

GUARDING THE GUARDIANS: DETERMINING THE SUITABILITY OF JUDGES
TO SERVE BY THE JUDICIAL SERVICE COMMISSION IN KENYA



UNIVERSITY OF NAIROBI

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fulfilment of the requirements for Master of Laws to the University of Nairobi, School of
Law*

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DECLARATION

I, **BILDAD MUNERIA KEKE**, do hereby declare that this is my original work and that it has not been submitted for award of a degree or any other academic credit in any other University.

Bildad Muneria Keke

Signed 

Date 08th December 2021

This Research project has been submitted for examination with my approval as university supervisor.

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DEDICATION

To my Parents,

You inculcated in me the spirit of humility, resilience, hard work, a lifetime of values and the quest for perfection as you lived your lives.

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Foremost I thank God almighty for blessing me with strength, health and wisdom to patiently endure this complex experience.

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United Nations Charter, 1945

UN Basic Principles on the Independence of the Judiciary, 1985

LIST OF ABBREVIATIONS

A.G	Attorney General
All E.R	All England Report
Anor	Another
App	Application
Cap	Chapter
CJ	Chief Justice
D.P.P	Director of Public Prosecution
E.A	East African Law Reports
E.A.C.A	East African Court of Appeal Reports
Ex. p	Ex parte
H.C.C.C	High Court Civil Case
J.S.C	Judicial Service Commission
KANU	Kenya Africa National Unity
K.L.R	Kenya Law Reports
Misc	Miscellaneous
Unrep	Unreported
Vol	Volume

ABSTRACT

This project examines the extent JSC complies with the procedure of initiating the removal of judges while observing the administrative principles under the Constitution of Kenya. The study makes two arguments: the first argument is although JSC has the constitutional mandate to initiate the removal of judges, nevertheless, the removal procedure is inconsistent and fragmented because of inadequate Regulations under the JSC Act, 2011 which makes it difficult to discern the standard of proof.

The second argument is although constitutional scholars and Commonwealth courts hold that the standard of proof is imperative in the removal of judges, nevertheless, JSC holds itself as a constitutional commission that is unbound by administrative rules because its role is to analyze the complaints on a preliminary inquiry and the standard of proof is inapplicable.

By reviewing case law, legislative and institutional framework, this study uses JSC's example to illustrate the nexus between fair administrative action and constitutional commission. It demonstrates that as a constitutional commission, JSC is bound by rules of administrative action, considering that to be heard and given written reasons, is a constitutional right and a legal requirement under the Fair administrative Action Act, 2015.

The existing literature failed to critically interrogate the form and substance in the ousting of judges from office. In particular, failed to evaluate the place of administrative justice principles in the removal of judges from office by JSC.

This study builds on existing knowledge in the area of Fair Administrative Actions involving Constitutional Commissions.

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CHAPTER ONE

1.0 Background

The Constitution, 2010 was enacted in Kenya, to cure the unfettered authority of the Executive, nourish rule of law, and inculcate spirit to respect rights and administration of justice in the country.¹ Ten years later, the Constitution, 2010 is facing the very challenges that its predecessor faced and it was desired the new Constitution will cure them.²

For purposes of this Research project, the guardian is Judicial Service Commission whose role is to guard the judges and protect the autonomy of the Judiciary, on the same breath, JSC has the authority to initiate the ousting of judges from office and the overarching questions running through this Research Project is whether judges are entitled to cross examine witnesses before JSC? And whether Judges are entitled to written reasons after preliminary inquiry is finalized?

The Constitution of Kenya guards removal of judges from office under Article 47(1), (2) together with Article 168(4) however, JSC has argued it is a constitutional Commission and unbound by rules of fair administrative action since the role of JSC under Article 168(4), is to investigate complaints under preliminary inquiry and when satisfied with the complaints, then a prima facie case on judicial misconduct is deemed established and JSC petitions the head of state to form a Tribunal.

¹ Julie Ouma Oseko, *Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform* (Unpublished PHD Thesis: University of Leicester, 2011) 65

² Walter Ochieng, 'The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights in Kenya', (2013) 3 the Young African Research Journal 10.

Based on the above argument, what is the yardstick to measure the level of satisfactoriness of the complaints received and assessed by JSC and what is the standard of proof?

Looking at Best practices from South Africa, Trinidad and Tobago, and New Zealand which is the appropriate standard of proof for initiating the removal of judges from office that JSC in Kenya should adopt? The above countries were selected because all of them have a common law system and both have judicial bodies which is tasked with initiating the ousting of judges from office.

The following Judges, Lady Justice Nancy Barasa, Justice Philip Tunoi, Justice D.K Marete, Justice Jackton Ojwang, Justice Joseph Mutava, and Justice Martin Muya, were accused of gross misconduct and complaints were filed against them by the public. This Research Project interrogates whether the procedure of their removal was consistent or inconsistent and which standard of proof was adopted by JSC.

JSC initiated the removal of Justice Nancy Barasa on allegations of pinching the nose of a security guard, at the Village Market, after judge refused to be searched by the security guard. JSC termed her conduct as dishonourable and unfitting for a judge, JSC suspended her from office for gross misconduct.³ Justice Jacton Ojwang was accused of ruling in favour of Migori Governor, Hon. Okoth Obado in a gubernatorial election petition while serving as the Supreme Court Judge and in turn Governor Obado built a tarmac road in

³ The Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR

the village leading to the home of Justice Ojwang.⁴ The Judge was suspended for gross misconduct for failure to honour summons issued by JSC in answering the above allegations.

Justice Tunoi was accused of receiving bribes from Hon. Evans Kidero the then Governor for Nairobi County,⁵ to rule in favour of him in an election petition at the supreme court in Kenya, though the Judge decided to retire before the Tribunal could complete its work.⁶

This research project was inspired by the standard of proof adopted by JSC when initiating the removal of judge, considering JSC, is an autonomous commission created under the Constitution of Kenya,⁷ with the primary duty of advancing and promoting the autonomy of the judiciary in Kenya.⁸ JSC also has the constitutional mandate of initiating the removal of judges from office,⁹ acting on its motion or by petition to JSC from members of the public.¹⁰

The JSC considers the petition and if satisfied, that the complaint discloses grounds for removal, ¹¹JSC petitions the president,¹² to suspend the Judge and form the Tribunal

⁴ Gazette Notice No. 3035 of 29th March 2019, Appointment of Chairperson and Members of a Tribunal to Investigate the Conduct of Justice Jackton Boma Ojwang Judge of the Supreme Court of Kenya (Government Printer, 2019)

⁵ Gazette Notice No. 1084 of 23rd February 2016 Appointment of chairperson and members of a tribunal to investigate the conduct of Justice Philip Kiptoo Tunoi, Judge of the supreme court of Kenya

⁶ Ibid

⁷ Constitution of Kenya, 2010, art 171(1)

⁸ Constitution of Kenya, 2010, art 172(1) (c)

⁹ Constitution of Kenya, 2010, art 168(2)

¹⁰ Ibid

¹¹ Walter Khobe, `The Architectonics of Administrative Law in Kenya Post 2010 Constitution` (2016) 2 Journal of Law and Ethics 8

within fourteen days. What is the prima facie case used by JSC when assessing the judicial misconduct? Having in mind that a prima facie case is defined in both Criminal law and Civil law, in *Bhatt v Republic*,¹³ and *Giella vs. Cassman Brown & Co. Ltd.*¹⁴ Respectively.

In *Bhatt v Republic*,¹⁵ it was held, “a prima facie case is one where a reasonable court directing its mind to the law and the evidence would convict if no explanation was offered by the defence,” whereas in *Giella* case, the court held, the plaintiff must prove three elements, `demonstrate probability of success, suffer irreversible injury and failure to prove the two, application be decided on the balance of convenience.`¹⁶

Considering, the removal of Judges from the office is neither criminal nor civil. Is *Sui Generis*,¹⁷ which is the convenient standard of proof to be used by the JSC when initializing the ousting of the Judge? And when is the Prima facie case established?

International instruments provide Judges be placed under disciplinary process only for incapacity and gross misconduct which puts the Judiciary in disrepute,¹⁸ and prevents the Judges from discharging their judicial functions efficiently and effectively.

The main argument in this research project is, although JSC has the constitutional mandate to initiate the removal of judges, nevertheless, the removal procedure is

¹² Constitution of Kenya, 2010, art 168(4)

¹³ [1957] EA 332

¹⁴ [1973] EA 358

¹⁵ [1957] EA 332

¹⁶ *Ibid* 14

¹⁷ *Chrysanthus Barnabus Okemo & another v Attorney General & 3others* [2018] eKLR [22]

¹⁸ Karl Klare, `Legal Culture and Transformative Constitutionalism` (1998) 14 *South African Journal on Human Rights* [146-157]

inconsistent and fragmented because of inadequate Regulations under the JSC Act, 2011 which makes it difficult to discern the standard of proof.

1.1 Statement of the Problem

Although the JSC has an authority of initiating the removal of judges from office acting on its motion, or on receiving petitions from members of the public.¹⁹ Nevertheless, the removal procedure is inconsistent.²⁰ And as a result the standard of proof is uneven and JSC being the guardian is bound by the duty to protect the independence of judges in the administration of justice.

JSC being the guardian has argued is a constitutional commission which is unbound by the requirements of fair administrative action when initiating the ousting of judges from office considering its role is to investigate the allegations on preliminary inquiry and is not a tribunal to consider the standard of proof.

This is in contradiction with the Judicial Service Act, 2011 which expects JSC to gazette regulations on the procedure of initiating the removal of judges from office to provide for a clear standard of proof.

¹⁹ Constitution of Kenya, 2010, art. 168(2)

²⁰ Walter Khobe. `The judicial-executive relations in post-2010 Kenya: Emerging judicial supremacy?´ in Charles Fombad (ed), Separation of Powers in African Constitutionalism (Oxford University Press, 2016) 270 see also Walter Khobe `The Architectonics of Administrative law in Kenya Post 2010` (2016) 2 Journal of Law and Ethics [1-12], Elisha Ongoya `Developing jurisprudence or creating Chaos? Reflections on the decision of the Court of Appeal of Kenya on selected topical areas of law` Strathmore law journal 1, May 2020 [174-175], Walter Khobe `The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights in Kenya` (2013) 2 Young African Research Journal [8-20] Ahmednasir Abdullahi `Restoring confidence in Kenya? Discredited, corrupt, in efficient and overburdened judiciary: the Judicial Service Commission? Agenda for reform

1.2 Justification of the study

This study aims at reforming the procedure of initiating the removal of judges from office by JSC and it contributes to literature through scholarly intervention on fair administrative actions involving constitutional commission.

1.3 Objectives of the study

- 1) To scrutinize the standard of proof when initiating the ousting of Judges from the office.
- 2) To demonstrate gaps in the previous and current Constitution of Kenya on the standard of proof when initiating ousting of Judges in Kenya.
- 3) To situate Legislative and Institutional framework for initializing the ousting of judges from office and identify potential gaps and challenges.
- 4) To use example of specific court`s decisions to demonstrate the process for initiating the ousting of judges from office and identify potential gaps and challenges.

1.4 Research Questions

- 1) Why is the standard of proof of ousting judges from office inconsistent and fragmented?
- 2) What are the gaps in the previous and current Constitution on the standard of proof when initiating the ousting of Judges in Kenya?
- 3) What are the gaps in legislative and Institutional framework for initiating the ousting of judges from office and what are the potential challenges?

- 4) Which court's decisions are available to demonstrate the procedure for initiating the ousting of judges from office and what are the potential gaps and challenges?

1.5 Theoretical Framework

This study adopts the following theories, legal realist theory, and Right answer thesis. The aforementioned theories are interlinked and intertwined, to explain why Judges rule cases in a particular manner, all are in agreement that, they are influenced by other factors outside the law, their training at law school and personal ideologies, this explains the fear why Judges are reluctant to hold JSC accountable to the rule of law.

