do so then he should not act for that client.⁷⁹ He says that the relationship between these two obligation gives rise to what is commonly referred to as conflicts of interest, and most accurately described as conflicts of duty. The conflict occurs in successive representation of clients with adverse interests because as he says, it is impossible to avoid disclosing the confidential information relating to an earlier client while using all skill and knowledge for the subsequent client. That the disqualification or conflict of interests’ rule is what is used as a safeguard to prevent disclosure of client confidences in such situations. Mitchell goes on to examine different approaches to

⁷⁷Michael Barnett, Chief Justice of the Supreme Court of Bahamas, during the open forum for the College of The Bahamas’ Law Criminal Justice Society in November 2011.

<https://uwilawsocietybs.blogspot.com/2011/11/> accessed on 17th March 2019.

⁷⁸Andrew Mitchell, ‘Whose Side Are You on Anyway? Former Client Conflict of Interest’ (1998)26 ABLR pp418-34.

⁷⁹As held in *Spector-vs- Ageda*, [1973] CH 30.

disqualification of practitioners in this situation and the various stages of the disqualification process.

Mitchell's work brings out a new perspective of conflict of interests, that which arises from the advocate's dual obligation between non-disclosure of a former client's confidential information, and that of disclosure of all relevant knowledge to a client. In this regard the literature is relevant to this study in that besides being obligated to protect confidential information of former clients, advocates employed by JSC ought to disclose to their clients the probable risk of their being conflicted as commissioners of JSC if they represent clients in court. Mitchell's work points to advancements in the practice of law which necessitate new approaches to resolving the problem of conflict of interests, but in the greater part it restricts itself to the current rule which is based on the possibility of misuse of confidential information and the presumption of shared confidences. It does not therefore, relate to the type of conflict of interests that is seen to affect practicing advocates employed by the JSC.

Additional work by Mitchell relates to the Chinese Walls in Brunei⁸⁰, as expounded in the famous case of *Prince Jefri Bolkaiah -vs- KPMG*.⁸¹ In this case KPMG, a firm of chartered accountants annually audited funds of Brunei Investment Agency (BIA), for which Prince Jefri was chairman. Also, KPMG privately undertook investigations for Jefri's private companies and thereby acquired extensive confidential information about his assets and financial affairs. Subsequently, KPMG was instructed to investigate location of special capital transfers made earlier on by BIA. It became clear that the findings would lead to proceeding against Prince Jefri. To protect the confidential information of Prince Jefri, KPMG erected an information barrier known as 'Chinese Wall', by separating its staff who had worked on the projects involving the confidential information, from those who had not acquired such information. Jefri sued to bar KPMG from continuing to carry out

⁸⁰Andrew D Mitchell, *Bolkiah v KPMG* [1999]2 WLR 215 (note) pp. 243-255.

⁸¹*Bolkiah v KPMG* above.

investigations against him.⁸² The court held that accountants were subject to the same obligations as solicitors, and declined to issue an injunction.

Mitchell discusses the various forms of advocates' disqualifications in cases of conflict of interests, among them being the creation of the Chinese Walls. This is an organizational device of preventing the flow of confidential information within firms, by ensuring that lawyers are segregated to work in different departments, buildings or towns to undertake specific work, limiting their access to files and databases. He points out that a Chinese Wall was also accepted as adequate protection against disclosure of confidential information in Australia where the courts held that rules of law did not exclude Chinese Walls or other arrangements of a similar kind as being insufficient to eliminate the risk of conflict of interests.⁸³ He states that courts do not set an unrealistic standard for the protection of confidential information which would create unjustified impediments in the way large professional firms conduct their business.⁸⁴

Although Mitchell does not talk about the kind of conflict of interests that is similar to that in the JSC, his work is relevant in the sense that this study can borrow from the concept of the Chinese Wall, to exclude advocates at JSC from representing clients in court, or participating in tasks like appointing of judges, which is likely to have a certain kind of influence over judicial officers and therefore occasion conflict of interests in the judiciary.

A symposium organized by Griffith University⁸⁵ deliberated on and made a report about diverse perspectives of conflict of interests. The participants discussed the foundation and importance of duty to avoid conflict of interests and observed that the fiduciary principle requires undivided loyalty to clients without being distracted by other interests including personal interests. They differentiated three categories of conflict of interests. The first one

⁸² *ibid* Judge Pumfrey.

⁸³ *Fruehauf Finance Corporation Pty Ltd. -vs- FeezRuthing*[1991]1 QB R 558.

⁸⁴ Quoting *Russel McVeaghMcKennzie Bartlett & Co.-vs- Tower Corporation* [1998]3 NZLR 641.

⁸⁵ A Report of the Symposium on Lawyers, Clients and Business of Law, of 15th March 2007.

was the Lawyer- client conflict of interests in which they emphasized that the client was entitled to place complete trust in the lawyer, who owes a corresponding duty of loyalty. They stated that lawyers must “subordinate their own interests to those of the client and avoid acting in situations where self-interest might tempt them to compromise their duty to loyalty”. The second type was identified as the Concurrent conflicts in which they pointed out the fundamental obligation to provide clients with professional advice and skill uncompromised by the performance of a like duty to another whose interests conflict with those of the client. Successive Conflicts was also identified, as that which occurs between the continuing duty of a lawyer owed to his former client, prohibiting the disclosure or use of what he learned confidentially, and the interest which he has in advancing the case of the new client. Participants looked into factors that contribute to conflict of interests, which they said were as a result of the developments in the range of services provided by law firms, and which extend beyond standard models of advice and representation. These include the tendering out of government legal work, major national law firms acting for government or statutory authorities, and corporate and private clients seeking to challenge government decisions. The conference stressed on the importance of effective systems to alert practitioners on both actual and potential conflicts and urged practitioners to take action and not merely be aware of conflict concerns.

The findings of this Report are relevant to this study because they allude to the developments in legal practice which necessitate advocates to work for the government. The report lays emphasis on the long time ethical rule which goes to the core of the advocates duty of loyalty, whose maintenance and protection is a matter of public interest. But the work does not address the issue of the likelihood of conflict of interests arising when advocates who are employed by the government act for private clients in court, as is the case exhibited in the JSC under this study.

Ongayo writes about the role of JSC in relation to individual independence of judicial officers.⁸⁶ She argues that although the JSC is charged with the obligation to ensure that the judiciary achieves institutional and individual independence, this has not materialized. That the relevant laws are flawed with the effect that JSC exercises arbitrary powers over judiciary.⁸⁷Ongayo goes on to observe that initially, threats to judicial independence were caused by other institutions such as parliament which had financial powers over judiciary. That currently, the mandate of JSC vesting in its management and oversight functions causes conflict of interests. Ongayo discusses two decided cases⁸⁸in which it is alleged that JSC violated human rights and the judiciary did not uphold plaintiffs' rights against JSC. She asserts that there is a conflict of interests when JSC is involved in court cases which are decided by judges and magistrates who are employees of the commission. That judges make partial decisions in fearing to question the acts of JSC which is their appointing body. She therefore recommends for separation of the dual roles of JSC. Ongayo's work is relevant to this study since it highlights broadly the problem of conflict of interests affecting the JSC. However, her work relates to the entire commission as an appointing body of judicial officers. It does not narrow down to the conflict of interests of practicing advocates comprising the commission, when they act for their private clients in court as is the case in this study. Francheshci analyzes the judiciary Code of Conduct and Ethics in relation to judicial independence and accountability. He states that the constitution of Kenya 2010 creates safeguards that seek to prevent interferences with the judicial function and easy manipulation of judges to satisfy superficial social whims, and that the judicial code aimed to concretize

⁸⁶Rosaline Akinyi Ongayo, 'Justiciability of Justice: The Role of the Judicial Service Commission in Kenya in the Decisional Independence of Judicial Officers' (LLM Thesis University of Nairobi 2014)8

⁸⁷Ibid, pp1-2, 8-9

⁸⁸*Federation of Women Lawyers & 5 others-v- JSC & Another*, Petition no. 102 of 2011 (2011) eKLR: *Nancy Barasa Makokha -v- JSC & 9 Others*, Petition no. 23 of 2012.

these safeguards.⁸⁹He states that judges are guardians of democracy,as they develop the law by constantly expandingits limits through their dimensions. Therefore, judgesare called to be guardians of the constitution and the guardians of every individual, against every power'.⁹⁰Francheschi further stresses the idea that the judicial code is designed to shield the independence of judiciary and inspire public confidence,ensuring that judicial officers are fair, impartial, and independent minded persons who apply the law faithfully devoid of personal prejudices.⁹¹He notes that however, the judicial Code lacks the necessary mechanisms of enforcement and accountability to make it a relevant instrument, sinceit is not based on the core values of the Bangalore Principles.⁹²

Although Franceschi's work does not relate to conflict of interests of advocates, it is important to this study because it emphasizes the importance of protecting the judiciary from improper influences that may encroach on judicial independence. He underscores the need to review the judicial code of conduct to ensure that it fosters accountability. Practicing advocates who serve as JSC commissioners may influence judicial officers and staff in the course of discharging their duties, when the advocates prosecute cases in courts. This would infringe on the personal independence of judicial officers, hence the need for a judicial code that conforms to international standards which uphold principles of judicial ethics, to protect judicial officers from interferences and address the problem of conflict of interests of advocates.

1.9.Limitations

The study was limited by the challenge of judicial staff and officers not divulging information freely,in view of the judiciary policy of confidentiality. Also, some of the interviewees who

⁸⁹ Luis G Franceschi in Judiciary Watch, 'Judicial Independence and Accountability in Light of The Judiciary Code of Conduct and Ethics of Kenya'(2016)103. Found at https://icjkenya.org/.../icj_judiciary_watch_ed_12 accessed on 27th July 2019.

⁹⁰ Ibid.

⁹¹Ibid p104

⁹²Ibid

were earmarked for interviews did not readily avail their time for this task. Additionally, some participants did not keep their appointments for the interviews and the Researcher had to go back several times to secure meetings with them.

1.10. Chapter breakdown

Chapter one

This chapter is the introduction to the study. It discusses the background to the problem, the statement of the problem, the research objective, it outlines the research methodology and the theoretical framework. It also includes the review of the relevant literature to the study, and justification of the study.

Chapter Two

This chapter traces the historical development of the Judicial Service Commission through the colonial and post-colonial periods, with the aim of understanding changes in its structure that have led to conflict of interests of advocates serving at JSC.

Chapter Three

This analyses existing legal and institutional framework that govern conflict of interests in Kenya, with a view to assessing their effectiveness.

Chapter Four

This is the case study of the law courts in Nairobi and Kisumu. It seeks to explore the reasons behind conflict of interests of practicing advocates serving at JSC.

Chapter Five

This examines the rules, standards and practices governing conflict of interest in other jurisdictions with an aim of informing this study on the best practices.

Chapter Six

This will present the research findings, make conclusion and recommendations of the study

CHAPTER TWO

HISTORICAL BACKGROUND AND CONTEXT

2.0. Introduction

This chapter makes a background overview of the history of the Judicial Service Commission during the colonial and post-colonial periods, with the aim of understanding changes that have led to the differences in the current structure of the membership of JSC, and the reasons behind conflict of interests affecting practicing advocates that serve at JSC. It also traces the origin of the concept of conflict of interests.

2.1 Historical Background of Judicial Service Commission

2.1.1 Colonial Period

Prior to the colonial era, the judicial process in Kenya comprised of traditional legal frameworks that were essentially informal. The history of the JSC is traceable in the creation of a formal legal system after Kenya became a British Colony in 1920⁹³. The colonial government sought to establish a legal system that would embrace the natives, Muslims and the English laws, and this resulted in both the East Africa Order in Council of 1897 and the Queen's Regulations establishing a legal system of subordinate courts that were mainly staffed by administrators and magistrates that would address matters relating to the natives, Muslims and British settlers.⁹⁴ There was established a Judicial Council (JC) which comprised of the Chief Justice, two persons from the Supreme Court appointed by the Governor General (GG), and two other people appointed on the advice of the Public Service Commission

⁹³Ongayo Roseline Akinyi, 'Justiciability of Justice: The Role of Judicial Service Commission in Kenya in the Decisional Independence of Judicial Officers' (LLM Thesis, University of Nairobi, 2014) pp29, 31-32.

⁹⁴Ibid.