1.5.1 Legal realism theory

This theory was developed by Oliver Wendell Holmes, Karl Llewellyn, and Frank Jerome, realist holds that judges review the facts and decide on the rule without analyzing statutory law or precedent,²¹ upon arriving at a particular conclusion the judges look for the principles in law that support the particular conclusion.²²

Frank Jerome postulated, 'judges make up their mind about the outcome even before they turn to the legal rules.'²³ In rare circumstances when such a theory cannot be justifiably maintained, the fact finder will change his or her conclusion. The realist disregards the formalist theory, which holds that the fact finder begins with some rules or principles of law as their theory, by applying facts and law to arrive at a sound decision.²⁴

²¹ Mary Dudziak 'Who Cares about Courts? Creating a Constituency for Judicial Independence in Africa' (2003) 101 Michigan Law Review 1622-1634

²² Richard Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 119 Law Quarterly Review 127-154

²³ <http://scholarworks.law.ubalt.edu/lf/vol29/iss1/2> accessed on 10/09/2020

²⁴ Jerome Frank, What Courts Do In Fact, 26 ILL .L .Rev(1932) 645,656

Benjamin Cardozo holds, the judge's decision is a "Judicial hunch"²⁵ is not a proper synthesis of law or fact moreover Judge Hutcheson in supporting Frank Jerome argues, "the judge decides by feelings as opposed to facts, law or evidence and intuition is given much consideration."²⁶ and Wendell Holmes, holds the decision of the courts are the laws of the country, to determine the outcome of the dispute, you search for decisions of the court and Holmes,²⁷ develops a theory of the bad man, who care less about the law, but only interested in the punishment the court will give him for committing a particular crime.

These theorists explain why Judges rule cases in a particular manner, all are in agreement that they are influenced by other factors outside the law, their training at law school and personal ideologies, this demonstrates that judges are influenced by factors beyond the law in making decisions.

1.5.2 The right answer thesis

The theory is postulated by Ronald Dworkin, by setting out, they are always the correct answer to any legal question, and the answers usually fit properly within the existing legal practices, rules, and principles to protect and manage the legal order.²⁸

When legal issue need to be settled upon, a fact finder always has equipment at their disposal,²⁹ who is right and deserve to win?³⁰ The answers to the question, the judge

²⁵ Dudziak (n21)28

²⁶ J.C. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *Cornell L.Q.* (1929).274, 278

²⁷ Oliver Holmes, "The Path of the Law" *Harvard Law Review* (1897) 10: 457 – 78

²⁸ Holmes(n32)12

²⁹J.W. Harris, "Legal Philosophies" (Lexis Nexis, Butterworths, 2nd ed. 2003)

³⁰ Ibid.

searches through the moral fabric and answers the question the best way possible since the law is a seamless web of legal rules and the judge can locate each principle to apply. Dworkin holds Judges do not have quasi-legislative discretion,³¹ unlike H.L.A Hart, who holds judges have the discretion to make law (judge-made laws).

According to Dworkin, judges have weak discretion, can decide the principles and rules to change or apply,³² to the question of the right answer. Dworkin resists the temptation to allow judges to act as deputy Legislators for two reasons, the doctrine of separation of powers, retrospectivity, and rule of law. Judges when handling administrative action dispute, their concern should be the principles.³³

The two theorist demonstrate that Judges will ordinarily shy away from holding JSC accountable to the rule of law, for fear of JSC, who exercises enormous powers against JSC and to avoid such situation Judges will rather develop new principles of law to favour JSC.³⁴ This situation has compounded the removal of judges from office due to many principles of law which are garmented and inconsistent.

A critical look at the theorist you find judicial craft developing whenever judges` interest are involved because judges are placed at awkward position of hearing a dispute involving a colleague and their employer who is JSC. The judge will ordinarily allow the interest of JSC to prevail.

³¹Tom Bingham, `The Rule of Law` (Penguin Books Ltd, London 2010) 12

³²Eric Barendt, `An Introduction to Constitutional Law` (Oxford University Press, Oxford 1998) 16

³³ Ibid

³⁴ Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR [31]

1.6 Research Methodology

This study uses doctrinal methodology because Law is a reflection of societal values which makes scientific-based (quantitative) methods of inquiry inappropriate for this study.³⁵

This Research Project examines the law, the procedure and practice of initiating the removal of Judges from office in Kenya, and the role of JSC in investigating the conduct of Judges and recommending their suspension to the president by requesting, for the formation of the Tribunal.

The best-suited method of data collection is the Qualitative method, with particular emphasis on the documentary method and case study method. The documents to be analyzed include the primary sources, The Constitution of Kenya, 2010, Legislation, Government policy, and Kenya Gazette. While secondary sources include Journal articles, mass media, published books, unpublished thesis and case law.

The case study method involves an in-depth observation of the judicial determinations from the Superior courts, involving the following Judges, Justice Joseph Mutava, Lady Justice Nancy Barasa, Justice D.K Marete and Justice Joseph Mutava who sued JSC for failure to observe the rules of fair administrative action when initiating their removal from office and the study further looks at best practices from South Africa, New Zealand, and Trinidad and Tobago on the procedure of initiating the removal of judges from office.

³⁵ David S Law, 'Constitutions' in The Oxford Handbook of Empirical Legal Research, in Peter Cane and Herbert M Kritzer (eds) (OUP, Oxford 2010) 383

The analysis involves why dispute arose, the reasoning of the courts and the doctrine of *stare decisis*. The documents to be analyzed include; the Constitution, statutes, case laws, journals and case digest.

1.7 Literature review

The review of the literature looks at historical literature, combined with a thematic analysis of the role of JSC under, The Westminster Constitution, The Independence Constitution of 1964 and the current Constitution, and the focus will be on the process of initiating the ousting of Judges from office, the Independence and accountability of JSC under the three Constitutions of Kenya.

The review further looks at the works of selected scholars, on initiating the ousting of Judges from Office. The Literature review scrutinizes the relationship between the Constitutional Function of the JSC in initiating the removal of judges and the role of Fair Administrative Action (due process) under the three Constitution.

1.7.1 Birth of Westminster Constitution 1963

The Westminster model was the Constitution that was negotiated upon Kenya attaining Independence in 1963. The fall of Colonialism and the birth of a newly independent Kenya produced the first clamour for a new Constitutional dispensation.³⁶ Prof Ojwang notes, the primary role of a Constitution allows the citizens to start afresh reviewing experience, identify the root cause of their problems and learn new lessons from their past mistakes.³⁷

³⁶ Prof. Jackton Ojwang, *The Constitutional Development in Kenya: Institutional Adaptation and Social Change*, (Acts Press, 1990) 257

³⁷ Ojwang (n36)15

The same thought is held by Nwabueze,³⁸ the primary goal of a new constitution is the establishment of a newly democratic system where rule of law, constitutionalism, and Governance flourish.³⁹ Since, the Constitution demarcates the power, functions in Government.

The Westminster Constitution established a government consisting of three arms, the Judiciary, Executive and Parliament.⁴⁰ The function of the Executive was to formulate and implement Government policy, the Legislature was to set the law and Judiciary was to solve disputes.

1.7.2 Judicial Service Commission under Westminster Constitution

Under the Westminster model, membership of the Commission consisted of the Chief Justice, the Governor-General appointed two persons on the advice of the Chief Justice and lastly, the Governor-General on advice by the Chairman of the Public Service Commission appointed two persons.⁴¹ The functions of the Commission were to discipline judicial officers, appoint and dismiss Judges, Kadhis, and other judicial staff.⁴²

Prof Muigai,⁴³ holds that the ousting procedure of a judge from office was complex under the Westminster Constitution and limited arbitral removal of judges.⁴⁴ The removal procedure was after serious investigation into allegation of misconduct or inability to

³⁸ Prof Ben Nwabueze, *Constitutionalism in the Emergent States* (Fairleigh Dickinson University Press, Rutherford 1973)

³⁹ Ibid.

⁴⁰ Githu Muigai, 'Legal Constitutional Reforms to Facilitate Multi-Party Democracy: The Case of Kenya', in J. Oloka Onyango, K. Kibwana and Chris Maina (eds) *Laws & Struggle for Democracy in East Africa* (Claripress, Nairobi, 1996) 536

⁴¹ Kenya Independence Order in Council of 1963, s 184 (1)

⁴² Kenya Independence Order in Council of 1963, s 185

⁴³ Muigai Githu, 'Legal Constitutional Reforms to Facilitate Multi-Party Democracy: The Case of Kenya', in J. Oloka Onyango, K. Kibwana and Chris Maina (eds) *Laws & Struggle for Democracy in East Africa* (Claripress, Nairobi 1996)

⁴⁴ Ibid.

discharge their function,⁴⁵ similarly Mbai⁴⁶ conveys that, the Westminster constitution was spectacular in creating an independent judiciary.⁴⁷

1.7.3 The Death of the Westminster Constitution

Okoth Ogendo,⁴⁸ argues the amendment to the Westminster Constitution, to make Kenya a Republic was the beginning of the journey from Democracy to Tyranny, all power was centred on the Executive, and President was in charge of the State and Government.⁴⁹ This tilted the centre of power, Judiciary was affected.

During Mzee Kenyatta's reign as the President, the Constitution was amended to concentrate power to the executive and was obeyed only when it was beneficial, as observed by Makau,⁵⁰ the resultant effect was an environment of corruption, political repression and human rights abuses flourished and Judiciary was reduced into a bulldog, which would only bark but not bite.⁵¹

When too much power is concentrated on an individual it tends to corrupt and absolute power corrupts absolutely.⁵² Following the Death of President Jomo Kenyatta, Daniel Moi took the mantle of the Leadership as the President, from 1978-2002.

Prof Okoth Ogendo,⁵³ notes Moi's Tenure as President, was Dictatorial and with constant violations of the Constitution, abuse of rule of law, the democratic space shrunk

⁴⁵Muigai (n 43) 50

⁴⁶Crispin Mbai, 'Public Service Accountability and Governance in Kenya Since Independence' (2003) 8 African Journal of Political Science, 119

⁴⁷ Ibid

⁴⁸ Okoth Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-1969' (1972) African Affairs 71

⁴⁹ Okon Akiba, *Constitutionalism and Society in Africa* (Ashgate Publishing, Aldershot 2004)

⁵⁰ Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya', (2001) 23 Human Rights Quarterly 98.

⁵¹ Ibid

⁵² Lord Acton, 1887

and human rights were violated.⁵⁴ The citizens were arrested and detained without trial, especially the political leaders and sympathizer of the opposition. Chief Justice and Judges dispensed Justice at the Mercy of the President with no personal independence considering they were directly appointed and dismissed by the President.⁵⁵

1.7.4 Judicial Service Commission under Independence Constitution, 1964

The JSC was established under the Independence Constitution, 1964 consisted of the Chief Justice, AG, a representative from High Court, a representative from the Appellate court and the Chairman of the Public Service Commission (PSC).⁵⁶ The JSC performed the following functions: appointment, discipline, and dismissal of judges, magistrates and judicial staff from the office.⁵⁷

Removal of a judge was only possible after the president appoints a tribunal, then the tribunal considers the matter and made recommendations to the president, Prof Makau holds the founding President was an imperialist, whose wishes were obeyed and fulfilled to the latter and no way could the recommendations of JSC conflict with the desires of the president.⁵⁸

Under the Independence Constitution, the removal of a judge from office was initiated by the Chief Justice, through representations to the President to form a Tribunal to

⁵³ Okoth-Ogendo, H.W.O., "The Politics of Constitutional Change in Kenya since Independence (1972) Vol. 71 African Affairs, 282

⁵⁴ Okoth(n53) 283

⁵⁵ Makau(n50) 99

⁵⁶ Constitution of Kenya (1964), art 68 (1)

⁵⁷ Constitution of Kenya (1964), art 69(1)

⁵⁸ Makau Mutua (n 50) 96

investigate the conduct of the Judge, upon the recommendations of the Tribunal, the Judge would be dismissed or retained in office.

Khobe,⁵⁹ notes the Chief Justice and members constituting the Tribunal were direct Presidential appointees, they were loyal to the President and not to the law, in the same vein, Justice Nyamu in *R vs Chief Justice ex parte Lady Justice Nambuye*,⁶⁰ held that Judicial Review does not apply to the President when dismissing a Judge from office since the judicial review is a statutory remedy as opposed to a constitutional right, just to avoid holding the President accountable to the Constitution.

The Constitution was silent on the Legal recommendations of the Tribunal, were they binding or merely persuasive to the President? The mechanism to lodge disputes or raise concerns or legal challenges on the outcome of the Tribunal was never provided for.⁶¹

Prof Kibwana,⁶² holds patronage, cronyism and Despotic Judges were appointed who were sympathetic to the regime of the day since the Executive could arbitrarily decide not to comply with the judicial decision then the potential of courts acting as a check on Executive arbitrariness were diminished, rule of law only existed on the Statutes, yet the Judiciary was crippled to make any meaningful ruling against the Executive.

⁵⁹ Walter Khobe, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' (2019) *Kabarak Journal of Law and Ethics* 4 (135-164)

⁶⁰ *Republic v Chief Justice of Kenya Ex parte Roselyn Naliaka Nambuye* [2004] eKLR

⁶¹ Khobe (n 59) 140

⁶² Kibwana Kivutha, 'The People and the Constitution: Kenya's Experience' in Kibwana K, Maina C and Oloka J O, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Claripress Ltd, Nairobi 1996) 343

1.7.5 The Constitution 2010: A New Dawn

The new Constitution ushered in a New Dawn, a living document that goes beyond addressing the needs of the living but the posterity as well.⁶³ Prof Kibwana,⁶⁴ argues that the constitution is not an ordinary piece of legislation. It is the supreme law and determines the form of governance for the country by giving to themselves a constitution of their own making.⁶⁵

In 2010, the people of Kenya gave to themselves a transformative constitution that ushered in a different constitutional architecture with independent Commissions and offices. Prof Lumumba,⁶⁶ notes Constitutional Commission and Independent offices were enshrined in the Constitution in an attempt to dismantle and democratize the Kenyan state.

The Judicial Service Commission is an independent constitutional Commission, established under the Constitution and is only subject to the law and not subject to the direction or control of any person or authority.⁶⁷ Khobe,⁶⁸ acknowledges this as a salient feature in the constitution, as it provides for Institutional and Functional independence.⁶⁹

The Constitution provides for Judicial Independence in the following sense, Institutional Independence, Decisional Independence, Functional independence and Perception

⁶³ Manyatera Gift and Charles Fombad, 'An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution' (2014) *The Comparative and International Law Journal of Southern Africa* 89, 104

⁶⁴ Kibwana(n62) 344

⁶⁵ Ibid

⁶⁶ Patrick Lumumba, Maurice Mbondenyi and SO Odero, (eds) *Constitution of Kenya, Contemporary Readings: Nairobi, Law Africa, 2013*

⁶⁷ The Constitution of Kenya, 2010, art 249(2)

⁶⁸ Walter Khobe 'Separation of Powers in Judicial Enforcement of Governmental Ethics in Kenya and South Africa' (2018) *Kabarak Journal of Law and Ethics* 3, 42

⁶⁹ Khobe(n 68) 43

independence. Gathii,⁷⁰ argues Functional Independence means the Judicial Service Commission must have administrative independence and be freed from interference from political institutions, on the other hand, Judges must perform their duties with zero interference or influence from any quarters.

What is the test of Independence? Khobe⁷¹ provides as follows, the determining factor is whether, from the standpoint of a reasonable and informed person, there is a perception that the institution enjoys the essential conditions of Independence, goes further to provide they are four levels of independence, Institutional, Personal, functional and perceptual.⁷² If any lacks then that Institution is not independent.

1.7.6 Judicial Service Commission under Constitution 2010

JSC is established under the constitution,⁷³ with the following mandate to promote and facilitate the independence of the Judiciary and ensure efficient, transparent and effective administration of Justice,⁷⁴ and JSC being a Constitutional Commission, is bound by the general functions and powers as stipulated in Chapter fifteen of the Constitution.⁷⁵

JSC performs the following duties, as observed by Prof Sihanya,⁷⁶ protect the sovereignty of the people, including their sovereign will, secure observance of the law by state organs, infuse democratic values and principles in the Constitution and most importantly promote Constitutionalism.

⁷⁰James Gathii, 'The Kenyan Judiciary's Accountability to Parliament and Independent Commissions: 2010-2016,' in Ghai JC (eds) Judicial Accountability in the New Constitutional Order (ICJ Kenya, 2016)

⁷¹ Khobe (n68) 45

⁷² Khobe(n68) 45

⁷³ Constitution of Kenya,2010, art 171(1)

⁷⁴ The Constitution of Kenya,2010, art 172

⁷⁵ The Constitution of Kenya, 2010, art 249(2)

⁷⁶ Ben Sihanya 'Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism' (2010) 6(1) The Law Society of Kenya Journal 24

JSC has the following mandate of ensuring the independence of the Judiciary through recruitment, the discipline of judicial officers and staff, initiating the removal process of Judges from office. Fordham,⁷⁷ held when JSC is performing the constitutional functions must ensure the right to fair administrative action is upheld that is expeditious, efficient, lawful, reasonable and procedurally fair.

Fordham further provides, judges must exercise their judicial function independently based on the judge's assessment of the facts and following a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats, or interference, direct or indirect, from any quarter or for any reason.⁷⁸

1.7.7 The removal of Judges

The Judicial Service Commission considers the petition and if it is satisfied that it discloses grounds for removal under clause 168(1),⁷⁹ sends the petition to the President. Fombad, notes Judicial Service Commission should act diligently and avoid being used as a conveyor belt whose role, once a complaint is made, is to transmit the same to the President for setting up a Tribunal, but must be guided by the Principles of Natural Justice.

The JSC has a cardinal rule of ensuring the Petition meets the required threshold and discloses the ground for the removal of a judge from office. Khobe,⁸⁰ argues the removal of a judge from office is a weighty matter and before initiating the process it is incumbent on the Commission to address its mind to the allegations, to evaluate the same and if

⁷⁷ Michael Fordham, *Judicial Review Handbook*, 6th edition, Hart Publishing, 2012

⁷⁸ Manyatera (n 63) 105

⁷⁹ The Constitution of Kenya, 2010, art 168(1),

⁸⁰ Walter Khobe 'Separation of Powers in Judicial Enforcement of Governmental Ethics in Kenya and South Africa'(2018) Journal of Law and Ethics

found frivolous dismiss the same.⁸¹The allegations must establish a prima facie case of misconduct after a thorough evaluation by the JSC.⁸²

Having reviewed the above literature, the following gaps were identified: the procedure of initiating the removal of Judges from office by JSC is fragmented and at times the rules on Fair Administrative Action were ignored prior Constitution of Kenya, 2010.

The majority of the Authors have centralized their works on the Independence of the Judiciary, at the expense of the standard of proof to be adopted by JSC when initiating the removal of a judge from office and whether JSC bound by rules of fair administrative action?

This study focuses on the above-identified gaps in the Literature review.

1.8 Limitations of the study

This study focuses on the Judicial Service commission when initiating the removal of Judges from office in Kenya, at the initial stages, subsequent stages may alter the findings of the first stage. Judicial Service Commission is a state organ, some documents are highly confidential and classified, and access is limited and time constraints considering the document should be ready within one year.

1.9 Hypothesis

The study hypothesizes that lack of proper fair administrative action has exacerbated the removal of judges from office undermining the impartiality and independence of the Judges in Kenya.

⁸¹ Ibid

⁸² Lumumba (n66)194

1.10 Chapter breakdown

Chapter 1 Introduction

This Chapter introduces the conceptual background of judicial removal and places JSC in context, it looks at the prima facie case of judicial misconduct and the differences between Prima facie case in civil and criminal? Considering judicial removal is neither civil nor criminal which is the appropriate standard of proof?

1.1 Statement of the Problem

Although the JSC has an authority of initiating the removal of judges from office acting on its motion, or on receiving petitions from members of the public. Nevertheless, the removal procedure is inconsistent. And as a result the standard of proof is uneven and JSC being the guardian has the duty to guard the independence of judges in the administration of justice.

1.2 Justification of the study

This study aims at reforming the procedure of initiating the removal of judges from office by JSC and it contributes to literature through scholarly intervention on fair administrative actions involving constitutional commission.

1.3 Objectives of the study

The objectives of study are four and are well aligned to the Research objectives and the Research Questions, both are keen at examining the extent JSC complies with the procedure of initiating the removal of judges while observing the fair administrative principles under the Constitution of Kenya, 2010.

1.4 Theoretical Framework

The research project has developed two theories, Right answer thesis and Legal Realism theory which inquire why judges rule in a particular manner, what is the motivating factor, it is the training at the law school, prejudice or judicial hunch. These Theories explain why judges are uncomfortable in holding JSC accountable to the rule of law.

1.5 Research Methodology

The research project has selected research methodology primarily because it examines the law, procedure and practices of initiating the removal of judges from office in Kenya and the best suited method of data collection is historical method, documentary and case method. The researcher adopts best practices from Trinidad and Tobago, New Zealand.

1.6 Literature review

The existing literature has been reviewed and majority of scholars have written on judicial independence, however it fails to critically interrogate the form and substance in the removal of judges in office. The ultimately scholarly I seek to make is fair administrative actions involving constitutional commission.

1.7 Limitation of the study

This study focuses on the Judicial Service commission when initiating the removal of Judges from office in Kenya, at the initial stages, subsequent stages may alter the findings of the initial stage. Judicial Service Commission is a state organ, some documents are highly confidential and classified with limited access.

1.8 Hypothesis

The study hypothesizes that lack of proper fair administrative action has exacerbated the removal of judges from office undermining the impartiality and independence of the Judges in Kenya as a result the standard of proof is uneven and inconsistent.

Chapter 2 Historical background and context

This chapter looks into the birth, workings, and challenges of the Judicial Service Commission, through three phases, the Westminster Constitutional Model, Independence Constitution of 1964, and The Constitution of Kenya, 2010. A key emphasis is placed on the Composition of the JSC, the functions, and the removal procedure of the Judges.

Chapter 3 Legislative and Institutional framework

This chapter delves into the law and institutional framework protecting the independence of Judges on their judicial removal at the International level, Regional level and National level. To protect the independence, impartiality and integrity of judges, they are key irreducible minimums that must be in place to be followed by JSC.

Chapter 4 Case study on initiating the removal of the Judges from Office by JSC in Kenya

This chapter focuses on the decisions of JSC that were challenged in the court of law, why were they challenged in the first place, what was the court's reasoning in agreeing or setting aside the findings of JSC, and the consequences of the decision of the Court.

Chapter 5 Findings, Conclusions, and Recommendations.

Findings are directly aligned to the research objectives and research questions, JSC has no uniform standard of proof, lack of uniform policy and no regulations to guide the removal of judges from office and this explain the fragmentation.

The recommendations include the enactment of the regulations to guide the process of removal as contemplated under the Judicial Service Act,2011 and they is need to have a judicial policy on the removal of judges from office.

CHAPTER TWO

JUDICIAL SERVICE COMMISSION IN KENYA: A HISTORICAL BACKGROUND AND THEORETICAL CONTEXT

2.0 INTRODUCTION

This chapter develops and interrogates a contextual framework for judicial independence, rule of law, fair administrative action and judicial removal. The crux of the discussion is pegged on the historical evolution of JSC under the Westminster constitution, Independence constitution and Constitution, 2010.

The following questions will be answered in this chapter, why is judicial removal of judges important? Why should we care? And what is the relationship between judicial independence and judicial removal? The analysis further focuses on the political events that shaped the democratic process in Kenya.

This include clamour for a new Constitutional dispensation in the 1990s, cry for multi democracy during the KANU dictatorial regime under President Moi, and the New Constitution, 2010 that was birthed under sweat and blood but the implementation process, proved a tantamount task that both President Mwai Kibaki and President Uhuru Kenyatta faced.

This chapter is divided into four parts, part one defines judicial independence, its nature and characteristic, part two describes the relationship between judicial independence, fair administrative and judicial removal., part three is concerned with the historical birth of JSC.