(PSC). The Attorney General was by then not a member of the JC.⁹⁵The JC was charged with the appointment and removal of judicial officers.⁹⁶

2.1.2 Post- Colonial Period

In 1963 when Kenya became independent it adopted a Constitution that was a Westminster model⁹⁷.The JSC was originally established under the Westminster Constitution as an autonomous institution without the direction or control of any person or authority.⁹⁸ Members of the JSC were drawn by a process of checks and vetting by parliament and this saw the independence of the commission. The JSC was therefore self-regulating but subject to checks by the Prime Minister and the Regional Assemblies.⁹⁹

In the repealed 1963 Constitution, members of the JSC were limited to the Chief Justice, the Attorney General, two judges who were appointed by the president, and the chairman of the Public Service Commission.¹⁰⁰The Commission acted with the consent of the president in discharging its functions. It was vested with power to appoint and confirm judicial officers and staff, to exercise disciplinary control as well as remove them from office.¹⁰¹Tom Kagwe equates JSC then to a club whose members were arbitrarily appointed by the president, and who propagated interests of the executive.¹⁰²

The Constitution of Kenya 2010 establishes JSC and sets out its structure in Article 171.

JSC membership draws from a broad range of public representation, made up of eleven members namely; the Chief Justice who is the chairperson of the Commission,¹⁰³ one

⁹⁵ Kenya Independence Order in Council 1963, Section 184.

⁹⁶Ibid.

⁹⁷ Ben Sihanya, *Constitutional Founding of Kenya and African States: Constitutional Democracy in Kenya and Africa* (forthcoming).

⁹⁸ Ibid.

⁹⁹Ongayo Roseline (n 98)26.

¹⁰⁰ Constitution of Kenya Revised Edition (1998)1992, Sections 68.

¹⁰¹ Constitution of Kenya above, Section 69.

¹⁰² Tom Kagwe, 'LSK-JSC Male Rep Elections about Integrity Ethics and Accountability' *The Star Newspaper* (April 27-28, 2019)4.

¹⁰³Article 171(2)(a)

Supreme Court Judge elected by judges of the Supreme Court,¹⁰⁴ one Court of Appeal Judge elected by the judges of the Court of Appeal,¹⁰⁵ one High Court Judge and one Magistrate, one woman and one man, elected by the members of the association of judges and magistrates,¹⁰⁶ the Attorney General,¹⁰⁷ two advocates, one a woman and the other a man, elected by members of LSK,¹⁰⁸ one representative of PSC,¹⁰⁹ two appointees of the president, a man and woman, representing the public and having been approved by the National assembly.¹¹⁰ JSC Commissioners are charged with an oversight duty over the Judiciary, besides performing various key functions as stipulated by the Constitution and section 13(1) of the Judicial Service Act. Of the said duties, the ones relevant to this study are; recommending to the president persons for the appointment of judges,¹¹¹ making recommendations on the conditions of service for judicial officers and other staff,¹¹² receiving for investigation complaints against judicial officers and staff with a view to carrying out disciplinary measures,¹¹³ and training judicial officers.¹¹⁴ JSC Act empowers the commissioners to discharge their mandate, discharging their responsibilities in conformity with provisions of the constitution and JSC Act.¹¹⁵

2.1.3 Establishment of the Judicial Service Code of Conduct

The JSC established the Judicial Code of Conduct and Ethics (Code of Conduct) in the year 2003, pursuant to provisions of the Public Officer Ethics Act.¹¹⁶ The Code of Conduct aimed

¹⁰⁴Art 171(2)(b)

¹⁰⁵171(2)(c)

¹⁰⁶ Art 171(2)(d)

¹⁰⁷Art 171(2)(e)

¹⁰⁸Art 171(2)(f)

¹⁰⁹Art 171(2)(g)

¹¹⁰Art 171(2)(h)

¹¹¹ Article 172(1)(a)

¹¹² Article 172(1)(b)

¹¹³ Article 172(1)(c)

¹¹⁴ Article 172(1)(d)

¹¹⁵ Section 13(2)(3)

¹¹⁶ Act of 2003, at section 5(1).

at establishing the standards for ethical conduct for judicial officers.¹¹⁷ Rule 10 of the Code outlines provisions relating to the integrity and impartiality of judicial officers. The Rule prohibits judicial officers from subordinating their judicial or administrative duties to their private interests or putting themselves in a position where there is a conflict between their official duties and private interests.

2.2. The Concept of Conflict of Interests

As already defined in the preceding chapter, conflict of interests refers to a real or seeming incompatibility between one's private and one's public or fiduciary duties¹¹⁸. It occurs in a situation in which someone in a position of trust such as a lawyer, executive director of a corporation, or a medical research scientist has competing professional interests¹¹⁹.

The notion of Conflicts of interest was firstly expressed by the phrase, 'You cannot have your cake and eat it too', contained in a letter dated 14th March 1538, from Thomas, Duke of Norfolk in England, to Thomas Cromwell¹²⁰. The phrase then became a popular English idiomatic proverb which means that one cannot retain a cake that he has eaten already, as the same is gone¹²¹. This figure of speech indicates that one cannot enjoy both of two desirable but incompatible alternatives¹²². Professor Brians explains this proverb saying that 'you can't eat your cake and have it too.... that once eaten keeping possession of the cake is no longer possible, seeing that it is in your stomach and no longer exists as a cake'¹²³.

¹¹⁷ In the Preamble

¹¹⁸ Black's Law Dictionary, 9th Edition.

¹¹⁹ Halsbury's Laws of England (5thEdn, 2010) vol.66. para56.

¹²⁰ Letters and papers, Foreign and Domestic, Henry VIII, Vol. 13 Part 1: January-July 1538 found at <www.british-history.ac.uk/letters-papers-hen8/vol13/no1/pp176-193> accessed on 17 January 2019.

¹²¹ Definition of cake in English <<https://en.oxforddictionaries.com/definition/cake>> accessed on 11/01/2019

¹²² Collins English Dictionary, definition of a cake.

¹²³ Paul Brian, 'Common Errors in English: Eat Cake' WSU found at <http://public.wsu.edu/~brians/errors/eat_cake.html> accessed on 11 January 2019.

This proverb is similarly used in other languages of different parts of the world, with the Swahili people of East and Central Africa expressing it as, ‘*njia panda ilimshindafisi*’,¹²⁴(the hyena was unable to walk on crossroads at the same time). The Czech say that you cannot sit on two chairs at the same time.¹²⁵ In German its said that one cannot dance in two weddings at the same time.¹²⁶ In Gujarati they say that one cannot have *a laddu* (sweet candy) in both his hands,¹²⁷ while the Hebrew on the same note say that it is impossible to hold a stick from both ends.¹²⁸ The Italians say that one cannot want the barrel full and the wife drunk. The Spanish say that a person cannot be both at mass and in the bell tower ringing the bells.¹²⁹ Similarly, the Holy Bible warns that ‘no one can serve two masters, for either he will hate the one and love the other, or else he will be loyal to the one and despise the other, you cannot serve God and mammon’.¹³⁰

2.3 Conclusion

The history of JSC shows how it has evolved through phases that have seen it revamped under the new constitutional dispensation, in terms of its composition and functions. These changes were aimed at enhancing JSC effectiveness. Membership of the new JSC under the 2010 constitution has secured public participation through appointment by the president of two persons who are not lawyers. Appointees to the JSC are vetted by the National Assembly and this provides the necessary checks and balances.

Two advocates representing the Law Society of Kenya are new entrants to the JSC. However, the advocates’ membership of JSC has raised ethical concerns in regard to conflict of interests

¹²⁴ K.W. Wamitila, *KamusiyaMethali, Lulu ZaLugha*(2ndedn, Longhorn Publishers 2008) 2223 p.293.

¹²⁵ The Phrase Finder, ‘Phrases, Sayings, idioms and expressions’ Found at <http://phrases.org.uk/bulletin_board/26/messages/1075.html> accessed 27/11/2018.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Holy Bible, New King James Version: Luke Chapter 16, verse 13.

arising when they represent cases in courts, which was not the case under the repealed constitution.

Unlike in the 2010 constitution, JSC in the 1963 constitution attracted a lot of criticism to the effect that it was manipulated by executive control. JSC commissioners were arbitrarily selected by the president, they served at his pleasure and were seen to propagate interests of the executive.

CHAPTER THREE

AN OVERVIEW OF EXISTING LEGAL AND INSTITUTIONAL FRAMEWORK ON CONFLICT OF INTERESTS IN KENYA

3.0. Introduction

This chapter examines the existing legal and institutional framework on the laws governing conflict of interests of public officers. It seeks to interrogate the effectiveness of the legal and institutional framework, with special focus on the practice and conduct of advocates vested with public authority. JSC commissioners serve as public officers, as such they are bound by the principles of leadership and integrity and subject to the authority of the institutions appertaining to them. A public officer is any person who holds a public office in the national government, a county government or the public service¹³¹.

COA in chapter six stipulates principles on leadership and integrity of public officers, which is the bedrock of various legislation that safeguard against conflict of interests. The legislation includes the Judicial Service Act,¹³² Leadership and Integrity Act,¹³³ and the Public Officers Ethics Act,¹³⁴ together with Advocates Practice Rules,¹³⁵ Advocates Code of Standards of Professional Practice and Ethical Conduct¹³⁶ (Code of Conduct), and Judicial Code of Conduct. Institutions that are responsible for the implementation of the laws on leadership and integrity as contained in Chapter Six of the constitution are; Commission for Implementation of the Constitution,¹³⁷ CAJ,¹³⁸ and EACC.¹³⁹

¹³¹ Article 260 of the Constitution.

¹³² Act Number 1 of 2011.

¹³³ Chapter 182 Laws of Kenya, Act number 19 of 2012.

¹³⁴ Chapter 183, Laws of Kenya

¹³⁵ Advocates Practice Rules 1966, Advocates Act, Chapter 16 Laws of Kenya.

¹³⁶ Of June, 2016.

¹³⁷ Established under the Sixth Schedule, section 5(1)(6)

¹³⁸ Is established by the Commission on Administrative Justice Act Number 23 of 2011, at Article 59(1)(4), it was formed after the restructuring of the National Human Rights and Equality Commission.

¹³⁹ Established by the section 3(1) of the Ethics and Anti-Corruption Act Number 22 of 2011. It is mandated to combat and prevent corruption and economic crime in Kenya

The chapter considers judicial practice to ascertain how courts have decided disputes concerning the question of conflict of interests in general. Two key decided cases on conflict of interests will be analyzed. Finally, the chapter identifies the disconnect between the written law and what is in practice and will suggest what reform is required so as to accord with prescribed international practices.

3.1. General Overview of the Legal Framework

The Constitution of Kenya is the foundation of all principles regarding ethical rules and values of state officers. Article 10 outlines values and principles of governance. It declares that national values and principles of transparency and accountability¹⁴⁰ bind all state organs, state officers, and all people.¹⁴¹

Principles of good governance prescribed to guide state officers are premised on the assumption that ‘State officers are the nerve center of the Republic and carry the highest responsibility in the management of state affairs and therefore their conduct should be beyond reproach’.¹⁴²

Article 73(1) of the constitution describes the authority vested in a public officer as ‘a public trust’ which ought to be exercised in consistence with the purposes and objects of the constitution¹⁴³ by demonstrating respect for the people¹⁴⁴, bringing honour to the nation and dignity of the office¹⁴⁵, and promoting public confidence in the integrity of the office¹⁴⁶.

Specifically, the provisions of Article 73(2)(c) outline and encompass rules of conflict, from which other related principles in statutory laws stem. The Article calls for selfless rendering of service based solely on public interest, demonstrated by honesty in the execution of public

¹⁴⁰ Article 10(2) (c)

¹⁴¹ Article 10(1) National values and principles bind all when applying or interpreting the constitution, enacting or interpreting laws, or making and implementing public policy decisions.

¹⁴² The Parliamentary Networking Report on the Implementation of Chapter Six of the Constitution of Kenya 2010 found at <https://africog.org/wp-content/uploads/2015/10> accessed on 19th May 2019.