2.1 Theoretical context: judicial independence

Judicial independence refers to the judiciary and judges acting independently from external influence, be it institutional or personal.⁸³ Judiciary as a juridical person and judges are expected to render impartial decisions.⁸⁴ The independence of judges to act can be traced to liberal democratic theorist, Aristotle,⁸⁵ and Baron de` Montesquieu.⁸⁶ The two theorists argue, when power is properly set out and defined then arbitrariness is limited and allows the rule of law to flourish which leads to constitutionalism and separation of powers.⁸⁷

An independent and assertive judiciary is indispensable in upholding human rights, considering it is established to ensure compliance with the law. This is tested by the following characteristic of judicial independence as provided by the Constitution of Kenya.⁸⁸ Institutional independence, functional independence, operational independence and financial independence.⁸⁹

The Purposes of this Chapter focus is placed on Functional independence, institutional independence and Personal independence.

⁸³ Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53(2) Osgoode Hall Law Journal [508-539]

⁸⁴ Vanessa MacDonnell, 'The Constitution as Framework for Governance' (2013) 63(4) University of Toronto Law Journal 624

⁸⁵ Aristotle in politics argues 'every constitution has three distinct elements, deliberative, magisterial and judicial'; see also John Locke, Two Treatises of Government (ed P Laslett, 1960).

⁸⁶ Montesquieu, The Spirit of the Laws David Wallace Carrithers (ed)), (University of California Press, London, 1977) 202

⁸⁷ Walter Khobe, 'The Architectonics of Administrative Law in Kenya Post2010' (2016) 2 Journal of Law and Ethics[1-12]

⁸⁸ Walter Khobe, 'The Architectonics of Administrative Law in Kenya Post2010' (2016) 2 Journal of Law and Ethics[1-12]

⁸⁹ Shimon Shetreet and Christopher Forsyth (eds), The Culture of Judicial Independence Conceptual Foundations and Practical Challenges (Martinus Nijhoff, 2012).

2.1.1 Institutional independence

The institutional independence is a critical component which places an obligation on the judiciary and the judges to exercise their constitutional obligation of dispensing justice with a duty of care.⁹⁰ From the above emanates two concepts, judiciary and judges which are two different institutions but identical in the dispensation of Justice.⁹¹

Judiciary has the cardinal duty of promoting the rule of law and constitutionalism by rendering decisions in disputes brought before it.⁹² To allow the courts operate efficiently with minimal hiccups, then the judiciary must be insulated from external influence and interference.⁹³

Institutional independence occurs when judiciary is insulated from external influence, which can be achieved through proper legislative and institutional framework, which clearly defines the governance structures of the judiciary,⁹⁴ and the role of JSC.⁹⁵ The intention is to clearly anchor the judiciary on the law and minimize the interference from Executive and Parliament.⁹⁶

⁹⁰ Art 159(1),(2) Constitution of Kenya, 2010

⁹¹ <https://gsdrc.org/document-library/guidance-for-promoting-judicial-independence-and-impartiality/> accessed on 11/11/2021

⁹² Art 159(1), (2) Constitution of Kenya, 2010

⁹³ Art 160 (1) Constitution of Kenya, 2010; see also Walter Khobe, 'The Horizontal Application of the Bill of Rights and the Development of the Law to give Effect to Rights and Fundamental Freedoms' (2014) 1 Journal of Law and Ethics [77-90]

⁹⁴ James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge University Press, 2016)

⁹⁵ Ibid

⁹⁶ In the Matter of Interim Independent Electoral Commission [2011] eKLR

The Constitution of Kenya has protected the institutional independence of judiciary on the procedure of appointment and promotion of judicial officers,⁹⁷ and staff, the establishment of judicial service commission,⁹⁸ terms and conditions for service, financial autonomy, the judicial conduct and discipline for the judicial officers.⁹⁹ These elements are demonstrated in the subsequent segments on the judicial independence.

The institutional independence placed on judiciary and judges is a special assignment to protect governance, rule of law and administration of justice.¹⁰⁰ JSC is the guardian of the judges and should operate without improper influence, fear or favor.¹⁰¹ The Executive and Parliament are political arms of government.¹⁰²

The holders of those offices are elected into office, however, for the judiciary the judges are appointed into office by the JSC and hold office for good behavior.¹⁰³ Once they misconduct themselves, they are removed from office, nevertheless, there can never be absolute separation of powers among the three arms of government.¹⁰⁴ It is expected the arms of government should be independent but accountable to each other.

2.1.2 Functional independence

The Judges, magistrates are appointed by JSC through a transparent, impartial and accountable process with the cardinal responsibility of dispensing justice to the people of

⁹⁷<https://www.kabarak.ac.ke/downloads/journal%20of%20law%20and%20ethics%20vol%205/01-he%20Jurisdictional%20Remit%20of%20the%20Supreme%20Court%20of%20Kenya%20Over%20Questions%20Involving%20the%20Interpretation%20and%20Application%20of%20the%20Constitution.pdf>
accessed on 11/11/2021

⁹⁸Ibid

⁹⁹ Ibid

¹⁰⁰ Adriana Kamotho v Attorney General, JSC & 2 others(2020) eKLR

¹⁰¹ Art 171,248, 249 Constitution of Kenya,2010

¹⁰² Re matter of speaker of the senate & another, Advisory opinion No. 2 of 2013[2013] eKLR

¹⁰³ Art 168(1) Constitution of Kenya,2010

¹⁰⁴ National party v Government of the Republic of South Africa and others (1999)(3) SA 191

Kenya.¹⁰⁵ The appointments are based on merit, free from personal or political influence with a criteria established by law or competent authority.¹⁰⁶ The same principles are employed during transfer and promotions, to avoid perceptions of corruption or favoritism.¹⁰⁷

The Constitution has succinctly provided the functions and authority of each courts.¹⁰⁸ Some courts have unlimited original jurisdiction, while others have appellate jurisdiction on first appeal or second appeal.¹⁰⁹ Functional independence allows the judiciary together with quasi-judicial bodies have the authority to issue orders or decrees,¹¹⁰ which are binding and enforceable.¹¹¹ This creates order in the dispensation of justice and ensures justice is served without delay by promoting values and principles of transparency and accountability as well as public participation.¹¹²

In promoting the functional independence of the Judiciary and efficient administration of justice by the JSC, judges should be allowed to exercise personal independence through

¹⁰⁵ Ibid, functional independence means having administrative independence and freedom from political institutions and individuals.

¹⁰⁶ Yueduan Wang, The More Authoritarian, The More Judicial Independence? The Paradox of Court Reforms In China And Russia, University of Pennsylvania Journal of Constitutional Law, Vol. 22, p.529, 2020

¹⁰⁷ Wang (n106) 530

¹⁰⁸ Art 162(1),(4) Constitution of Kenya,2010

¹⁰⁹ Ibid

¹¹⁰ Anannia Welsh and George Williams, 'Judicial Independence from the Executive: A First Principles Review of Australian Cases', Monash University Law Review, 2014, vol 40, no.3,[593-638]

¹¹¹ Ibid

¹¹² Fingelton v The Queen (2005) 216 ALR 474, 507, see also Morris Kiwinda Mbondenye, Evelyne Owiye Asaala, Tom Kabau and Attiya Waris (eds). Human Rights and Democratic Governance in Kenya: A post-2007 appraisal.Pretoria University Law Press, 2015,[421]

hearing the dispute, assessing the facts, the evidence, the law and make final determination in form of judgement or ruling based on the law and evidence.¹¹³

The removal of a judge from office by the JSC must be based on the law only.¹¹⁴ This power by JSC should be exercised carefully to promote accountability in the judiciary where judges hold office on good behavior only.¹¹⁵ The grounds for removal of judge should be clear, precise and accountable.¹¹⁶

When judiciary and quasi-judicial organ have well elaborated functions and powers, it allows the rule of law and constitutionalism to flourish,¹¹⁷ since each of them is drawing authority from the Constitution, which is the supreme law.¹¹⁸ Functional independence calls for both judiciary and JSC to be accountable through fair administrative action.¹¹⁹ This means judicial authority should be exercised in discretionary manner as opposed to capriciously,¹²⁰ and judicial staff are not liable for action or omission done in good faith in the performance of judicial functions.¹²¹

¹¹³ Jackton B Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (African centre for Technology Studies Press. Nairobi 1990) see also Makau Mutua, 'Justice Under Siege; The Rule of Law and Judicial Subsistence in Kenya' (2001) 23 *Human Rights Quarterly* [96-118]

¹¹⁴ Claude K Kamdem; *The Political Independence of The Judiciary in Cameroon: Fact or Fiction?*, *Africa Review* 2019, vol 11, No 1, pp. 46-62.

¹¹⁵ Kamdem(n114) 60

¹¹⁶ Art 47(1), 168, *Constitution of Kenya*,2010

¹¹⁷ Mary L Dudziak, 'Who Cares about Courts? Creating a Constituency for Judicial Independence in Africa' (2003) *Michigan Law Review*.

¹¹⁸ Art 2(1) *Constitution of Kenya*,2010

¹¹⁹ Art 47(2) *Constitution of Kenya*,2010

¹²⁰ James Thuo Gathii. *The Contested Empowerment of Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis*. Sheria Publishing House, 2016 [196]

¹²¹ *Ibid*

2.1.3 Personal independence

Judiciary plays a critical role in the social order, by resolving conflicts through application of laws.¹²² The judges are expected to be neutral and decisions made based on law and exercise discretion with no influence from any quarter.¹²³ The judgement or ruling is binding on the parties unless is appealed to a court of competent jurisdiction.¹²⁴

The role of judges in the society has expanded. While some commentators have called for judges to exercise judicial restraint in disputes that are of political nature and the role of policy formulation and politics be left to politician,¹²⁵ other commentators have called for judiciary to get involved in politics through judicial review of the decision made by the Executive.¹²⁶

The expansion of the judicial power,¹²⁷ judges have the duty to sit in any dispute unless conflict of interest arises.¹²⁸ JSC is expected to be impartial and independent when investigating the removal of a judge from office, considering a decision made by the judge has the power to influence the legal culture.¹²⁹

¹²² Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012).

¹²³ Kiwinda Mbonenyi and Osogo Ambani, *Constitutional Law of Kenya: Principles, Government and Human Rights* (Law Africa, 2012)

¹²⁴ *Trusted Society of Human Rights Alliance and 3 Others v. Judicial Service Commission and Another*, [2016] eKLR

¹²⁵ Roger M Asterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press, 2011)

¹²⁶ Brian A Tamanaha, 'The History and Elements of the Rule of Law' [2012] *Singapore Journal of Legal Studies* 232 –247

¹²⁷ Wendell L. Griffen, 'Comment: Judicial Accountability and Discipline' (2017) *Law and Contemporary Problems* [75-77

¹²⁸ Roger M Asterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press, 2011)

¹²⁹ Peter H Russell, 'Toward a General Theory of Judicial Independence' in Peter H Russell and David MO'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press, 2021)

There is usually a temptation of initiating the removal of a judge based on the decision made.¹³⁰ Any complaints received which touch on the personal independence of the judge,¹³¹ should be dismissed summarily, to avoid the legitimacy of judges being called into question by the public.¹³²

The international instruments include Bangalore principles, Latimer House Principles which are soft laws that guide nations in ensuring the judicial independence is well protected and judges are not intimidated while undertaking their judicial roles, with the judges at the center determining the outcome of the disputes, a lot of vested interests emerge.¹³³ Chapter 3 will address comprehensively on the international instruments, regional treaties and national laws on judicial removal.

The impartiality and independence of judges is properly placed in the Constitution,¹³⁴ not to allow a judge act arbitrarily but to be accountable in the manner they exercise power.¹³⁵ Judges are expected to be free from any influence, inducement or pressure in order for judicial independence to grow.¹³⁶ The main objective of having an independent

¹³⁰ Abdul Majid Cockar, *Doings, Non-doings, and Mis-doings by Kenya Chief Justices, 1963-1998* (Nairobi: and Graphics, 2012).

¹³¹ Laurence Juma and Chuks Okpaluba, *Judicial Intervention in Kenya's Constitutional Review Process*, (2012) 11 Wash. U. Global Stud. L. Rev. 287, 304

¹³² *Ibid* see also Judicial Integrity Group, *Bangalore Principles of Judicial Conduct*, ESC Res 2006/23, UN ESCOR, 41st mtg, Agenda Item 14(c), UN Doc E/RES/2006/23 (27 July 2006) 4, Value 1 'Independence' ('Bangalore Principles')

¹³³ James Thuo Gathii. *The Contested Empowerment of Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis*. Sheria Publishing House, 2016 [196]

¹³⁴ *Trusted Society of Human Rights Alliance and 3 Others v. Judicial Service Commission and Another*, [2016] eKLR

¹³⁵ Brian A Tamanaha, 'The History and Elements of the Rule of Law' [2012] *Singapore Journal of Legal Studies* 232–247.

¹³⁶ *In the Matter of the Kenya National Commission on Human Rights* [2014] eKLR

judge is to promote constitutionalism,¹³⁷ by allowing the judge to exercise free will while exercising judicial authority.¹³⁸

A judge should never feel encumbered by consequences of a decision which was issued in compliance with the whole parameters in place,¹³⁹ which include the judge assessed the evidence, the law and the facts.¹⁴⁰ Judicial bodies must exercise restraint when interrogating the removal of judges, especially when the allegations involve judicial determination.¹⁴¹

2.1.4 Judicial accountability: an emerging tension in judicial independence

Judiciary is expected by the Constitution to be accountable to the people of Kenya, National Assembly and Executive through interacting, co-ordination and consulting with the three arms of government.¹⁴² Constitutional scholars have indicated judicial independence is not a carte blanche for judiciary to act in disregard of the law.¹⁴³

The judiciary as an institution should never feel unencumbered with negative consequences as a result of the decision rendered by the judges and this was witnessed in Kenya,¹⁴⁴ in the year 2007 and 2008 when institutional independence was watered down

¹³⁷ Walter Khobe, 'The judicial -executive relations in post-2010 Kenya: Emerging judicial supremacy?' in Charles Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) [286-299]

¹³⁸ Ibid

¹³⁹ Justice Kalpana H. Rawal v Judicial Service Commission and 3 others [2016] eKLR, see also Art 160(4), Constitution of Kenya, 2010, see also Republic of Kenya, Public Accounts Committee Report on the Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May 2014 (11th Parliament Third Session 2015).

¹⁴⁰ Ibid

¹⁴¹ Peter Strauss, 'The place of agencies in government: Separation of powers and the fourth branch' (2014) 84(3) *Columbia Law Review* 594

¹⁴² In the Matter of the National Land Commission, Advisory Opinion Reference 2 of 2014, [2015] eKLR

¹⁴³ Walter Khobe, 'The judicial -executive relations in post-2010 Kenya: Emerging judicial supremacy?' in Charles Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) [286-299]

¹⁴⁴ Report on the Commission of inquiry into the Post-election violence

to the extent that fundamental human rights were never protected, rule of law was never enforced.¹⁴⁵

The Court orders were disregarded in the end,¹⁴⁶ post-election violence was witnessed in Kenya, reason; the citizenry lacked trust in judicial system and vigilante justice was seen as an alternate and on the account where,¹⁴⁷ it was considered servient to the Executive.¹⁴⁸

2.1.5 Why is judicial removal important and why should we care?

Judicial independence guards the personal independence of the judges from interference by the JSC and disgruntled litigants,¹⁴⁹ who are concern with removing a judge from office,¹⁵⁰ however judges hold office for good behaviour until retirement at the age of seventy four years or in case they misconduct themselves, the removal process is initiated.¹⁵¹

The constitutional authority of the removal judges is placed on JSC as the custodian of the affairs,¹⁵² however what is the appropriate standard of proof for initiating the removal? And what is the required prima facie case for judicial misconduct? When the

¹⁴⁵ Republic of Kenya, Final Report of the Task Force on Judicial Reforms (July 2010) Government Printer,105

¹⁴⁶ Ibid

¹⁴⁷ Abdul Majid Cockar, Doings, Non-doings, and Mis-doings by Kenya Chief Justices, 1963-1998 (Nairobi: and Graphics, 2012).

¹⁴⁸ Ibid

¹⁴⁹ Laurence Juma and Chuks Okpaluba, Judicial Intervention in Kenya's Constitutional Review Process,(2012) 11 Wash. U. Global Stud. L. Rev . 287, 304

¹⁵⁰ Ibid

¹⁵¹ Art 168(1) Constitution of Kenya,2010

¹⁵² Art 171, Constitution of Kenya,2010

removal process of judges is not properly well laid down,¹⁵³ then it allows gaps to be exploited to remove judges perceived unfavourable.¹⁵⁴

When judges are removed on flimsy grounds,¹⁵⁵ it raises questions on the independence of the judiciary considering judges are not political appointees but are appointed to protect the rule of law and administration of justice.¹⁵⁶ The questions to be asked, what is the standard of proof to be adopted in the removal of a judge?

This is where the fair administrative action principles come into play and expects the judges to be given the right to be heard before an impartial tribunal and the right to be given written reasons,¹⁵⁷ nevertheless JSC exercises enormous powers in the removal of a judge from office, these powers when left unregulated and unchecked then the judges are in danger for improper, unfair and unprocedural removal from office,¹⁵⁸ considering JSC employs, transfers and dismisses the judges from office.¹⁵⁹

This power can only be challenged in the court of law, however it places the judge handling the dispute in a precarious position with JSC,¹⁶⁰ the judge is expected to evaluate the decision of JSC and at the same time handle the concern of the colleague, who is suing JSC for unfair removal.¹⁶¹

¹⁵³ Justice Kalpana H. Rawal v Judicial Service Commission and 3 others [2016] eKLR

¹⁵⁴ Ibid

¹⁵⁵ Geoffrey Robertson, 'Judicial Independence: Some Recent Problems', International Bar Association's Human Rights Institute Thematic Papers No. 4, June 2014, 3

¹⁵⁶ John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 Southern California Law Review 355

¹⁵⁷ Art 47(1) Constitution of Kenya, 2010

¹⁵⁸ Julie Oseko, 'Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform' PhD Thesis University of Leicester (2011) 124

¹⁵⁹ Art 171 Constitution of Kenya, 2010

¹⁶⁰ JSC v Mutava Joseph [2015] eKLR

¹⁶¹ Ibid

The Constitution has noted the removal of a judge must be based on clear grounds and the procedure of removal should be aligned to the fair administrative actions principles.¹⁶² The Research Project will be investigating this concern and whether it is a reality or it is a piped dreamed.¹⁶³

The fair administrative action is an accountable mechanism to prevent JSC from acting arbitrarily in the removal of judges.¹⁶⁴ The independence of judges has clearly demonstrated there must be a distinct role between the judges and JSC. Without proper separation of powers, the accountability of judges and judiciary as whole will be shrouded in mystery.

Chapter four will demonstrate how the judges were uncomfortable in holding JSC accountable to the rule of law and were keen in developing new principles and some were in conflict with the natural principles of justice, based on the above reasons is important to guard personal independence of judges by ensuring their removal process is fair, efficient and compliant with the law.

2.2 Historical evolution of JSC

The fall of Colonialism and the birth of a newly independent Kenya produced the first clamour for a new Constitutional dispensation.¹⁶⁵ Kenya was granted a New Constitution by the Colonial Master in 1963, which was fairly drafted from the practice and custom of

¹⁶² Art 47, Constitution of Kenya, 2010

¹⁶³ Charles G. Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric', (2006) Indiana University School of Law Legal Studies Research Paper Series, Research Paper No. 61.

¹⁶⁴ Walter Khobe 'The Architectonics of Administrative Law in Kenya Post-2010' (2016) 2 Journal of Law and Ethics [1-12]

¹⁶⁵ Prof. Jacton B. Ojwang, *The Constitutional Development in Kenya: Institutional Adaptation and Social Change*, Acts Press, 1990

Britain and with few modifications, to suit Kenya.¹⁶⁶ The Constitution was never subjected to drafting or a referendum by Kenyans hence pressing needs at that time were ignored.¹⁶⁷

The Westminster Constitution provided for a Parliamentary system of Government.¹⁶⁸ The Governor-General was the head of the state as a representative of Her Majesty the Queen and Jomo Kenyatta was the head of Government, was appointed by the Governor and sat in the House of the Representatives as a member.¹⁶⁹ The Westminster Constitution, provided an elaborate separation of powers between the three arms of Government, with regular checks and balances.

2.2.1 Judicial Service Commission under Westminster Model

2.2.1.1 Composition of Judicial Service Commission

The Westminster Constitution established the Judicial Service Commission,¹⁷⁰ consisting of the Chief Justice as Chairman, two persons appointed by the Governor-General on advice from the Chief Justice, two persons appointed by the Governor-General on the advice of the Chairman of the Public Service Commission.¹⁷¹

¹⁶⁶ Ibid

¹⁶⁷ Prof Okoth-Ogendo, *Politics of Constitutional Change in Kenya since Independence, 1963 to 1969*, (1971), St Anthony College, Oxford United Kingdom, African Affairs, (9-34).

¹⁶⁸ Prof. Okoth Ogendo(n 167)12

¹⁶⁹ Kivutha Kibwana, 'The People and the Constitution: Kenya's Experience' in K. Kibwana, Chris Maina and J. Oloka Onyango, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Claripress, Nairobi 1996) 344

¹⁷⁰ Kenya Independence Order in Council of 1963,s 184 (1)

¹⁷¹ Walter Khobe, 'The judicial-executive relations in post-2010 Kenya: Emerging judicial supremacy?' in Charles Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) (286-299)

There was little Executive interference in the Composition of the JSC, as the members were not direct appointees of the Executive, there was no one promoting the agenda of the Executive in JSC, hence judicial independence was observed.¹⁷²

The functions of the Commission were to appoint, discipline, and dismiss Judges, magistrates, Kadhis and other members of the subordinate courts.¹⁷³ The Attorney General was not a member of the JSC,¹⁷⁴ also JSC was to advise the Governor on the appointment and the dismissal of Judges, Magistrates, Kadhis and other members of the Subordinate courts.¹⁷⁵

2.2.1.2 Removal of Judges from office

Westminster Constitution established a tripartite process of removing the Chief Justice and Judges from office, the removal process could be initiated by the Prime Minister, President of any Regional Assembly or the Chief Justice representing the Governor-General.¹⁷⁶ The grounds for the removal of the Chief Justice or Judges were only on account of inability to perform the functions of office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.¹⁷⁷

A judge could only be removed from office after very exhaustive investigations by an Independent tribunal made up of senior judges from the commonwealth.¹⁷⁸ The Tribunal

¹⁷² Ibid

¹⁷³ Kenya Independence Order in Council of 1963, s185

¹⁷⁴ Republic of Kenya, Final Report of the Task Force on Judicial Reforms (Ouko Report) (2010) 13 Available:

<http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf> (accessed 21st April 2020)

¹⁷⁵ Prof Okoth Ogendo (n167)28

¹⁷⁶ Kenya Independence Order in Council of 1963, s 173(4)

¹⁷⁷ Kenya Independence Order in Council of 1963, s 173(3)

¹⁷⁸ Githu Muigai, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication', in Philip Kichana (ed), Constitutional Law Case Digest, II (Kenya Chapter

investigates the Conduct of the Judge and the findings are communicated to the Governor, who with the Advice of JSC, will either uphold the findings or reject the findings.¹⁷⁹

The removal process was elaborated in the Constitution so was the Independence of the Judiciary which was well enshrined and rooted in the Constitution, Mbai observes as follows,

“Westminster constitutional arrangement was impressive in creating a Judiciary that was independent, non-partisan and was guided by values of ethics, impartiality, effectiveness, and discipline in the removal of Judges from Office.”¹⁸⁰

JSC was accountable to the Prime Minister and the Regional Assemblies in undertaking its duties under the Westminster Constitution.