¹⁴³ Article 73(a)(i)

¹⁴⁴ Article 73(a)(ii)

¹⁴⁵ Article 73(a)(iii)

¹⁴⁶ Article 73(a)(iv).

duties and the declaration of any public interest that may conflict with public duties. These principles bind every state officer by virtue of the oath of office which they take, signaling their commitment to serve the people.¹⁴⁷

Furthermore, the Constitution lists values and principles of Public Service, some of which are high standards of professional ethics¹⁴⁸, responsive, effective, impartial and equitable provision of services¹⁴⁹ and accountability for administrative actions¹⁵⁰.

These rules therefore, are meant to ensure that state officers exhibit moral soundness in their character, at all times maintaining fidelity and honesty while discharging their duties. This is in contrast with the past years under the old constitutional dispensation in which institutions of governance were largely subject to presidential patronage with unregulated powers of appointment and dismissal¹⁵¹, which saw public servants to be accountable to the president. The absence of public accountability in the exercise of power then also created an environment in which corruption and impunity thrived¹⁵². Chapter Six of the current constitution is calculated to fetter governmental power by ensuring that public officers are accountable to the public¹⁵³ for the exercise of their powers and that impunity does not prevail.

The main laws that operationalize Constitutional provisions on leadership and integrity are outlined in the Leadership and Integrity Act, ¹⁵⁴which spells out the relevant procedures and mechanisms for operation.¹⁵⁵Besides promoting ethics and integrity of public officers, it

¹⁴⁷ Article 74, state officers take oath of office prior to assuming state office, affirming to serve in accordance with provisions of the constitution.

¹⁴⁸ Article 232(1)(a)

¹⁴⁹ 231(1)(b)

¹⁵⁰ Article 232(1)(e).

¹⁵¹Section 106(2) & (6), members of the Public Service Commission were appointed and removed from office by the president. Their powers were exercised with the approval of the president at Section 107.

¹⁵² Parliamentary Initiatives Network Report (n138)2.

¹⁵³ Article 73(2)(d).

¹⁵⁴ Chapter 182 Laws of Kenya, no.19 of 2012.

¹⁵⁵ As per its citation

ensures that they adhere to the values and principles specified in the constitution¹⁵⁶. The Act sets out the General Leadership and Integrity Code¹⁵⁷ together with rules of enforcement¹⁵⁸. Section 16 of the Act requires that public officers use the best efforts to avoid being in a situation where personal interest conflict or appear to conflict with their duties,¹⁵⁹ that a public officer should not have any other interest in a public entity or other body if such would result in conflict of the public officer's personal interests and duties,¹⁶⁰ and that public officers whose personal interests conflict with their duties shall declare the personal interests to the public entity or the Ethics and Anti-Corruption Commission (Commission).¹⁶¹ Further, in cases of conflict of personal interest and public duties, the commission would give direction on the appropriate action to enable the public officer avoid the conflict of interests¹⁶². Additionally, a public officer is required to declare his interest at the beginning of any meeting in which the issues to be discussed are likely to occasion conflict of interests¹⁶³. A member of parliament or of a county assembly has to declare any direct pecuniary interest or benefit in any debate, proceeding or transaction of a body of which he is a member¹⁶⁴. Section 16 sub-sections 10 and 11 provide for the maintaining of registers of conflict of interest in which affected state officers shall register the particulars of registrable interests, and which shall be open to the public for inspection¹⁶⁵.

The Public Officers Ethics Act is the additional legislation designed to advance the ethics and performance standards of public officers. Among its objects is to provide for a code of

¹⁵⁶ Primary purpose of the Act, section 3.

¹⁵⁷ Part II; Section 6(1)(2) provisions of Chapter Six of the Constitution form part of this Code.

¹⁵⁸ Part IV, Enforcement of the Leadership and Integrity Code at sections 40-45.

¹⁵⁹ 16(1).

¹⁶⁰ 16(2).

¹⁶¹ 16(3).

¹⁶² 16(4)

¹⁶³ 16(7).

¹⁶⁴ 16(9).

¹⁶⁵ The clerk of the Senate, the National Assembly or County assembly shall keep the register for members of parliament and of the county assembly. Public entities shall maintain registers for other state officers.

conduct and ethics for public officers,¹⁶⁶ and identify different bodies to be the commissions responsible for given public officers.¹⁶⁷ Further, it requires the commissions to establish specific Codes of Conduct to guide public officers for whom they are responsible.¹⁶⁸

3.2. General Overview of the Institutional Framework

Implementation of the provisions of Chapter Six of the constitution calls for combined efforts of the people, state agents and non- state agents, in view of Article 3 which requires that all people uphold and defend the constitution¹⁶⁹.

One of the main entities designed to contribute to the implementation and enforcement of Chapter Six of the constitution is the Commission for the Implementation of the Constitution (CIC), an independent body established under the Sixth Schedule of the Constitution (the Schedule) to monitor, facilitate and oversee the development of legislation and administrative procedures necessary for the implementation of the constitution¹⁷⁰. CIC like all other constitutional commissions is aimed at protecting the sovereignty of the people and secure the observance by all state organs of the democratic values and principles and promote constitutionalism.¹⁷¹ It coordinates with other government agencies in reporting on the progress in implementation of the constitution and the impediments thereof.¹⁷²

The Judicial Service Commission is an organ of management of judicial services,¹⁷³ charged with the mandate to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.¹⁷⁴ Among its

¹⁶⁶ Number 4 of 2003 in its citation.

¹⁶⁷ Section 3.

¹⁶⁸ Section 5(1)(2).

¹⁶⁹ Article 3(1).

¹⁷⁰ Sixth Schedule, Section 5(1) (6)

¹⁷¹ Article 247 of the Constitution.

¹⁷² Schedule Six provides that CIC coordinates with the Attorney General and Kenya Law Reform in preparing legislation for tabling in parliament and reporting on progress in implementation of the constitution.

¹⁷³ section(3)(a), Judicial Service Act.

¹⁷⁴ Article 172(1) of the Constitution.

objects is to facilitate a judicial process that is designed to render justice to all, besides being committed to the protection of the people and their human rights.¹⁷⁵

The Commission on Administrative Justice (CAJ) also known as the Office of the Ombudsman, is established by the Commission on Administrative Justice Act, to replace the Public Complaints Standing Committee (PCSC).¹⁷⁶ One of the functions of CAJ is to ensure that state officers conduct themselves in a manner that would not demean their office, or cause conflict of interests.¹⁷⁷ It is the body to which aggrieved members of the public would seek expeditious redress if a public officer or office is corrupt, misuses office, delay in delivery of services or displays any other inefficiency or ineptitude on the part of the official.¹⁷⁸ CAJ has initiated measures to ensure compliance with the leadership and Integrity provisions of Chapter Six of the constitution.¹⁷⁹

The EACC replaced the former Kenya Anti-Corruption Commission, and is established by the EACC.¹⁸⁰ It is charged with combating corruption and economic crime in Kenya by taking measures that stop unethical practices.¹⁸¹ The EACC is known to have spearheaded the drafting of Regulations for the Leadership and Integrity Act, such as handling gifts given to public officers, declaration of conflict of interests, the procedure for lodging complaints, among others.¹⁸²

¹⁷⁵ Section 3(b)(f), Judicial Service Act.

¹⁷⁶ Commission on Administrative of Justice Act No. 23 of 2011, section 3(1)(2) the PCSC

¹⁷⁷ Parliamentary Initiatives Network Report (n148)13

¹⁷⁸ *ibid*

¹⁷⁹ The Commission on Administrative Justice Annual Report of 2012, states that CAJ forwarded a list of 35 individuals to the Independent Electoral and Boundaries Commission whom it blacklisted not fit to hold public or elective offices due to their unsuitability.

¹⁸⁰ Section 3(1) of Act Number 22 of 2011.

¹⁸¹ Section 13(2)(c)

¹⁸² Parliamentary Initiatives Network Report (n173)16

3.3. Rules Regulating Professional Conduct

The Advocates Practice Rules¹⁸³ (Rules) as outlined in the Advocates Act (the Act), together with the Advocates Code of Standards of Professional Practice and Ethical Conduct¹⁸⁴ (Code of Conduct) regulate the conduct and practice of advocates in Kenya. The Act prohibits advocates from engaging in acts which amount to professional misconduct. Section 60 describes such acts to be ‘disgraceful or dishonourable conduct incompatible with the status of an advocate’. In addition to this, the Rules lay out various prohibitions of advocates’ conduct, among them being that ‘advocates should not act in a matter in which they believe they would be required to give evidence as witnesses’.¹⁸⁵ On the other hand, the Code of Conduct also prohibits conflict of interests and states that ‘The advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest unless he/she makes adequate disclosure to both clients and obtains their consent’.¹⁸⁶

The Judicial Service Act provides for the operations of the judiciary.¹⁸⁷ It empowers JSC to ensure judicial independence.¹⁸⁸ On conflict of interests, the Act requires that members of the commission declare their private interests on the onset, in a matter that is the subject of consideration in any meeting of the commission. That unless the commission directs otherwise, a member with such interest is barred from participating in the matter.¹⁸⁹

3.4 Judicial Practice in general cases of conflict of interests

Specifically, there have been no cases filed in court relating to the type of conflict of interests affecting JSC advocates. However, a few advocates have raised their objections complaining

¹⁸³ Advocates (Practice) Rules 1966, Advocates Act, Chapter 16 Laws of Kenya.

See also *ibid*, Part VIII of the Act, on acts that are regarded to be offences by advocates.

¹⁸⁴ Of June 2016.

¹⁸⁵ Section 8.

¹⁸⁶ Rule 6

¹⁸⁷ Act Number 1 of 2011, in its citation.

¹⁸⁸ Section 3(a)

¹⁸⁹ Section 44(1)

about the representation of litigants by commissioner Tom Ojienda.¹⁹⁰ Those advocates felt that Professor Ojienda then being a JSC commissioner, was definitely conflicted when appearing in court before judges and magistrates. Nonetheless, courts are occasionally confronted with and decide numerous cases on general conflict of interests of advocates.

It is commonly observed however, that court decisions emanating from disputes concerning general conflict of interests, tend to circumvent and not comprehensively address the issues raised, thereby resulting in judgments that have failed to establish a clear position on the matter. Several judgments show that courts have failed to set any interpretative standards upon which an aggrieved person could premise a case regarding conflicts of interests as will be discussed here. Two examples here are pertinent.

In the case of *Philomena Mbetemwilu -vs- The Director of Public Prosecutions and 3 Others*,¹⁹¹ two issues were raised. Firstly, whether members of a parliamentary committee who had deliberated on the issue of representation of the Respondent by foreign counsel, were entitled to represent the Petitioner in court in a case on the same matter. Secondly, whether rules of professional conduct were applicable to the said members of parliament, who are also advocates of the high court.

Facts of the case

Philemona (the Petitioner) who had been charged with several corruption offences, filed a Petition alleging that the investigations carried out by the Director of Criminal Investigations (DCI) and institution of the criminal proceedings against her, violated her constitutional rights. DPP opposed representation of the Petitioner by Senior Counsel James Orengo and Okong'o Omogeni on the grounds that the two counsels being members of the Senate Committee on Justice, Legal Affairs and Human Rights, had on the 5th of December 2018, met a multi-agency team including the DPP and the DCI, and deliberated on the engagement

¹⁹⁰ Interview with a judge of the court of Appeal (Nairobi 18th June 2019).

¹⁹¹ High Court Constitutional and Human Rights Division Petition No. 295 of 2018.

of Mr. Qureshi, QC, to act on behalf of the DPP in the present Petition. That on the following day the 6th of December 2018, the two counsels in a clear case of conflict of interests, appeared in the current matter to represent the Petitioner to object to Mr. Qureshi's appearing for the DPP, without disclosing their participation in the Senate Committee meeting. The DPP further asserted that the two counsels had a duty to disclose their interest in the matter, which they failed to do so, neither did they excuse themselves from the Senate proceedings.

Court's decision

The court dismissed the DPP's application and held that failure to make disclosure before the parliamentary committee was misconduct in the discharge of the counsels' parliamentary duty, which had no bearing on matters of conflict of interest in the proceedings before court.

Analysis of the case

Indeed, the court found that the two counsels had flouted provisions of Paragraph 6(1)(b) of the Code of Conduct for Members of Parliament¹⁹² which obliged them to declare their relevant interests in the parliamentary debate, before making their contributions on the issue of representation of the DPP by Mr. Qureshi, QC. However, the court declined to find the counsels conflicted by their representing the Petitioner in the very matter they had presided over in parliament.