2.3 President Jomo Kenyatta regime (1964-1978)

The first amendment to the Westminster Constitution took place in the House of Representatives which gave birth to the Independence Constitution of 1964.¹⁸¹ The effects of the amendments to the Westminster Constitution were catastrophic. The Prime Minister automatically became the President.

The President became head of State and Government,¹⁸² Prof Ogendo Okoth notes, the sudden changes to the Westminster Constitution, was the birth of impunity by African

of the ICJ, Nairobi 2005) 160

¹⁷⁹Yash Ghai, `A Journey around Constitutions: Reflecting on contemporary constitutions` (2004) The South African Law Journal 815

¹⁸⁰ Crispin Mbai, `Public Service Accountability and Governance in Kenya since Independence` (2003) 8 African Journal of Political Science, (118-119)

¹⁸¹ Constitution of Kenya (Amendment) Act No. 2 of 1964 (Government Printer, Nairobi 1964)

¹⁸² Independence Constitution, s 8

leaders, by accepting the Constitution but rejecting the classical idea and the notion of constitutionalism.¹⁸³

Governor-General ceased to hold any Constitutional roles in Kenya, the Regional Assemblies were abolished and the Bi-Cameral parliamentary system was abolished and the National Assembly was retained.¹⁸⁴ The President acquired authority to summon, dissolve, or prorogue Parliament at his discretion.¹⁸⁵

The drastic changes in the Constitution created room for an imperial President, whose powers were never subjected to challenge by any authority or state Organ. The Unitary System of Government was born in Kenya.¹⁸⁶ Excessive powers were centralized to the President, this created a dictatorial state. During the regime of President Jomo Kenyatta, human rights and state machinery were abused.¹⁸⁷

In a centralized system of Government, the president exercised excessive power in the appointment of the CJ, Judges, Magistrates, and powers of the JSC were limited recommendations.¹⁸⁸ The recommendations to the President by JSC were never binding but merely persuasive.

¹⁸³Prof Okoth Ogendo, 'Constitutions without Constitutionalism: Reflections on an African political paradox' (A working paper prepared for the American Council of Learned Societies Comparative Constitutionalism Project)(1988)

¹⁸⁴ Legal Notice No. 28 of 1964

¹⁸⁵ Constitution of Kenya (Amendment) Act, 1964, s 6

¹⁸⁶ Walter Khobe, 'The judicial-executive relations in post-2010 Kenya: Emerging judicial supremacy?' in Charles Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) (286-299)

¹⁸⁷ Prof. Okoth Ogendo (n167)18

¹⁸⁸ Yash Ghai and JPWB McAuslan, 'Public Law and Political Change in Kenya: A study of the legal framework of government from colonial times to the present' (Oxford University Press, 1970) 251

2.3.1 Judicial Service Commission under Independence Constitution

2.3.1.1 Composition of Judicial Service Commission

JSC under Independence Constitution comprised of Chief Justice as Chairperson,¹⁸⁹ the Attorney General,¹⁹⁰ a representative from the High Court,¹⁹¹ a representative of the Appellate court,¹⁹² and the Chairman of the Public Service Commission (PSC).¹⁹³ The above membership were all direct appointees of the President.

They were never subjected to vetting by Parliament, since the Constitution lacked a provision on the vetting of Presidential appointees, being a centralized system of Government, the Executive wielded too much power that was never checked and the other two arms of Government were reduced to departments of the Executive.¹⁹⁴

2.3.1.2 Role of Judicial Service Commission

JSC performed the following functions made recommendations to the President, for the appointment of Judges and Magistrates, discipline Judges and dismissal judicial staff from office.¹⁹⁵

2.3.1.3 Removal of judges from office

The CJ initiated the process of removal of judges from office by recommending to the President to form a Tribunal to inquire the conduct of the Judge.¹⁹⁶ On the following

¹⁸⁹ Constitution of Kenya 1969, s 68(1)(a)

¹⁹⁰ Constitution of Kenya 1969, s 68(1)(b)

¹⁹¹ Constitution of Kenya 1969, s 68(1)(c)

¹⁹² Ibid

¹⁹³ Constitution of Kenya 1969, s 68 (1)(d)

¹⁹⁴ Kiraitu Murungi, 'Relationship between the three Branches of Government' in Report of the Pan African Forum of the Commonwealth Latimer House Principles on the Accountability and the Relationship between the Three Arms of Government, (Commonwealth Secretariat, London 2005) 9

¹⁹⁵ Constitution of Kenya (1964), s 69(1)

¹⁹⁶ Constitution of Kenya (1964), s 62(4)

grounds inability to undertake functions of the office, misbehaviour, and gross misconduct.¹⁹⁷ Upon the recommendations of the Tribunal, the Judge is dismissed or retained in office.¹⁹⁸

The Chief Justice power to represent the President to form a Tribunal was subject to abuse, the president used that opportunity to weed out Judges and Magistrates that were against his regime and those Judges who issued unfavourable orders against the government, considering the majority of Judges were foreigners.¹⁹⁹

The Constitution was silent on the mechanism to lodge disputes, raise a concern or challenge the outcome of the Tribunal, the procedure of removing a judge lacked accountability, the decision of the Tribunal was Final and no room existed to challenge the determination. The Tribunal composed of presidential appointees.²⁰⁰ The desires and wishes of the president were fulfilled whether were right or wrong by the Tribunal.

2.3 President Daniel Moi regime (1978-2002)

Following the death of Mzee Jomo Kenyatta, H.E Toroitich Moi who was serving as the Vice president was sworn in as President and adopted the slogan “**Nyayo**” to mean footstep, President Moi`s slogan, meant he was going to follow in the footstep of the founding Father Mzee Jomo Kenyatta by ensuring total eradication of Poverty, Ignorance, and Disease.

¹⁹⁷ Constitution of Kenya, (1964), s 62(3)

¹⁹⁸ Ibid

¹⁹⁹ Kiraitu (n194) 10

²⁰⁰ Khobe (n186)289

During Moi's Tenure, the Independence Constitution was still in force and intact, but there were considerable constitutional changes President Moi,²⁰¹ brought which interfered with judicial independence. The president through a gazette notice abolished the Tenure of Judges, Auditor-General, and the Judges were dismissed from office by the President at will.²⁰²

To consolidate his grip on power, President Moi appointed Chief Justice, Judges and Magistrate who were sympathetic to his regime,²⁰³ in the process this bred cronyism, patronage and corruption. Corruption was institutionalized during the Moi regime and systematically installed in the Judiciary and this made Judiciary a department of the Executive, by either fault or desire.²⁰⁴

Judges who issued unfavourable orders against the state were forced to resign or were transferred to stations outside Nairobi or in remote areas, foreigner Judges` whose contracts expired were never renewed and were forced to return to their country.²⁰⁵

The Independence of the Judiciary was disregarded when the President would suspend the Chief Justice, Judges and Magistrate from office, when they delivered unfavourable rulings or judgements against the state,²⁰⁶ simply by constituting a Tribunal to look into

²⁰¹ Constitution of Kenya Amendment No 1 of 1990

²⁰² Githu Muigai, `Amending the Constitution: Lessons from History`, The Advocate, Vol. 2, No. 3, February 1993 60

²⁰³ Ibid

²⁰⁴ Constitution of Kenya Amendment No 1 of 1990

²⁰⁵ Murungi (n194)10

²⁰⁶ Paul Mwangi, `The Black Bar: Corruption and Political intrigue in the Kenyan Legal Fraternity` (Oakland Media 2001)

the misconduct of the Judges, it is prudent to note the members constituting the Tribunal, were direct Presidential appointees.²⁰⁷

During President Moi's regime, corruption and torture were synonymous with the regime, they were a consistent outcry in Kenya for judicial reforms from the civil societies, diplomatic communities and the opposition political parties in the country,²⁰⁸ demanded a new Constitution which provides for an independent Judiciary that protects and promotes the fundamental human rights and Judicial tenure.²⁰⁹

Judges were dismissed from office for being too critical to the regime, this exacerbated the already bad situation, excessive violation of fundamental human rights that were ironically enshrined in the Constitution, and judges were forced to use technical provision in the constitution, to rule in favour of the government.²¹⁰

The Independence Constitution was subjected to numerous amendments,²¹¹ to the extent the Constitution was reduced into a sheer paper under President Moi regime, though the institution of JSC remained intact as it were during Mzee Jomo Kenyatta, the office bearers were different and were only devoted to the President and the KANU. The very ideals that hold a judicial system were severely interfered with.²¹²

The President yielded to pressure from the Diplomatic community and Donors from the International community to repeal section 2A and paved the way for multi democracy in

²⁰⁷ Ibid.

²⁰⁸ Appiagyei-Atua, 'Human Rights in Africa-A New Perspective on Linking the Past to the Present,' 41 McGill Law Journal, (1995-1996) 822

²⁰⁹

²¹⁰ Gibson Kamau Kuria vs Attorney General Miscellaneous Civil Application No.550 of 1988(unreported)

²¹¹ Njoya and 6 others v Attorney-General and 3 Others, Kenya Law Reports, 1 [2004] [298-299]

²¹² Kanyi Kimondo, 'Salient Features of the Independence Constitution' in K. Kibwana, G. Kanyi Kimondo and James Thuo Gathii (eds.) The Citizen and the Constitution (Claripress, Nairobi 1996) 36

the country, though, the courts were a letdown in perpetuating the illegality of the KANU regime, by ruling in favour of the president Moi even after contesting the 1987 and 1992 elections and losing to Kenneth Matiba and Mwai Kibaki respectively.

Judges were dismissed unfairly and without reason during the Moi regime, despite the return of judicial tenure for judges,²¹³ which had been removed through an amendment to the Constitution.²¹⁴ The appointment of Bernard Chunga as the Chief Justice,²¹⁵ previously he was a Public Prosecutor, caused an outcry in the country, since, he was at the forefront in prosecuting those who were opposing President Moi regime, popularly referred to as “political dissents” his impartiality and Independence was doubted from the moment he was appointed as the Chief Justice.²¹⁶

2.4 President Mwai Kibaki regime (2002-2013)

President Mwai Kibaki was voted in as the third President, during the 2002 General Election in the Republic of Kenya, Prof Ghai notes, the new administration was elected on the agenda to reform judiciary and fight corruption, and Kenyan people desired a democratic nation that respected the rule of law and fundamental human rights.²¹⁷

President Mwai Kibaki was elected under the Independent constitution of 1964, and the provisions on the JSC in the Constitution were intact, composition, functions but the

²¹³ The Constitution of Kenya (Amendment) Act No.2 of 1990

²¹⁴ Ibid

²¹⁵ Yash Ghai, ‘A Journey around Constitutions: Reflecting on contemporary constitutions’ (2004) 122(4) The South African Law Journal 815

²¹⁶ Yash Ghai, ‘A Journey around Constitutions: Reflecting on contemporary constitutions’ (2004) 122(4) The South African Law Journal 815

²¹⁷ Jill Cottrell & Yash Ghai, ‘The Role of Constitution Building Process in Democratization: Case Study-Kenya’ International IDEA, (2004)

office bearers were different, there was little interference on the working of JSC during Kibaki Regime, but despite corruption being institutionalized at the Judiciary.²¹⁸

The first changes to be implemented by the Kibaki Administration were the appointment of Chief Justice Evan Gicheru to replace Chief Justice Bernard Chunga who was president Moi's point man at the Judiciary,²¹⁹ during his tenure Corruption, torture, conviction without trial flourished and to slay the dragon of corruption, president Kibaki formed a committee popularly known as the Ringera Committee.²²⁰

2.4.1 Ringera Committee

President Kibaki appointed Chief Justice Evan Gicheru, as part of the radical surgery at the helm of the Judiciary, which was considered a branch of the Executive,²²¹ Chief Justice Bernard Chunga opted to resign and not to face the Tribunal that was set up to investigate his conduct as a Judge.²²²

The Integrity and Anti-corruption committee (Ringera committee) was established by the President and headed by Justice Aaron Gicheru, with the following term of reference "Investigate and report the magnitude and level of corruption in the Judiciary,"²²³ "its nature and form, causes and impact on the performance of the Judiciary"²²⁴ and

²¹⁸Ibid

²¹⁹ Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly 96

²²⁰ Report of the Integrity and Anti-Corruption Committee 2003 (Government Printer, Nairobi 2003)

²²¹ Walter Khobe, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' (2019) *Kabarak Journal of Law and Ethics* 4 (135-164)

²²² Ibid

²²³ Ringera Report (n220)1

²²⁴ Ibid

“recommend strategies for detection, prevention of corruption in the Judiciary and address any other related matters.”²²⁵

The committee after deliberating on its mandate published the findings of their report to the president, but the findings of the committee were leaked to the public and damaging stories were published in the media, the Judges implicated by the report were Justice Waki and Justice Ole Keiwua.²²⁶

The Judges implicated were informed to resign or face a tribunal, several Judges resigned, but a number refused to resign²²⁷ those that refused to resign, the Chief Justice gazetted their names in the Kenya Gazette for suspension and made representation to the President to form a Tribunal to investigate their conduct,²²⁸ what followed was acrimony,²²⁹ they were denied salaries, allowances, the security details were withdrawn together with State vehicles.

The findings of the committee exposed gaps in the Constitution concerning the removal of the Judges from Office,²³⁰ legal gaps included, the Chief Justice could make representation to the President to form a tribunal to look into the conduct of the Judge and there was no procedure to check the excess powers of the Chief Justice when making such representations.²³¹

²²⁵ Ibid

²²⁶ Republic vs Chief Justice of Kenya & 6others Exparte Moiyo Mataiya Ole Keiwua [2010] eKLR

²²⁷ James Gondi, ‘The need for a Disciplinary Process in Addition to the Removal Process for Judges in Kenya: A Comparative Perspective’, Phillip Kichana (ed), Judiciary Watch Report: Judicial Reform in Kenya (Vol. 1 Kenya Section of the ICJ, Nairobi 2005)

²²⁸ Ibid

²²⁹ Ibid

²³⁰ Republic vs Chief Justice of Kenya & 6 Others Ex parte Moiyo Mataiya Ole Keiwua [2010] eKLR.

²³¹ Ibid

The authority of the Chief Justice was abused and unfavourable judges were targeted for removal, hence Perceptual, Institutional, and functional Independence of the Judiciary was lost. The Judges were never given notice, reasons for the decisions and an opportunity to challenge the findings of the committee, despite the Constitution protecting fundamental human rights, the courts were reluctant to uphold and promote human rights, consequently playing a puppet to the Executive.²³²

If the Judges were removed from office with ease and with no protection from the Constitution or JSC then the Independence Constitution, 1969 was a failure to the people of Kenya and Judges as a whole,²³³ the autonomy of the Judiciary was exposed by the Ringera committee and considering the Chief Justice never set out any measures and regulations to protect the Judges from undue interference from the Executive.²³⁴

Under this background clamour for a new Constitution gained unprecedented momentum, Judiciary was crippled and Kenyans lost substantial trust in Judges and the Institution of justice as a whole, when the disputed Presidential Election of 2007 rocked the country, there was no avenue to ventilate the dispute, the courts had lost public trust.²³⁵

When avenues for solving disputes are clogged up, citizens are left at the mercy of vigilante justice, which is fast and merciless, lots of lives were lost due to deeply

²³² Republic v. Hon. Chief Justice of Kenya & Others ex parte Roseline Naliaka Nambuye, HC Misc. 764 of 2004

²³³Walter Khobe, 'Separation of Powers in Judicial Enforcement of Governmental Ethics in Kenya and South Africa' (2018) Journal of Law and Ethics

²³⁴ Makau Mutua (n150)92

²³⁵The Report of the Commission of Inquiry into Post-Election Violence (CIPEV) 2008 (Government Printer, Nairobi) 18

entrenched political mistrust, land issues and unfair distribution of resources in the country that were left unsettled for years.²³⁶

2.4.2 The constitution of Kenya, 2010

The Constitution was promulgated on the 27th August 2010 under the reign of President Kibaki ending a three-decade clamour for the Constitution,²³⁷ the Constitution provided an aura of hope as it was firmly anchored on Human rights protection and governance.²³⁸

Justice Mahomed holds as follows,

*“The Constitution of a nation is not simply a statute which mechanically defines the structure of governance and the relationship between the government and the governed it is a mirror reflecting ‘the national soul’ the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion”*²³⁹

The Constitution of Kenya, 2010 was promulgated during the tenure of the Grand Coalition Government,²⁴⁰ Grand coalition government, was established in March 2008. Under the agreement,²⁴¹ Kibaki retained the presidency and Raila Odinga became prime-minister, according to the agreement the prime-minister had the authority to “coordinate

²³⁶ Ibid

²³⁷ Republic vs Chief Justice of Kenya & 6others ex parte Moiyo Mataiya Ole Keiwua [2010] eKLR

²³⁸ Ibid

²³⁹ State vs Acheson [1991] 20 SA SOS

²⁴⁰ Constitution of Kenya (Amendment) 2008

²⁴¹ The National Accord and Reconciliation Act (the Accord) No.4 of 2008

and supervise the execution of the functions and affairs of government”²⁴² including those of ministries.

This arrangement was instituted after the election violence that marred the whole country, after the disputed presidential election pitting Raila Odinga and President Kibaki who was the incumbent and was defending the Presidency for a second term, Parliament passed, The National Accord and Reconciliation Act (Accord) which provided for the four point-agenda.²⁴³

The trust that was substantially eroded in the Judiciary started to gain momentum, considering for a long time the Judiciary faced denunciation for failing to uphold protection of Human rights and corruption held the Judiciary hostage for two decades and worsened during President Moi era, the longest-serving President.

The Constitution of Kenya, 2010 was the necessary panacea to the deeply entrenched political, social and economic woes that rocked the country for the past 46years, after gaining Independence.²⁴⁴ The Constitution, 2010 had a solution for every problem in the country, but much focus will be placed on the JSC.

2.4.3 Judicial Service Commission under Constitution 2010

The Constitution establishes JSC as a constitutional Commission,²⁴⁵ and subject to the law.²⁴⁶ Institutional, functional, and decisional Independence were safely enshrined in the JSC, through the following provisions.

²⁴² The National Accord and Reconciliation Act No.4 of 2008, s 4

²⁴³ The Accord(n 159)

²⁴⁴ 12th December, 1963.

²⁴⁵ Constitution of Kenya, 2010, art 172(1)

²⁴⁶ Constitution of Kenya, 2010, art 160(1)

2.4.4 Composition of Judicial Service Commission

The JSC is composed of 11 Commissioners, who include the following The chief justice,²⁴⁷ a judge to represent the Supreme court,²⁴⁸ a Judge to represent the appellate court,²⁴⁹ one judge to represent the High court,²⁵⁰ one magistrate to represent the magistrates elected by their association and ensuring gender equality(one man and one woman),²⁵¹ Attorney General,²⁵² two representatives of Law Society of Kenya to represent the Advocates,²⁵³ two people appointed by the president from members of the public not being Advocates(one man and one woman)²⁵⁴ and one representative from the Public Service Commission,²⁵⁵ and the Chief Registrar is the secretary to the Commission.²⁵⁶

The above composition is a total departure from the Independence Constitution, it introduced gender equality and broadened the membership by involving the public in the management of the Judiciary, the vetting of presidential appointees by the National Assembly, ensures proper balance of power.²⁵⁷

The rest of the commissioners are elected for five years by their respective representatives, the election is managed in such a manner that the activities of the commission are not interfered with due to quorum hitch, consequently, JSC is answerable

²⁴⁷ Constitution of Kenya, 2010, art 171(2) (a)

²⁴⁸ Constitution of Kenya, 2010, art 171(2) (b)

²⁴⁹ Constitution of Kenya, 2010, art 171(2) (c)

²⁵⁰ Constitution of Kenya, 2010, art 171(2) (d)

²⁵¹ Ibid

²⁵² Constitution of Kenya, 2010, art 171 (2) (e)

²⁵³ Constitution of Kenya, 2010, art 171(2) (f)

²⁵⁴ Constitution of Kenya, 2010,art 171(2) (h)

²⁵⁵ Constitution of Kenya, 2010, art 171(2) (g)

²⁵⁶ Constitution of Kenya, 2010, art 171(3)

²⁵⁷ Constitution of Kenya, 2010, art 254(1), (2), (3)

to the National Assembly in the performance of its function.²⁵⁸ Institutional and decisional independence of JSC is fundamentally guarded in the Constitution.²⁵⁹

2.4.5 Functions of Judicial Service Commission

The following functions are done exclusively by the JSC, promotes the autonomy of the Judiciary, through recruitment of Judges, Magistrates, and judicial staff, the discipline of judges and recommends to the President for the formation of a Tribunal.

Functions of the JSC are very broad and succinctly with the Bangalore Principles on Judicial conduct that require states to ensure the autonomy of the Judiciary in the performance of the judicial duties, accountability to the Citizens, National assembly and the Judges by ensuring fairness, integrity, propriety, Equality, competence and equality in the performance of the Judicial functions by JSC and Judiciary.²⁶⁰

Functional Independence is properly enshrined in the Constitution and there is limited interference in the working of the JSC.

2.4.6 The Removal of Judges

JSC initiates the removal of judges, on its motion,²⁶¹ or by receiving the petition from members of the public.²⁶² A petition must be writing.²⁶³ Setting out the grounds violated;²⁶⁴ under the code of conduct;²⁶⁵ or gross misconduct or misbehaviour.²⁶⁶

²⁵⁸ Ibid.

²⁵⁹ Constitution of Kenya, 2010, art 172(1)

²⁶⁰ Restoring Confidence in the Judiciary Vetting of Judges and Magistrates in Kenya Final Report of the Board (2016) available at <http://www.jmvb.or.ke>. Accessed on 23rd April, 2020.

²⁶¹ Constitution of Kenya, 2010 art 168(2)

²⁶² Ibid

²⁶³ Constitution of Kenya, 2010, art 168(3)

²⁶⁴ Constitution of Kenya, 2010, art 168(1)(a)

²⁶⁵ Constitution of Kenya, 2010, art 168(1) (b)

JSC evaluates complaints received,²⁶⁷ to appraise whether a prima facie case of judicial misconduct subsist through preliminary investigation, and if the complaints have merits, a recommendation is made to the President constitute a Tribunal.²⁶⁸

Tribunal investigates the conduct of a Judge and if it finds the Judge unsuitable to serve, then binding recommendations are made to the president to suspend the Judge indefinitely from office.²⁶⁹ The Judge has a remedy, to challenge the outcome of the Tribunal at the Supreme Court,²⁷⁰ when a judge is removed from office by the Tribunal, he or she can never hold a State office.²⁷¹

The Constitution provides for an intricate procedure for ousting of Judges from office, that is Independent, efficient, procedural fair, proportionate and subject to challenge in the High court at any stage, by an aggrieved party, considering JSC is a state organ,²⁷² it is bound by the rules of fair Administrative action,²⁷³ which provides for just, expeditious, proportionate and procedural fairness in handling matters concerning the appointment or removal of Judges from office.²⁷⁴

The Independence Constitution now repealed, lacked a mechanism to challenge the decision of the head of state or CJ concerning the ousting of a Judge,²⁷⁵ whereas the Constitution, 2010. Provides for an elaborate mechanism to challenge the decisions of JSC, before the High Court, which has constitutional authority on matters involving

²⁶⁶ Constitution of Kenya, 2010, art 168(1) (a), (b), (c)

²⁶⁷ Constitution of Kenya, 2010, art 168(4)

²⁶⁸ Constitution of Kenya, 2010, art 168(5)

²⁶⁹ Constitution of Kenya, 2010, art 168(6) (b)

²⁷⁰ Constitution of Kenya, 2010, art 168(8)

²⁷¹ Constitution of Kenya, 2010, art 75(3)

²⁷² Constitution of Kenya, 2010, art 260

²⁷³ Constitution of Kenya, 2010, art 47(1)

²⁷⁴ Ibid.