Paragraph 6(2) of the above code defines a relevant interest to be 'an interest that may be seen by a reasonable member of the public to influence the way the member discharges his duties.'

The two counsels had a pecuniary interest in the Petitioner's case which they failed to declare, and which in the words of Paragraph 6(2) above, would influence the way in which they conducted the proceedings of the committee. Therefore, rules of Parliamentary Conduct would not preclude counsels from the purview of the rules of ethics outlined in the

¹⁹² The Fourth Schedule of the Parliamentary Powers and Privileges Act, No. 29 of 2017, Paragraph 6(1)(2).

Advocates Practice Rules, as the said Senators were advocates as well. Furthermore, the court failed to consider rules of natural justice which dictate that the counsels should not only have disclosed their interests in the matter, but also disqualified themselves from either sitting in the committee meeting or representing the Petitioner in court. The counsels were in effect judges in their own causes.

In the case of *Coalition for Reform and Democracy (FORD), Kenya National Commission on Human Rights (KNCHR) and 8 Others*,¹⁹³ similar issues to those in the Mwilu case were raised. It was asked whether members of a parliamentary committee who had deliberated on a matter in the committee's meeting, were entitled to represent a party in a case on the same matter.

Facts of the case.

The National Assembly had enacted the Security Laws (Amendment) Act,¹⁹⁴ whose operationalization the Petitioners sought conservatory orders to suspend and have the Act declared unconstitutional. The Petitioners claimed that the Act had been introduced for the first and second readings in the National Assembly without the public being afforded an opportunity of participation as provided for by Article 118 of the Constitution which requires parliament to facilitate public participation and involvement in its legislative and other business.¹⁹⁵ The Respondents denied these allegations and instead raised an objection on the ground of conflict of interests, in regard to the appearing of Senators Orengo, Wetangula and Wako as counsels in the matter, saying that they had sat in a special meeting of the Senate that discussed the Security Laws Amendment Act.

¹⁹³ High Court Constitutional and Human Rights Division, *Petitions no. 628 and 630 of 2014*.

¹⁹⁴ Number 19 of 2014.

¹⁹⁵ Standing Orders of the National Assembly No. 127 also require that a bill after its first reading be committed to a committee that would conduct public participation and incorporate the views of the public in their report.

Court's decision

The court dismissed the Petition and adopted the decision made in a similar case of *John Okelo Nagafwa -vs- The Independent Electoral and Boundaries Commission & 2 Others*.¹⁹⁶ The court required the Petitioner to demonstrate that the Senator's participation in the proceedings as counsel was inherently incompatible with his responsibility as a Senator or would impair his judgment in execution of the functions of his office as a member of Senate or would result in a conflict of interest.

Case analysis

The court failed to appreciate that the conflict of interest complained of by the Petitioners arose by the senators having made determinations on the same matter in the senate committee whereas they had a pecuniary interest in the case before the court. In such instances, a conflict of interests manifests in two ways, it can either be real, or there be a significant risk of conflict of interests.¹⁹⁷

A major setback in tackling the problem of conflict of interests is the permissive nature of some provisions of law that regulates conduct of state officers. Section 12(5) of the Public Officers Ethics Act states that 'these regulations *may* govern when the personal interests of a public officer conflict with his official duties for the purposes of this section'. These provisions are generally cast in the term 'may' and are not mandatory but are permissive, indicating that discretion can be exercised in their applicability.

The institutions charged with implementing Chapter Six of the Constitution have also encountered various setbacks in discharging their mandate. The Parliamentary Initiatives

¹⁹⁶ 2013eKLR.

¹⁹⁷ Halsbury's Laws of England, 5thedn, Vol 66, para56 'Conflict of Interests Under the Code'.

Network Report¹⁹⁸ highlights some of these problems. Firstly, the institutions encounter political interference from the government which infringes on their independence. This is because the Commissioners are appointees who serve at the president's pleasure and are accountable to Parliament. The Report indicates that in many instances investigations relating to government officials were delayed, and the government was seen to lack the political will to among other things, promote enforcement of justice. That the presidency appoints persons of questionable character and to public offices. There is need for the independence of these institutions from the executive and strict adherence to rules of good governance.

3.5. Conclusion

The government has put in place various mechanisms to regulate the conduct of state officers. Indeed, meaningful protective measures are depicted in the normative order provided by the constitution and the laws. However, it can be seen that these safeguards have not borne much success, particularly in a bid to combat conflict of interests of the advocates serving as commissioners of the JSC. The main problem is that the laws fail to cover the issue of conflict of interests adequately, so that whereas the law prohibits public officers from engaging in situations that occasion a real or probable conflict of interests of their personal and official duties and requires officers to declare their personal interests to relevant entities or EACC, the practice is different. Advocates serving at the JSC, who in essence are employers of judicial officers and staff, continually prosecute their private cases in courts before their employees and this causes conflict of interests. There are no known instances where the advocates have declared their competing interests to the EACC, or registered particulars of such interests in the register of conflicts as required by section 16(10) (11) of the Leadership and Integrity Act.

¹⁹⁸ Report on the Implementation of Chapter Six of The Constitution of Kenya 2010, pp17-18 found at https://africog.org/wp-content/upload/2015/10/implementation_of_chapter_six_constitution accessed on 15th April 2019

Answers to the problem of conflict of interests of practicing advocates at the JSC and its resultant effect on the impartiality of the judiciary, lie in considering and borrowing from established best practices from other jurisdictions, as will be discussed in chapter four of this study.

CHAPTER FOUR

CASE STUDY OF NAIROBI AND KISUMU LAW COURTS IN REGARD TO CONFLICT OF INTERESTS AFFECTING PRACTICING ADVOCATES SERVING AT JSC

4.0 Introduction

This chapter outlines a case study undertaken at the Nairobi and Kisumu law courts in relation to conflict of interests occasioned by practicing advocates who serve as commissioners at the JSC. The two court stations were selected due to the fact that they are major regional courts which not only comprise tribunals, kadhi, subordinate and appellate courts¹⁹⁹, but also where practicing advocates at the JSC commonly represent cases. The case study aimed at deepening the researcher's understanding and hence clearer insight into the probable and actual instances of conflict of interests caused by advocates serving at JSC when they prosecuted cases in courts, and the causal factors.

This chapter firstly discusses the research design and the strategies used in data collection. It then outlines and analyses the responses from participants. Finally, it discusses the instances of conflict of interests of advocates at JSC when they represent cases in courts.

4.1 Research Design

This study was undertaken by way of case study, through a combination of strategies. The researcher firstly identified key informants from a population group of judicial officers, executive officers, court and registry clerks, and legal practitioners, who were handpicked for interviews. Selection of these respondents was informed by the fact that they possess first-hand information and shared experiences that are relevant to this study. The next stage entailed collection of data and then the data analysis.

¹⁹⁹Found at www.judiciary.go.ke/courts accessed on 4th December 2019.

4.2 Data Collection

Data was generated by interviewing the key informants through an interview schedule²⁰⁰ whose questions were formulated to suit the research questions. The data collection process involved the interviewing of one judge of Appeal, one retired judge of the supreme court, a former JSC commissioner, one magistrate, one executive officer, nine advocates, one registry clerk and one advocate's clerk.

4.3 Data Analysis

The data that was generated was gathered in the form of responses to interviews in line with the questions designed. The interview schedule had been designed in google forms, which upon being filled, the google tool analysed the data as per the formatted questions.

4.4 Ethical Considerations

The researcher made prior arrangements to secure appointments and consent of the participants for the interviews. The researcher also explained to the participants the objectives of the research, assuring them that it was purely for academic purposes. Participation was voluntary, and the researcher ensured to uphold the participants' confidentiality and respect their autonomy. Most of the participants sought anonymity in the course of the interviews, therefore the researcher identifies their responses by way of alphabetical numbers.

4.5 Role of advocates

Two judicial officers who were interviewed shared the same views when asked whether conflict of interests was occasioned by advocates serving at JSC when they represented cases in courts, if there were any probable causes, and whether judges and magistrates were influenced by JSC advocates. This part discusses responses of the two participants, who laid more emphasis on the vital role of advocates.

²⁰⁰Appendix 1

Both participants observed that advocates take oath of office when being entered on the Roll, to support the constitution, faithfully discharge their duties to the best of their knowledge and ability, and to strive to conduct themselves with dignity, courtesy and integrity as officers of the court.

One of the judges explained that the inclusion of practicing advocates to the membership of JSC was propelled by the public feeling that JSC had a narrow representation which excluded the legal profession²⁰¹. He observed that practicing advocates working at the JSC, just like any other advocate, had won several cases and lost others. He did not consider that judicial officers were influenced or intimidated by advocates at JSC.²⁰²

The participants pointed out that there are advocates in the public-sector who work either as judges, prosecutors or as counsel in government agencies while those working in private firms mainly engage in meeting the needs of clients who are unable to undertake litigation and other legal services for themselves. That there are many Advocates that support communities by offering free legal services (pro bono services) to those people who have limited resources and cannot access legal services, or who would otherwise be deprived of legal representation. Also, Non-Governmental Organizations such as the Federation of Women Lawyers (FIDA) in Kenya, work to eliminate all sorts of prejudice against women, while Kituo Cha Sheria offers free legal aid and protection of human rights to the poor and marginalized, to enhance equality and access to justice for all. Nonetheless, the participants concurred that there have also been many reported cases of advocates' misconduct in the course of their work that have tainted the integrity of law practice. They cited one example of the renown 'Panama papers' scandal of 2016, in which a whistle-blower leaked confidential documents from the law firm

²⁰¹Public views presented to the Constitution of Kenya Review Commission in 2001-2002.

²⁰²Interview with a judge Court of Appeal of Kenya (Nairobi, 18th July 2019).

of Mossack Fonseca²⁰³ which revealed illegal dealings including fraud, tax evasion, money laundering and evasion of international sanctions, involving international crime syndicates, politicians and public officers from different countries, including Kenya in which a retired judge of a superior court was implicated.

The participants said that advocates serving at JSC just like their counterparts, won some cases and lost others. They did not however, rule out instances of conflict of interests caused by the JSC advocates.

4.6 Perceived scenarios of Conflict of Interests of practicing advocates serving at JSC

Responses in this part came from six advocates and two advocates' clerks. The participants stated that scenarios of improper influences and conflict of interests of practicing advocates serving at JSC related to unfair competition in handling cases, court decisions, registry services and JSC administrative duties.

4.6.1 Unfair competition in handling big cases

The advocates stated that big briefs such as election petitions and corruption cases involving colossal sums of money, are believed to be a preserve of advocates working for the JSC. They asserted that Professor Tom Ojienda, the former LSK representative to the JSC, was seen to be a household name whose public reputation was achieved mostly by handling high flying political cases. When asked for reasons of their statements, they opined that most members of the public involved in big court cases prefer to engage advocates who double up as members of the Judicial Service Commission, with the hope that such advocates by virtue of their office, were capable of procuring favourable outcomes of their cases. The advocates proposed that advocates who wish to represent the LSK at the JSC should be required to

²⁰³ Investigations carried out by the International Consortium of Investigative Journalists (ICIJ) in 2016. It was reported that some lawyers had turned out to be facilitators of corrupt transactions using their clients' accounts.

surrender practice before the courts of law during their tenure as JSC Commissioners. That otherwise, there was no equality of arms between litigants when one of the parties was represented by an advocate who has the power to bully judicial officers to find in favour of his or her client.²⁰⁴

One of the advocates commented on the LSK elections that were conducted on 5th May 2019, of the male representative to the JSC, pointing to various matters which they considered to have been the reasons why they took high moral ground in choosing their suitable representative in the said elections. He said that the majority of LSK members were clear about issues of integrity of lawyers and proportionate handling of big cases to be the outstanding virtues to which they set as a gold standard.

The advocates cited the case of Mohamed Abdi Mahamud the governor for Wajir County whose election had been nullified by the high court and the court of appeal found to be invalid, for his lack of requisite academic qualifications. The supreme court upheld the governor's election

In the *Petition of Appeal between and Ahmed Abdullahi Mohamad and 3 Others*,²⁰⁵ appealed to the supreme court., thereby overturning the decision of the court of appeal, which had also found the governor's election to have been invalid.

Judgment of the supreme court had caused an uproar from different quarters with some people levelling bribery allegations against certain judges and accusing them of gross misconduct.²⁰⁶

The outrage was accentuated by the fact that Professor Tom Ojienda SC, a commissioner of the JSC, was one of the advocates that represented the appellant governor in the Petition.

²⁰⁴ Paul Mwangi advocate, 'Lawyers too have a case to answer' *Nation Newspaper Sunday Review* (10 February, 2019)29.

²⁰⁵ Supreme Court Petition No. 7 of 2018.

²⁰⁶ Ahmednasir Abdullai SC, filed a Petition at JSC seeking to remove four supreme court judges over bribery claims in the Wajir gubernatorial petition.

Also, in an earlier case of *Kalpana Rawal and Philip Tunoi vs Judicial Service Commission and 5 Others*,²⁰⁷ the applicants were justices of the supreme court who sued the JSC for allegedly purporting to retire them earlier than their lawful period of service. The two were duly appointed and were in service under the old constitution and had continued in service under the new constitution of Kenya, 2010. The supreme court upheld both decisions of the high court and court of appeal, to the effect that the new constitution did not accord the justices service and benefit rights derived from the old constitution.

This prolonged dispute was one of the major cases in which JSC's stakes were high, as it was to determine the fate of the remaining judges who had been hired under the old constitution. As seen again, the advocate handling this big brief on behalf of the JSC was Ahmednasir Abdullai SC, the preceding commissioner of the JSC.

4.6.2 Undue advantage over other advocates when seeking court services

The advocates complained that Judicial officers have traditionally accorded preferential treatment to JSC commissioners in the practice of law. When asked to explain the preferential treatment, they said it was exhibited in various ways. They stated that such preferential treatment resulted from the commissioners' undue influence and intimidation, not only of judges and magistrates, but also of their fellow advocates in the hearing and determination of some cases. They explained that the former and current representatives of the LSK to JSC have continued to appear before judges and magistrates to seek 'prayers' in the cases which they represent. That other advocates appearing before the same judges and magistrates, are not only intimidated, but their 'prayers' often go unheard, in favour of the JSC advocates.

The advocates further said that the other members of LSK have become increasingly concerned about the suspected abuse of office that their previous representatives at the JSC were accused of engaging in. They decried improper private influences that had captured the

²⁰⁷*Supreme Court Civil Application no. 11 consolidated with no. 12 of 2016.*

Judiciary from within and without, and which they said had penetrated the election of the lawyers' representatives to the JSC itself. They emphasized the need for the independence of the judiciary from such improper influences.

The advocates also discussed the past nomination for election LSK male representative to the JSC. One of the eligibility criteria required a prospective candidate to have a Tax Clearance Certificate (TCC) from Kenya Revenue Authority (KRA). Professor Tom Ojienda (Ojienda) the preceding LSK representative to JSC who sought to be re-elected for a further term to the same post did not have the TCC. He stated that he had complied with the requisite conditions of remitting accounts and payment of appropriate tax when applying for issuance of a TCC for the year 2018-2019, but KRA rejected his application. He sued KRA seeking the court to grant judicial review orders to compel KRA to issue him with the TCC, and LSK to accept his nomination as their male representative to the JSC, for the then oncoming LSK elections, without the said TCC.

KRA opposed the suit, arguing that Ojienda had an outstanding sum of Kshs 443,631,900 being the total tax due and owing for the period 2009 to 2016 and had instituted proceedings in which he obtained orders prohibiting KRA from demanding the said tax arrears. KRA asserted that where there was an outstanding tax dispute a TCC could not issue.

The court held that Ojienda had established an arguable case which would be rendered nugatory if the orders sought were denied, since nominations for the subject elections were nearing to close. That he had fulfilled all the conditions for issuance of TCC but KRA had declined to issue him such certificate. The court issued a mandatory order compelling KRA to immediately issue the TCC.

KRA appealed against this decision, arguing that the court's ruling and consequential orders were in violation of sections 2 and 72(2) of the Tax Procurement Act and Article 27 of the Constitution of Kenya. The Court of Appeal stayed the decision and held that if it failed to

grant stay of execution of the said orders, KRA would be compelled to issue TCC contrary to the laid down procedures required by law, and that LSK would be deprived of the right to vet the candidates using the same criteria.

In separate proceedings another judge held that the court could not determine Ojienda's tax liability and thereby prohibited KRA from demanding the outstanding tax. Following this decision, Ojienda filed another Constitutional Petition in which he obtained orders restraining KRA from undertaking any tax investigations or questioning of his tax affairs for the period 2009-2016.

The advocates pointed out that each nominee was entitled to be subjected to the same vetting criteria in compliance with the requirements outlined in the LSK notice for nomination, but high court nevertheless elevated Professor Ojienda to a status outside the purview of tax administration laws by making orders compelling KRA to issue him with a clearance certificate to enable him vie for the JSC seat when clearly, he had defaulted in earlier payments and his tax arrears were a subject of a multiplicity of cases pending in court. They opined that payment of tax is government policy to which every person with income chargeable to tax is subject, and that the high court decision set a bad precedent as it was biased towards Ojienda and removed him from the purview of the tax administration law, and the orders defeated the very essence of granting of TCC.

4.6.3. Preferential treatment in Fixing dates for hearing cases

These responses were made by two advocates' clerks.

They explained that the practice in both high court and chief magistrates' courts of fixing hearing dates for civil cases is that, one party invites the other to attend the court registry on a specified day, for purposes of agreeing upon and selecting a convenient date to prosecute their case. Where parties are represented by advocates, such fixing of dates is carried out by

their clerks. The clerks complained that in cases where the opposing party is represented by an advocate who is a JSC commissioner, registry clerks display outright favouritism towards such advocates' firms. That this happens when the inviting clerk comes to the registry on the fixing day but his counterpart from the firm of the JSC commissioner fails to show up. Registry clerks then decline to issue a hearing date in the absence of the defaulting clerk and insist that he be sought for. Ordinarily, where prior notice is given for fixing a hearing date, registry clerks would issue ex-parte dates notwithstanding the absence of one party. Further, the advocates' clerks said that registry clerks make phone calls to communicate directly with JSC commissioners on issues touching on the case files for matters that are handled by these advocates.

4.6.4 Weapon against dissenting judicial officers

Responses in this part came from a judicial officer at the chief magistrates' court and a legal researcher. The participants alleged that the position of JSC commissioner was at times misused as a weapon against employees who tend to disagree in any way with some commissioners. A judicial officer stated that she was abruptly transferred to another court station under unclear circumstances, contrary to the Judiciary Human Resource Policy which stipulates a specific period of time which judicial officers can work in a given station. She said such victimization was common and attributed the unexplained transfer to her having disagreed with the submissions of a partner in a law firm of one commissioner and thereby dismissing their case.

4.6.5 Opinions of some senior advocates and scholars

Information contained in this part was obtained by the researcher observing interviews of senior advocates and professors of law regarding the issue of conflict of interests of

practicing advocates at JSC, carried out on television. The respondents included two professors of law, and three senior counsels.

One Professor alluded to there being conflict of interests in the JSC. He observed that at such times of tension in the Judiciary, there is need to have people who do not have experience of the courts, who are not part of the scene of the courts, to serve as members of the JSC. His view is that such people would have no biases. He proposes retired chief justices and judges in the place of practicing advocates.²⁰⁸

Another senior counsel agreed that there is conflict of interests occasioned by LSK representatives who practice law. She cited the example of Uganda in supporting the position taken by the first Professor, of employing retired judicial officers to serve on the JSC.²⁰⁹

The other professor of law stated that she preferred JSC membership as was constituted under the old constitution, which did not include advocates.²¹⁰ She points to both corruption and conflict of interests as the problems currently bedeviling the judiciary. She urges for the integrity of the advocates and judicial officers.²¹¹

Another senior counsel analogized the type of conflict of interests affecting advocates at JSC, to that of advocates serving on parliamentary committees²¹². In his view, the representation of clients in court by advocates who were JSC commissioners, had a bearing on the performance of judicial officers. He stressed the need for such advocates to cease practicing while they held public office²¹³.

On the other hand, a former JSC commissioner when asked whether judges felt intimidated when he appeared before them in court during his tenure as a JSC commissioner, replied that

²⁰⁸Tonny Gachoka, TV Interview with Professor of law on his career and opinion on the judiciary and JSC, (Nairobi, 24th February 2019).

²⁰⁹Tonny Gachoka, Interview with senior counsel (Nairobi, 17 April 2019).

²¹⁰Tonny Gachoka, Interview with a Senior Lecturer University of Nairobi, referring to section 68(1) of the repealed Constitution of Kenya (Nairobi, 15 May 2019).

²¹¹ Ibid.

²¹² Interview with senior counsel (Nairobi, 7th June 2019).

²¹³ Ibid.

‘judges are hard rock...why should they fear an advocate?’ He went on to say that he felt there was no likelihood of the LSK representatives being conflicted when they appeared before judicial officers to prosecute cases.²¹⁴ In what appeared to be a flip-flop of this assertion, he filed a petition at the JSC later in the year seeking to remove four supreme court judges over bribery allegations in the Wajir gubernatorial election petition.²¹⁵ He accused the judges of gross misconduct following their decision to uphold the election of Wajir governor Mohamed Abdi,²¹⁶ whose election the court of appeal had found to be invalid for the governor’s lack of the requisite academic qualifications,²¹⁷ besides the conduct of the election having been fraught with illegalities and irregularities thereby undermining its integrity. These allegations were heightened by the fact that in the supreme court, the governor was represented among other advocates, another former commissioner of the SJC. This participant therefore, perhaps to exonerate himself as former JSC commissioner, was not genuine in his earlier denial of probable conflict of interests by advocates at the JSC. Another senior counsel considered JSC to be a representative commission just like other bodies such as the Public Service Commission and the Trade Unions. He had no objection to advocates serving on the JSC carrying on with their practice of law. He therefore urged the public to have some confidence in the judges and magistrates.²¹⁸

4.6.5 Personal Experience

In this section the researcher summarizes the observations she made when she visited court registries and sat in some courts when they were in session.

²¹⁴ Jeff Koinange, Interview with former JSC commissioner on the Judiciary and his tenure as member of the JSC (Nairobi, 20th February 2019).

²¹⁵ Editorial, ‘Queries as apex court delays verdict on Wajir Poll Petition’. Petition filed in October 2018, following another petition to the chief Justice by a group of elders from Wajir. *Nation Newspaper*: (10 February, 2019)2.

²¹⁶ *Election Petition no. 7 of 2018, Mohamed Abdi Mohamud and Ahmed Abdullahi Mohammed and 3 Others.*

²¹⁷ The governor was said not to possess a degree from a university recognized in Kenya, contrary to section 22(2) of the Elections Act.

²¹⁸ Tonny Gachoka, Interview with a Senior Counsel on Conflict of Interest in the JSC. (Nairobi, 13th March 2019).

On different occasions the researcher witnessed instances in which advocates who are JSC Commissioners were treated more leniently when they delayed to appear for the hearing of their cases and the court would put aside their case files, to allow some time for them to show up. This was not the obvious case for other advocates as the court was strict with its time allocations and most advocates who arrived late for the hearing of their cases, would get their files put away if called out and there was no response. On a different occasion the researcher was in a court registry when a clerk from a Commissioner's law firm came to ask for a certain Judgment to use as a precedent, but whose details regarding the case number and parties she did not know. It would be difficult to retrieve a judgment in the voluminous Records of Appeal without the exact citations, but the clerk at the counter remarked '*hiyo ni yamkubwa*', (that one is for the boss), and so the executive officer together with other registry clerks embarked on a tedious search for that judgment, a thing that they would ordinarily not do.

4.7 Findings

Judges concur that lawyers play important roles in society, being engineers in protecting the public interest and improving access to justice.

On the other hand, advocates, professors of law and senior counsels argue that interactions between practicing advocates serving at JSC and judicial officers have caused ethical problems arising from conflict of interests. Advocates say that these problems are judicial anomalies which are exhibited in biased court decisions as in the Ojienda cases, which were clear indications of the various judges' biases towards the JSC commissioner, presumably resulting from their being unduly influenced. They observed that the court decisions were in favour of Ojienda and violated of Article 27 of the constitution that guarantees equality to

every person. Advocates and clerks point to favoritisms shown to advocates serving at JSC, in allocating time for making submissions in court, and fixing hearing dates.

A magistrate and legal researcher state that advocates at JSC occasionally misuse their power to punish employees who are not beholden to them especially in rendering court services.

Former commissioners of JSC indicate that the problem of conflict of interests relates to isolated cases.

Some of the respondents were of the view that JSC should employ retired judicial officers to serve as commissioners, while others suggested that advocates who serve at JSC should cease practicing law in courts in the duration of their appointments.

Findings of responses made by professors of law, senior counsel, advocates and their clerks, provide answers to questions three and five of the research questions.

4.8 Conclusion

This chapter on the case study of the Nairobi and Kisumu law court stations reveals that there is conflict of interests occasioned by practicing advocates who serve at JSC when they practice law in courts. This is notwithstanding denials by JSC commissioners of the existence of such conflict of interests. The conflict of interests occurs when a judicial employer, an advocate who is a member of the Judicial Service Commission, appears before employees, judges and magistrates prosecuting cases in court. This amounts to intimidation of a judicial officer not to forget who is before him or her. The conflict of interests manifests through favouritisms towards advocates at JSC in being accorded court services, undue advantage over their counterparts in handling cases, improper influences of judicial officers, abuse of power, and unfair competition.

CHAPTER FIVE

BEST PRACTICES AND GUIDELINES FOR PREVENTION OF CONFLICT OF INTERESTS OF ADVOCATES IN THE JSC.

5.0. Introduction

It cannot be denied that the Judiciary continues to struggle to assert its independence and freedom against pressures from various entities; the executive, Parliament, corporate and civil society.... Also important are insidious pressures... the institution is yet to acknowledge the said insidious forces as being significant roadblocks to its function and mandate.²¹⁹

Justice Albie Sachs reinforces this position when he explains that courts defend the fundamental rights of everybody and protect people against prejudice. He says that however, there are institutional tensions between the judiciary and other entities, the administrative and terms of service, which he says are the inlying pressures that can be put on judges.²²⁰

The importance of both the institutional and personal independence of the judiciary cannot be gainsaid. Julie Oseko writes that judicial independence is a central component of any democracy which enables personal independence of judges, enabling them to make decisions without interferences that threaten the rule of law.²²¹

Some insidious forces and inlying pressures within the judiciary are those exerted by the advocates serving as commissioners of the JSC as discussed in chapters one, two and three of this study. It is said that these advocates use their office to influence decisions made by some of the judicial officers when they appear in court to prosecute cases, and that they also get

²¹⁹Dr Willy Mutunga, 'Securing Judiciary as an Institutional Political Actor' (February 2019) *The Nairobi Law Monthly* p 32.

²²⁰ Justice Albie Sachs, in Kituo Cha Katiba Occasional Publication 2, *The Independence of The Judiciary and Rule of Law: Strengthening Constitutional Activism in East Africa*. Keynote address during a regional workshop held on 14th April 2005 in Kampala.

²²¹ Julie Ouma Oseko, 'Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform' (PHD Thesis University of Leicester 2012) pp1-2.

favouritisms from the staff when being accorded other court services. This renders the commissioners to be conflicted, and such conflict of interests have the ripple effect of infringing on the independence of the judges and the judiciary as a whole.

These occurrences reveal a gap between policy and practice on the issue of conflict of interests occasioned by the said advocates. As seen from chapter three a foregoing, the gaps lead to the conclusion that although the existing laws and institutions provide a normative framework for addressing the issue of conflict of interests, the safeguards though outlined, some are weak, and are often not adhered to in practice.

Chapter three of this study was concerned only with the prevailing national policy and legislation in respect to conflict of interests of public officers but did not make reference to universal guidelines and practices regarding the matter. This chapter explores how the rules on conflict of interests and the practice and regulation of advocates' conduct in Kenya can be reformed by learning from established rules drawn from renown court decisions, and advocates' codes of conduct in other jurisdictions. It will take the approach of examining guiding principles on conflict of interests, together with rules in advocates' codes of conduct. It will also look at the tenets comprising effective regulatory bodies which oversee legal practice and underscore the relevance of the judiciary's independence in alleviating the problem of conflict of interests of advocates. Finally, it will look at the composition of JSC in a comparative context. This survey is important because as seen earlier, despite the numerous provisions of law prohibiting conflict of interests and the attendant regulatory institutions, the problem remains prevalent and unresolved among practicing advocates who are JSC commissioners. The jurisdictions focused on include the United Kingdom, United States of America and Canada. These countries are selected because their legal systems, like that of Kenya, are based on English Common law and their examples would easily be compatible with Kenyan circumstances.

5.1. Common Law rules on conflict of interests of advocates

Lord Mackay lays down the general rule on conflict of interests by asserting that ‘a solicitor must not act if there is a conflict of interest...’²²²The rationale for this rule as elaborated by Marc Rodwin is that conflict of interests results from multiple interests of people, which often pull them in different directions, making them compromise fulfilling their obligations.²²³ He says that such conflict is due to their divided loyalties and the dual roles of conflicting duties, resulting in conflicts of commitments.²²⁴

5.1.1. The Principle in the Gold Clause Cases

Graham-Green amplifies the principle enunciated by Lord Mackay and Rodwin, by establishing rules requiring the exemption of lawyers from public duties.²²⁵ He sets out principles governing Rights and Privileges of Solicitors which provide in part that:

a qualified solicitor is exempt from performing any public duty other than war services, that might interfere with his professional duties. Thus, he is not bound to accept office under a municipal body, nor as a churchwarden...²²⁶

Graham further says that for the same reason, solicitors and notaries in practice who have taken out their annual certificates, should not serve on a jury.²²⁷ He premised the principles on the decision of the supreme court in the Gold Clause Cases²²⁸.

The Gold Clause cases raised two fundamental issues, one, whether a presidential resolution would override provisions of private contracts, and two, whether the principle of precedents

²²² Halsbury’s Laws of England 5th edn vol 66 para 56 ‘Legal Profession’.

²²³ Marc A. Rodwin, ‘Attempts To Redefine Conflicts of Interest’ (2018) 25 No. 2, SALS p67.

²²⁴ Ibid.

²²⁵ Graham J. Graham-Green, in T.D. Cordey’s *Law Relating To Solicitors: Exemptions From Public Service*, (6th edn London Butterworths) 46.

²²⁶ Graham J. Graham-Green, in Cordey’s above, *Rights and Privileges of a Solicitor Virtue Officii*.

²²⁷ Ibid p 47.

²²⁸ Gerald’s Case (1777) 2 Wm, Bl. 1123.

was of ‘no value in modern society’ as asserted by Robert Jackson, a lawyer representing the state.

In that case, during the 1930s in the United States of America, private contracts and Treasury bonds were drafted with a standard provision requiring the creditor to be repaid in gold dollars. The clauses guaranteed that the debts would be payable in principle and interest in gold dollars as valued at the time a contract or bond was executed. However, the deflation that followed the Great Depression crippled debtors as their obligations grew in value while their incomes were falling and this translated into their being forced to pay back much more than they owed originally. Congress therefore, in a bid to avoid a looming wave of bankruptcies, passed a Joint Resolution declaring all gold clauses null and void. President Franklin Roosevelt perceived that the court would invalidate the Joint Resolution and he vowed not to comply with such court’s decision.

Aggrieved creditors then filed suit alleging that the Joint Resolution was unconstitutional and that the invalidation of existing contracts by congress violated due process. Private debtors and the United States responded that the contracts could not defeat congressional authority when their modification served public good. During the hearing of the case, Robert Jackson a lawyer representing the state in the Treasury Department dismissed the argument and opposed discussing precedents, which he said were arguments based on the ancient custom of kings to ‘clip’ coins, and which were of no more real value to a modern society.

It emerged from this case that Robert Jackson, a lawyer who was employed by the government in the Treasury, outrightly departed from his professional duty to defend the course of justice and uphold the rule of law. His interests collided while he held public office, when he failed to exercise sensitive professional and moral judgment in carrying out his responsibility, but instead condoned the president’s illegal cancellation of private contracts and also denounced the age-old doctrine of precedents. As a consequence, Graham

formulated rules to exclude lawyers from holding public offices, hence the aforesaid principles governing the Rights and Privileges of Solicitors. These principles aim at ensuring that advocates who work as public officers are not torn between their allegiance to the government and their professional obligations so as to avoid conflict of their interests. These principles can be applied to advocates in Kenya seeking to be employed by JSC to the extent that while they remain in private practice of law, they should be exempted from working for the government.

5.1.2. The Chinese Walls Principle

The Chinese Walls, also known as information barrier, is commonly used in big firms to segregate workers and office equipment, so that certain workers are excluded from accessing specific information or doing specific assignments. This mechanism works to ensure that employees who by virtue of possessing confidential information or being of such status that could occasion conflict of interests to the detriment of a client do not undertake any work relating to that client. Erecting Chinese Walls was mainly done by accounting firms and was later embraced by law firms when the court held that there was no distinction between the duty owed by an accountant to his client and that owed by his solicitor or counsel, and that accountants were subject to the same obligations as solicitors.²²⁹ Chinese Walls therefore can be used to define the scope of work of advocates in public office, so that they do not undertake tasks that would occasion their conflict of interests.

Chinese Walls principle was propounded in the case of *Prince Jefri Bolkiah versus KPMG*²³⁰. KPMG, a firm of chartered accountants, performed annual audits of the Brunei Investment Agency (BIA) which held and managed the general reserve fund of the government of Brunei. Prince Jefri who was the brother to the Sultan of Brunei, was the chairperson of BIA.

²²⁹ Judge Pumfrey, *Bolkiah v. KPMG*, High Court.

²³⁰ (1999)2 WLR 215

Large capital transfers were made out of the government funds, which the board of BIA together with Prince Jefri directed KPMG not to audit the transfers. Later on, Prince Jefri retained KPMG to undertake investigation of some litigation involving one of his companies. In the course of the investigation KPMG acquired extensive confidential information about Prince Jefri's assets and financial affairs. Following a fallout between Prince Jefri and the Sultan, BIA instructed KPMG to investigate the destination of the special transfers. Prince Jefri sought an injunction to restrain KPMG from continuing with the investigations of BIA, as it would lead to proceedings against him. The court found that KPMG had taken all steps that could be expected to protect the confidential information of Prince Jefri which it had acquired, by erecting an information barrier or Chinese wall.

5.1.3. The Rule against Conflict of Interests

In the Kenyan Code of conduct of advocates, the yardstick for measuring the existence of conflict of interests is the 'presence of a substantial risk in the advocate's representation' which would materially and adversely affect the interests of a client, due to his own interest or duties to another.²³¹ This rule on conflict of interests is concerned with securing clients' interests, but not emphasising on the advocate's loyalty as centrepiece in clients representation, as is the case in the Canadian Code of Professional Conduct. Provisions in the Kenyan Code would therefore not prevent an advocate from employing crude tactics to fulfil his clients' interests. The Code has also construed the rule on conflict of interests in a narrow manner that leaves out many different circumstances that may establish or reveal such conflict. It does not envisage that an advocate's representation of a client can conversely, prejudice a third party such as is the case of the JSC. This default has seen several blames made by some advocates, laid on LSK for its failure to protect the judiciary from conflict of

²³¹ The advocates Code of Standards of Professional Practice and Ethical Conduct, Rule number 96

interests and interferences by members who work as commissioners of the JSC. Paul Mwangi points out that despite LSK having its representatives to JSC for the last eight years, the commission is greatly indicted for responsibility for corruption and impunity in the judiciary.²³²

The Federation of Law Societies of Canada²³³ has said that the rule governing conflict of interests is founded in the duty of loyalty which is grounded in the law governing fiduciaries. That therefore other duties such as a duty to commit to the client's cause, duty of confidentiality, the duty of candour and the duty not to act against the interests of a client arise from an advocate's duty of loyalty. In this regard the rule in the Canadian Code of Professional Conduct was amended to read that 'A conflict of interests exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client or a third person'.²³⁴

Therefore, the rule in the Kenyan Code needs to be amended in terms that get rid of possible risks of compromising the advocate's duty of loyalty which is owed to a client.

5.1.4. Advocates holding public office not to represent clients in court

The Solicitors' Code of Conduct of England provides that a solicitor must not act if there is a conflict of interest²³⁵. This Rule provides in part that there is conflict of interest if a solicitor owes separate duties to act in the best interests of two or more clients in the same or related matters and those duties conflict or there is a significant risk that those duties may conflict.²³⁶

²³² Paul Mwangi advocate, *Nation Newspaper* (10 February, 2019)29

²³³ The Federation of Law Societies of Canada is the national coordinating body of fourteen law Societies which are mandated to regulate Canada's lawyers, Quebec's Notaries and Ontario's Independent Paralegals. Found at <<https://flsc.ca>> visited on 2nd July 2019.

²³⁴ Law Society Codes of Conduct: Model Code of Professional Conduct found at <<https://flsc.ca/interactivecode>> accessed on 4th September 2019.

²³⁵ Solicitor's Code of Conduct 2007, r.3.01(1)

²³⁶ Rule 3.01(2)(a)

The Code prohibits solicitors who are employed by the government or their partners from acting in two instances. First, in cases where by virtue of their appointment there is a significant risk or real conflict of interests,²³⁷ and second, where the public might reasonably think that the solicitor used his office to the advantage of the client.²³⁸ The rule on conflict of interests in the Canadian Code augments the principle in the Gold Clause Cases. Whereas this rule bars advocates vested with official authority from acting for clients, the Gold Clause rule on the other hand prohibits qualified advocates from being employed by the government.

The Code applies to all legal practitioners who are subject to the Law Society or Solicitors Regulation Authority. It charges them with core obligations of upholding the rule of law and proper administration of justice,²³⁹ acting with integrity,²⁴⁰ not allowing their independence to be compromised,²⁴¹ and not acting in a way that is likely to diminish the trust the public places in their profession, among others.²⁴²

This Code has elaborated provisions that address conflict of interests. Its prohibitions stretch to all categories of advocates besides those whose partners hold public office. Remarkably, it takes into consideration the perception of the public where advocates act in instances that would arouse conflict of interests.

The provisions enumerated in Rule 3.05 (a) and (b) above, would appropriately deal with the kind of conflict of interests affecting practicing advocates at the JSC. The rule not only envisages conflict of interests arising when an advocate or his partner vested with public authority acts for clients, but also acknowledges the public consciousness in such scenarios, hence bars representation.

²³⁷ Rule 3.05(a)

²³⁸ Rule 3.05(b)

²³⁹ Rule 1.01

²⁴⁰ Rule 1.02

²⁴¹ Rule 1.03

²⁴² Rule 1.06

It is the role of the LSK to protect the independence of the judges and magistrates from advocates, and to ensure that practicing advocates do not become a threat to judicial independence. LSK should formulate policy requiring advocates employed in public offices and their partners not to represent clients in court. The Kenyan code, like the English one, should highlight the importance of public perceptions in instances where advocates vested with public authority may be perceived to use their positions to benefit their clients.

Likewise, the American Bar Association (ABA) has outlined Rules for Professional Conduct (RPC), in which conflict of interests is dealt with in Rules 1.7 and 1.8.²⁴³ The rules prohibit a lawyer from representing a client if either there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to another client, or by a personal interest of the lawyer,²⁴⁴ or where the representation is prohibited by law.²⁴⁵ Importantly, the RPC Special Rules provide that a lawyer employed by a public entity either as a lawyer or in some other role, shall not undertake the representation of another client²⁴⁶ if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.²⁴⁷ A public entity is prohibited to allow representation otherwise prohibited by this rule.²⁴⁸ The RPC, like the Solicitors Code of Conduct, also bars advocates who hold public offices from representing other clients.

If LSK formulates policy that widens the scope of the conflict of interests rule to require the relinquishing of practice in court of advocates working for the government, the problem of conflict of interests posed by advocates at JSC would be resolved.

²⁴³ Found at www.americanbar.org/groups/professional_responsibility accessed on 21st July 2019.

²⁴⁴ Rule 1.7(a)(2) found at (n) 25 above.

²⁴⁵ Rule 1.7(a)(2)

²⁴⁶ RPC Rule 1.8 (k), Conflict of Interests: Current Clients; Special Rules.

²⁴⁷ Ibid.

²⁴⁸ Rule 1.8(l).

5.2. Different Entity as Regulator of Advocates' Practice and Conduct

In Kenya the Law Society is charged with the facilitation of access to justice and the maintenance of integrity and professionalism in carrying out its functions.²⁴⁹ The Society in this regard performs both representative and regulatory functions in overseeing the conduct and practice of advocates. This multiplicity of duties has hindered the effective discharge by the society of its functions. As seen earlier in this study, LSK has been accused of failing to address the issue of conflict of interests involving its representatives to JSC, and also, its failure to protect the judiciary from interferences by the said representatives.²⁵⁰ Additionally, a section of lawyers has complained about the excessive powers vested in the LSK resulting from these dual roles, particularly citing partiality when dealing with matters relating to the practicing of advocates. Nicholas Sumba observed that during the last LSK elections of its male representative to the JSC, there was an attempt by the LSK Council to bend its own pertinent regulations to accommodate unqualified candidates for election, which he says was abhorrent.²⁵¹

5.2.1. Distinct roles of the Law Society, and Bar Council of England

In England, the Law society exists to promote and support all solicitors, to ensure adherence of all people to the law, and protect everyone's right to access justice²⁵². It derives its powers and duties from the Solicitors' Act²⁵³. Although the Society is the governing body for the

²⁴⁹ Section 6(b)(d)

²⁵⁰

²⁵¹ Nicholas Sumba Advocate, when analyzing LSK elections that were conducted on May 5th 2019. Sumba like other advocates, criticized the action by the LSK Council to clear unqualified candidates to contest the election despite a court order declaring one of the candidates to be ineligible, and also a report of the Nomination Committee to that effect. *Nation Newspaper*; (14th May 2019)18.

²⁵² Found at <<https://lawsociety.org.uk>> accessed on 13th July 2019.

²⁵³ Of 1974, also see Legal Services Act 1990.

whole legal profession, membership to the same is not compulsory following qualification as a solicitor²⁵⁴.

Initially, the Law Society acted as both the representative and regulator of solicitors. This dual function was seen to cause a conflict of interests, as the Law Society was perceived to be biased towards the solicitor to the detriment of the consumer, when making decisions relating to the regulation of the profession.²⁵⁵ Self-regulation was therefore done away with, and the conduct of solicitors is now regulated by the Solicitors' Regulatory Authority (SRA) under the legal Services Board.²⁵⁶

Barristers mainly engage in advocacy and are governed by the Bar Council (the Council) which safeguards the interests of barristers.²⁵⁷ Like the Law Society, the Council too has delineated its representative functions from its regulatory functions by establishing the Bar Standards Board (BSB) to be responsible for regulation of the bar, while the BSB makes rules and takes the decisions in administrative matters.²⁵⁸

There is need to create a separate entity to regulate the legal profession in Kenya, which will be distinct from the representative body. This will have the advantage of enhancing better administration and accountable exercise of power. LSK can emulate this model of governing the legal profession as is done in the United Kingdom.

5.3. The 'Cab Rank' Rule

Advocates at the JSC tend to handle the bulk of big cases, hence the imbalance in competition for clients. Ordinarily, these advocates do not act in small or petty claims. This happens despite the fact that one of the functions of the LSK is to establish mechanisms

²⁵⁴ Smith, Bailey and Gunn, (n 111) *The Legal Profession Today* p145.

²⁵⁵ Catherine Elliot and Frances Quinn, *English Legal System: Solicitors* (Pearson 2016) p187.

²⁵⁶ Pursuant to a government commissioned report by Sir David Clementi of 2004. Found at www.sra.org.uk accessed on 13th July 2019.

²⁵⁷ Catherine Elliot and Frances Quinn (n 300)195.

²⁵⁸ Ibid.

necessary for the provision of equal opportunities for all legal practitioners.²⁵⁹ This is not clearly seen to be done.

LSK can therefore learn from the case in England, where Barristers work under the ‘cab rank’ rule.²⁶⁰ This rule requires that if a barrister is not already committed for the time in question, he or she must accept any case which falls within their claimed area of specialisation and for which a reasonable fee is offered. In these circumstances barristers must uphold the principle of non-discrimination which dictates that they must not refuse to work because of the way it is funded or because the client is unpopular.²⁶¹

Although the cab rule applies where a potential client is referred to the barrister by a solicitor as is the common practice in England, the LSK can employ this rule by undertaking to allocate to its members cases whose parties may not afford to access or hire services of prominent advocates.

5.4. Indispensability of the Independence of the Judiciary

As seen earlier in this study, practicing advocates working as commissioners at the JSC are perceived to unduly influence decisions of some judicial officers and intimidate other staff in their work. Such acts breach the duly established principles that stress the importance of the independence of the judiciary. Lord Clarke emphasises that a judge should decide cases ‘between citizen and citizen,’²⁶² and this would mean without limitations that inhibit their ability to uphold the rule of law.²⁶³

²⁵⁹ Section 4(k)

²⁶⁰ Catherine Elliot and Frances Quinn, *English Legal Systems: Barristers Work* (14thedn. Pearson 2013) pp193-194.

²⁶¹ *Ibid.*

²⁶² Lord Clarke, ‘How the Judiciary is Governed’ found at <www.judiciary.uk/about-the-judiciary> accessed on 12 July 2019.

²⁶³ Julie Ouma Aseko (n 267).

The Kenyan Judicial Service Code of Conduct has been found to be lacking in the core values outlined in the Bangalore Principles.²⁶⁴ The Code has been declared to be a mere guide which is not entrenched in legislation, therefore, lacking legal effect and the force of law.²⁶⁵ Furthermore, the judiciary is blamed of still lacking in recapturing public imagination through the rigour of its jurisprudence in some instances²⁶⁶.

The Bangalore Principles of Judicial Conduct outline seven principles which every judicial officer is expected to uphold, namely: independence, impartiality, integrity, propriety, equality, competence and diligence. Equally important are the Latimer House Guidelines²⁶⁷ which spell out the relationship of the judiciary and other branches of government, requiring that the three branches of government should exhibit high standards of accountability, transparency and responsibility in the conduct of all public business²⁶⁸.

Independence of the judiciary enables the impartial adjudication of disputes without external interferences and influences, so that judges base their decisions on facts and the law without any external pressures.²⁶⁹ Judicial autonomy is expressly declared by the Constitution of Kenya,²⁷⁰ as well as International rules contained in international treaties, declarations, regional instruments together with writings of scholars, all which recognize the necessity of states having independent judiciaries. Lord Bingham observes that judicial systems are grounded upon people's trust in the streams of justice, and moral uprightness of judges.²⁷¹

Judicial independence is aimed at ensuring impartiality and fair trials, besides providing for a

²⁶⁴ Dr. Nihal Jayawickrama, Review of the Judicial Service Code (2011).

²⁶⁵ Onyango Otieno JA, 'Report of the Ethics and Governance Sub-Committee of the Judiciary' (2006)60.

²⁶⁶ Dr Willy Mutunga, Former Chief Justice and President of the Supreme Court of Kenya, in 'Judiciary Transformation Framework (2012-2016) Preface p3.

²⁶⁷ Commonwealth (Latimer House) Principles, adopted in 2003 in Abuja, Nigeria. Available at www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf accessed on 22 July 2019.

²⁶⁸ Ibid.

²⁶⁹ Justice Edwin Cameron, 'The need for the independence of the Judiciary and the Legal Profession' (2008) pp33-34. Found at https://journals.co.za/content/advocate/AJA10128743_448 visited on 5 September 2019.

²⁷⁰ Article 160. The Judiciary shall be subject only to the constitution and the law and not the control or direction of any person or authority.

²⁷¹ Lord Chief Justice Bingham of England, 'Judicial Independence' during a Judicial Studies Board Annual Lecture found at www.jsboard.co.uk accessed on 11th July 2019

separation of powers that enables courts to place checks on the executive and legislature.²⁷² UDHR entitles everyone to fair hearing in resolution of their disputes.²⁷³ ICCPR provides for fair hearing of disputes by competent impartial tribunals.²⁷⁴ The CRC also entitles children to be heard by impartial courts or authorities.²⁷⁵

JSC is charged with making rules that facilitate the conduct of a judicial process designed to render justice to all.²⁷⁶ This means that it should set the example, making it a paramount objective, to remove all circumstances that would cause encroachment on the independence of the judiciary by its commissioners. Otherwise failure to guarantee such independence compromises judicial officers and staff, thereby exposing them to manipulation and control by individuals. Just as Luis Franceschi rightly emphasises, ‘It is therefore not sufficient to be independent, but also necessary to appear so’.²⁷⁷

5.5. Exclusion of advocates from membership of the JSC

Currently, the JSC in Kenya comprises of the Chief Justice, one Supreme Court judge, one Court of Appeal judge, one High Court judge and one Magistrate, the Attorney General, two advocates, one person nominated by the Public Service Commission, and two people representing the public.²⁷⁸ Critics have argued that the two advocates pose a risk of manipulating judicial officers when representing their clients in court.²⁷⁹ Also, this JSC is seen to be dominated by judicial officers who pose a risk of their group working together to perpetuate the narrow interests of members of the judiciary that may be against the wider public interest.²⁸⁰

²⁷² Smith, Bailey and Gunn, (n 111)28 ‘*Independence of Judges*’ p264.

²⁷³ Adopted on 10th December 1948, Article 10.

²⁷⁴ Adopted on 16th December 1999. Article 14(1).

²⁷⁵ Adopted on 20th November 1989. Article 37(d)

²⁷⁶ Article 172(1) of the Constitution read with Section 3(b) of JSC Act

²⁷⁷ Luis Franceschi (n 251)53.

²⁷⁸ Article 171(1) of the Constitution

²⁷⁹ Paul Mwangi advocate (n 278)65.

²⁸⁰ George Kegoro, in *The Judiciary Watch*, ‘The factors likely to determine selection of Chief Justice in Kenya’. He asserts that the recruitment process of Kenya’s second Chief Justice under the 2010 constitution was

In the England, the Judicial Appointments Commission (JAC) is responsible for the appointing all judges and judicial officers.²⁸¹ JAC is a body corporate with fifteen members who include one lay chairman, five judicial officers, a tribunal member, a lay justice, two professional members, and five lay members, who are recommended by the Lord Chancellor and appointed by the Queen.²⁸² Schedule 12 to the Constitutional Reform Act establishes and sets out the structure of the Judicial Appointments Commission.²⁸³ Composition of JAC was designed to promote diversity and was seen necessary to command public confidence.²⁸⁴ It is noteworthy that Barristers are not included in the membership of JAC.

Similarly, Canada has Independent Judicial Advisory Committees comprising of representatives from various organizations and who come from all walks of life, who undertake the appointment of judges. The Canadian Judicial Council (CJC) has designated federal or provincial councils which are empowered to investigate the conduct of judges and impose measures or recommend sanctions to be taken by proper authorities.²⁸⁵ Both the advisory committees and federal councils are distinct from the Canadian Judicial Council. CJC has the mandate to ensure efficient rendering of judicial service in the superior courts of Canada,²⁸⁶ and handles complaints against judges.

CJC has thirty-nine members, the Chief Justice being the chairperson. The other council members are the chief justices and associate justices of Canada's superior courts, the senior judges of the territorial courts and the chief justice of the court Martial Appeal court of Canada.²⁸⁷ This shows that CJC is majorly comprised of judicial officers to the exclusion of

bedeviled by the preference of the representatives of judges and magistrates for the position to be occupied by an already serving judge. p56.

²⁸¹ Smith, Bailey and Gunn, *Judges Method of Appointment* p253.

²⁸² Ibid.

²⁸³ Charles Wild and Stuart Weinston, in Smith and Keenan's English Law (n *The Main Legal Professions* p131.

²⁸⁴ Smith, Bailey and Gunn (n 111) p241.

²⁸⁵ Canadian Judicial Council, 'Why Is Judicial Independence Important To You?' May 2016 pp16 and18 found at <www-cjc-ccm.gc.ca/english/about_en.asp> Accessed on 21st July 2019

²⁸⁶ Ibid.

²⁸⁷ Canadian Judicial Council (n 331).

advocates, and that advocates do not participate in the appointment or disciplining of judges. The CJC is a model which can enable JSC in Kenya to ensure that commissioners who are practicing advocates do not appoint or undertake disciplinary matters of judicial officers.

5.6. Conclusion

It is seen from this study that practicing advocates working for the JSC have seized the opportunity to exploit the weak regulatory national framework relating to conflict of interests and independence of the judiciary. The available solution is to borrow from international principles and set standards which envisage avoidance of conflict of interests protect judicial independence. Provisions of the code of conduct of advocates in Kenya should be spelt precisely and broadened to cover all aspects of conflict of interests. More importantly, the Judicial Service Code has to be drawn as per prescribed international standards, to embody the Bangalore Principles. There is need too, to have a separate body regulating the practice and conduct of advocates, as distinct from the LSK, as seen in the case of the United Kingdom. As has been argued severally, LSK representatives to the JSC appear not to be suitable commissioners so long as they remain in the practice of law, due to their being conflicted. JSC can learn from the practice in Canada, where practicing advocates are excluded from the appointing and disciplinary functions of the council. There should be neutral LSK representatives who would not use positions of their office to influence judicial officers and staff in the discharge of their duties.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.0. Research Summary and findings

This study was inspired by prevailing concerns about competing interests of practicing advocates who are employed as JSC commissioners in Kenya, and their interplay with judicial officers who hear and determine cases in which such advocates have interests. The research focused on three issues. First, it sought to find out whether the responsibilities and official duties of practicing advocates employed as commissioners of the JSC conflict with their professional interests. Second, it examined the constitutional provisions and legal rules that govern conflict of interests in Kenya with a view to assessing their effectiveness. Third was to identify international best practices and standards in preventing conflict of interests of advocates.

The study finds that most cases which were represented by advocates who are JSC commissioners and hence employers of judicial officers, were decided in favour of the commissioners even when there were strong opposing grounds. In various instances, the advocates were perceived to unduly influence and intimidate judicial officers and staff, who in turn were seen to be biased and protective of the interests of the said advocates. Official powers vested in the commissioners were sometimes used in a manner that not only infringed on the independence of individual judges and magistrates, but also on the independence of the judiciary as a whole. Practicing advocates who serve at JSC have not embraced and put to practice the rules and objectives of integrity. The numerous existing laws that prohibit public officers from engaging in instances that occasion conflict of interests were not adhered to. This resulted in conflict of interests of the advocates and partiality of the respective judicial officers. The scenarios discussed in chapter two clearly show that not only were the

advocates conflicted, but the independence of judges and magistrates was equally compromised. These findings resonate with the first and second objectives of the study to the effect that the risk of conflict of interests and the attendant repercussions that arose or could possibly arise there from is exemplified by advocates employed by the JSC in Kenya. This is nevertheless, there being elaborate legal provisions addressing the matter of conflict of interests.

6.1. Conclusion

Lawyers hold a unique position in society, as major players in the justice system and who advocate for the rule of law. The legal profession is self-regulated and these powers are donated to lawyers on the understanding that they would be exercised in the public interest. Rules of conduct do assist, and not hinder lawyers in their liberty to provide legal services to whichever clients they chose. However, the legal services ought to be rendered in a way that ensures that public interest is protected. Advocates who are employed as JSC commissioners have litigated cases in court before judicial officers, and this manifested into their conflict of interests, and on the other part, judges not satisfying the impartiality test.

This has happened notwithstanding the fact that the Advocates Rules of Practice together with the Code of Conduct, besides the constitution and other numerous laws, prohibit engaging in instances that would create conflict of interests. As seen from the study, all these laws do not envisage the type of conflict of interests that relates to the advocates working at the JSC, they therefore completely fail to address it. In this regard, the rules of conflict of interests need to be broadened to embrace all scenarios that arouse conflict of interests.

The historical appraisal of the courts and JSC shows how these institutions have developed from executive control and now to independence under the COK 2010. Under old constitutional dispensation, courts were seen to be lacking independence in their decisional

and institutional contexts, which then informed the persistent perception that they were the handmaiden of the executive. The composition of the JSC on the other hand exhibited heavy executive presence and control as all its five members were direct appointees of the president hence prejudicial to the independence of the judiciary. Given that both the composition and functions of the JSC have been revamped under the new constitutional dispensation, the JSC now has to mould the future of a new judiciary. It has to ensure that judges have the necessary autonomy and insulation from all forms of interference to enable them perform their duties. The new constitution is framed with a value -laden commitment to the cause of justice, equity and human rights. Courts being the unquestionable guardians of the constitution, are therefore charged with the prime duty to enforce its provisions. This would not materialize if judges and magistrates lack the individual freedom to decide cases before them primarily on facts and applicable norms.

6.2.Recommendations

6.2.1. LSK representatives should not practice law

It is recommended that advocates who seek to serve as JSC commissioners should cease the practice law in courts for the duration of holding public office. Advocates too ought to relinquish their offices just like members of parliament and county officials are required to do upon their being elected as JSC commissioners. This would not only deter advocates at JSC from prosecuting cases in courts to avoid their conflict of interests, but also enhance fairness and equality in representation of clients.

6.2.2. Exclusion of advocates from membership of JSC

In the alternative, it is proposed that membership of the JSC should not comprise advocates, just as is done in England and Canada. This is the import of the principle in the Gold Clauses

case which bars qualified advocates from performing public duties. Since JSC is said to be a representative body,²⁸⁸ the legal profession is duly represented by the various judicial officers serving on the commission. To achieve this objective, both the JSC and LSK can embrace the principle of erecting Chinese Walls that enable entities to exclude their members from taking up certain jobs.

6.2.3. Re-definition of Conflict of Interests

It is recommended that the concept of conflict of interests as outlined in the Code of Conduct of advocates should be redefined to be in tandem with conventional ethical guidelines. This is because, as the practice of law continues to evolve there are advances and changes in the culture of those accessing legal services, and which call for laws that are responsive to such evolution. The conflict of interests' rule should be broadened to include all circumstances that reveal conflicts, and not be restricted to the traditional advocate- client confidentiality principle. Instances of advocates holding public office and who represent private clients in court have not been taken into consideration in the current rule. The LSK should reframe the Code of Conduct, to reflect the provisions in the Canadian Code discussed in the previous chapter, which set out classic circumstances that cause conflict of interests as those which compromise a lawyer's loyalty in his representation of a client. These modern ethical principles help to maintain a profession which dedicates itself to standards of competence, honesty and loyalty.

6.2.4. Replacement of the Judicial Code of Conduct

The Judicial Service Code of Kenya plainly provides that judicial officers should not subordinate their judicial duties to their private interests or put themselves in positions where

²⁸⁸Tonny Gachoka, Interview with James Orengo Senior Counsel, on the composition of JSC (Nairobi, 27 July 2019).

there is conflict of interests between their official duties and their private interests.²⁸⁹ The Code is said to be lacking in the seven Principles of judicial conduct prescribed for all global judicial codes as articulated in the Bangalore Principles. It is recommended that the Judiciary should replace the existing judicial code with a new one which will reflect the Bangalore principles, as required by the said principles. This will enhance the standards for ethical conduct of judicial officers.

6.2.5. Separation of the roles of the LSK

It is proposed that the LSK should appoint a separate body that will undertake administrative matters and regulate the conduct of advocates, while the main LSK remains to be the representative body. This will help to streamline the operations of these bodies to ensure more efficiency and curb on the problem of arbitrary decision making as was complained of in the course of the last LSK election of JSC male representative.

6.2.6. Delineate the appointing and disciplinary roles of the JSC

It is suggested that the roles of appointing and disciplining judicial officers as vested in the JSC should be made a preserve of sub-committees whose membership should exclude advocates working for the commission. For instance, the Canadian Judicial Council has designated Federal Councils which deal with the conduct of judges while Independent Judicial Advisory Committees made of representatives from different entities and excluding advocates, are charged with the appointment of judges. This has the advantage of ensuring that advocates do not get embroiled in court cases and diminishes chances of such advocates influencing judges to determine disputes in their favour, not being free from the pressure on how to decide cases.

²⁸⁹ Rule 10(a)

6.2.7. Embrace the ‘Cab rank Rule’

The LSK is mandated to ensure equal opportunities for all practicing advocates. It is recommended that to realise this objective fully, LSK should put in place mechanisms to mandatorily require that advocates do not select a category of clients they want to represent, and not turn some down. Also, LSK should sensitize the public with a view to having them seek legal services from any advocate. This way, all types of cases and not big briefs only, will be handled by all practitioners thereby resolving the problem of unfair competition and selective handling of cases.

APPENDIX 1

QUESTIONNAIRE

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