²⁷⁵ Republic vs Chief Justice of Kenya & 6 others ex parte Moiwo Mataiwa Ole Keiwua [2010] eKLR

fundamental human rights and jurisdiction to entertain any questions in respect to the interpretation of the Constitution.²⁷⁶

2.4.7 Journey through the Constitution 2010

President Kibaki on 29th January 2011, nominated Justice Alnashir Visram as the Chief Justice, Mr. Kioko Kilukumi to position of the Director of Public Prosecution and Prof Githu Muigai to the position of the Attorney General, without the Consultation of the Prime Minister,²⁷⁷ the law provided all appointments by the President must be done after deliberation with the president and the Prime Minister, considering the Grand coalition was a unique form of Government popularly referred as “a marriage of convenience.”²⁷⁸

The matter was challenged in the Court of law on the principle of gender equality, considering all the appointees were male and for the lack of consultation.²⁷⁹ The court declared all the appointment illegal, despite the Constitution providing for the procedure for appointing the First Chief Justice, still, the President ignored the procedure.²⁸⁰ This was setting the constitutional interpretation on the wrong foot by the President.

2.4.7.1 Vetting of Judges and Magistrates in Kenya

Following the promulgation of the Constitution in Kenya, all Judges and judicial officers were to be vetted to ascertain their fitness to serve in the Judiciary. The Constitution

²⁷⁶ Constitution of Kenya, 2010, art 165(2)(b),(d)

²⁷⁷ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR

²⁷⁸ National Accord and Reconciliation Act, No. 4 of 2008

²⁷⁹ Ibid

²⁸⁰ S 24 of the sixth schedule, Constitution of Kenya,2010

along the sixth Schedule mandated Parliament to ensure there is a legislative and institutional framework for the vetting of the Judges.

The Vetting of Judges and Magistrates Act,²⁸¹ was enacted to provide for the role of the judges and Magistrates Vetting Board. The Board found several Judges unsuitable to serve especially of Superior Court including Justice Nyamu, Justice O`kubasu, Justice Riaga Omollo and Justice Bosire.²⁸²

When the Board made recommendations for the ousting of the Judges, the Judges sought the interventions of the Court on the legality of the vetting Board to make suspension of the Judges and the court held, the final authority on the suspension of the Judges squarely lies with the High court.²⁸³ The vetting Board as currently constituted is equal to a Tribunal and appeals are filed at the High court.²⁸⁴

The decision of the Superior Court was heavily criticized for opening Pandora's Box on the findings of the vetting Board, the Judges who were found unsuitable to serve, ran to court to challenge the decision of the Vetting Board.²⁸⁵

Prof Sihanya argues the decision of the Board is final only when rules of fair administrative action are followed, both substantively and procedurally.²⁸⁶

²⁸¹ No.2 of 2011

²⁸² First Report of the Kenya Judges and Magistrates Vetting Board [2012] eKLR

²⁸³ Jeanne W. Gacheche & 6 Others v The Judges and Magistrates vetting board & 2others [2012] eKLR

²⁸⁴ Constitution of Kenya, 2010, art 165(2)(c)

²⁸⁵ Samuel .O. Bosire v. The Judges and Magistrates Vetting Board and 2 others Nairobi Petition No. 434 of 2012, Hon. Justice J.G. Nyamu v. The Judges and Magistrates Vetting Board and 2 others Nairobi Petition No. 438 of 2012 eKLR

²⁸⁶ Ben Sihanya, Constitutional Supremacy and the Rule of Law; The Separation of powers model in Kenya, the role of the Judiciary in promoting constitutionalism, presentation to the Kenya National Commission on Human rights (KNHCR) stakeholders' consultative forum on the role of the Judiciary in the Implementation of the Constitution at KSMS March19, 2011

2.5 Uhuru Kenyatta Era 2013 - To Date

On 4th March 2013, Hon.Uhuru Kenyatta was elected the Fourth President of Kenya under Jubilee Ticket, he was elected on the platform of a digital government that will revolutionize the Country through integrating technology in the performance of all government functions. Notwithstanding this was the first government to be elected under the New Constitution.

They were under the strict obligation of implementing the Constitution and ensuring the fundamental principles in the Constitution are anchored properly and deeply, namely the fundamental rights, and the principles of national values.²⁸⁷ The President being a symbol of national unity, must be at the forefront in upholding and protecting the Constitution.²⁸⁸

President Uhuru Kenyatta`s Administration on numerous occasion absconded the duty of protecting, upholding and promoting the Constitution instead, it mutilated and reduced it, into a mere paper with no value, in the following instances, an analysis is shown on how the President acted with Impunity and ignored the clear Provisions of the Constitution.

In 2014 and 2020 President Uhuru failed to appoint Judges into office, after JSC conducted the shortlisting and interview of the candidates, a list of merited candidates was sent to the President for an appointment, the list was ignored, even after the intervention of the courts.

²⁸⁷ Constitution of Kenya, 2010, art 10 (1),(a).(b),(c)

²⁸⁸ Constitution of Kenya, 2010, art 131(1) (e)

The constitution of Kenya limits the role of the President in appointment of judges to a passive role, by providing “all judges shall be appointed by the President, following the recommendations of the JSC.”²⁸⁹ JSC when investigating the conduct of Chief Registrar Gladys Boss Shollei, failed to observe the fundamental rules of fair administrative action, by ensuring a notice, detailing the allegations under inquiry, the evidence is served to Gladys Shollei and written reasons for the decision after the inquiry is served to her.

The matter led to a protracted battle in the Courtroom, in the superior Courts but finally, Boss Shollei bowed out, despite her dismissal being procedurally unfair and in bad faith. It sparked a war between the National Assembly and JSC.²⁹⁰

Justice Tunoi was suspended from office on the allegations, he received a bribe of 200Million shillings from Dr Evans Kidero who was then, the Governor of Nairobi, to set aside the decision of the appellate court. The Judge opted to resign rather than face the Tribunal constituted by President Kibaki, though the report of the Tribunal was presented to President Uhuru and the findings were never made public.

President Uhuru caused the Budget of the Judiciary to be slashed by the Minister of Finance as part of austerity measures to curb the ballooning wage bill, questions were raised as to what informed the Minister of Finance to slash the budget of a different arm of Government, without the involvement of Parliament.

²⁸⁹ Constitution of Kenya, 2010, art 166(1)(a), (b)

²⁹⁰ Judicial Service Commission V Speaker of the National Assembly [2014] eKLR.

The Judiciary fund, which is a fund established under the constitution. The law provides the money charged into the fund shall be used for the functions set out in the constitution, the slashing of the funds was aimed at crippling the functions of the Judiciary.

As part of fighting corruption the JSC suspended the following judges from office, Justice Joseph Mutava from office who was accused of corruption-related charges, by causing a file involving Kamlesh Pattin to be heard by him and issued favourable orders despite the case lacking merit, the judge was sitting on a different division of the court but still went ahead and heard the matter, despite the judge not being the duty judge.

President Uhuru Kenyatta, in 2017 promised to teach the Judiciary a lesson after the Supreme Court invalidated the presidential election and ordered a fresh election. The president told judiciary “We shall revisit, we surely have a problem” this statement was never taken lightly by the International community, the donor community and public-spirited taxpayers.

The president lived to his statement, the Judiciary faced myriad of problems through crippling the functions of the Judiciary, refused appoint Judges to office, threaten to oust the Chief Justice and arrested the Deputy Chief Justice and was expected to appear before her junior to answer to corruption charges, the Constitution of Kenya was severely offended.

2.6 Conclusion

This Chapter has demonstrated that the Kenyan Presidents were the problem, the law provided necessary checks and balances, but our leaders felt the law was the problem,

they subjected the law to numerous amendments to the extent the Independence Constitution was reduced into a mere paper. As the first part has indicated, the Westminster Constitution was drafted by the British with the inputs of few elite Africans.

The second part examined the Independent Constitution, under Jomo Kenyatta Era, the first amendments to Westminster Constitution are instituted that centralizes power to the presidency, hunger for power is shown through Kenyatta's Presidency, by having an exclusive power to control both the Judiciary, Executive and Parliament. The balance of power was severely impaired.

Third part demonstrated how Moi's Presidency, upheld the damage caused by President Kenyatta, human Rights, governance space were limited and the Judiciary reduced into a department of the Executive, the democratic space in the Country was nonexistent, considering KANU was made the official party in Kenya.

The independence Constitution lost vital grip, in the removal of Judges especially at the initial stages, the Chief Justice who was a direct presidential appointee would send representation to the President to constitute a tribunal. The Judges were rarely subjected fair hearing before the Tribunal.²⁹¹

There was little or no mechanism to challenge the decision of the Chief Justice or the findings of the Tribunal as their outcome was treated with finality,²⁹² the consequences of the above arrangement were that the Judiciary was full of corrupt Judges, rule of law was

²⁹¹Republic vs Chief Justice of Kenya & 6 Others Ex parte Moiyo Mataiya Ole Keiwua [2010] eKLR.

²⁹² Ibid

violated and there was no protection of the fundamental human rights against the state, especially during Moi era it was worse.²⁹³

The Westminster Constitution ensured both Institutional Independence and Personal independence of Judges to perform their duties with limited interference, the grounds for removal were limited to physical and mental infirmity and misconduct.²⁹⁴ The Constitution lacked an elaborate procedure on how a prima facie case was established before recommendations were sent to the Governor-General to constitute a Tribunal,²⁹⁵ a lot was left desired on the standard of proof applied by Chief Justice, President of Assemblies and the Prime Minister when initiating the removal of Judges from office.²⁹⁶

The Constitution 2010, brought back the safeguards that were similar to the Westminster Constitution, clearly defining the role of the Judiciary, Executive and Parliament, a devolved government is established and generally the Constitution is transformational.²⁹⁷

This Chapter has demonstrated the challenges facing Judicial Independence both decisional and institutional were ordained by the Executive from the moment President Jomo Kenyatta become the First President, but the Constitution 2010 remedied those inefficiencies by putting enough safeguards, through well-defined functions and authority

²⁹³ Ibid

²⁹⁴ Walter Khobe, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' (2019) *Kabarak Journal of Law and Ethics* 4 (135-164)

²⁹⁵ Ibid

²⁹⁶ James Gondi, 'The need for a Disciplinary Process in Addition to the Removal Process for Judges in Kenya: A Comparative Perspective', Phillip Kichana (ed), *Judiciary Watch Report: Judicial Reform in Kenya* (Vol. 1 Kenya Section of the ICJ, Nairobi 2005)

²⁹⁷ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR

to act independently and accountable to the people of Kenya through various Institution.²⁹⁸

²⁹⁸ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR

CHAPTER THREE

LEGISLATIVE AND INSTITUTIONAL FRAMEWORK GOVERNING JUDICIAL SERVICE COMMISSION IN KENYA

3 Introduction

This chapter mainly focuses on an analysis of the legislation, and Institutions governing JSC at the International level, Regional level and National level. The previous chapter saw the evolution of JSC from a dependent, weak and rubber stamp- induced institution during the Independence Constitution of 1964 to an independent, Transparent and accountable Institution in the Post 2010 Constitutional dispensation.

Chapter three is divided into three major parts first, the Legislative framework governing the initial stages of removing Judges from office at the International, Regional, and local levels. The questions to be answered are, what are the mechanisms, grounds and procedure for initializing the ousting of judges from office?

Secondly, the Institutional Framework in place, to discipline the Judges and the standards of proof required for the ousting of Judges from office at the International level, Regional level and National level. Finally, a conclusion on the gaps identified and the challenges, despite the presence of an elaborate law and Institutions.

3.1 LEGISLATIVE FRAMEWORK

3.1.1 International Level

At the International level, many governments all over the world have participated in the formulation of treaties and conventions governing judicial independence, procedure for

ousting Judges from office and Access to justice. These principles require judges to be accountable for their conduct and appropriate institutions be established by a member state to maintain judicial standards.

3.3.1.1 United Nations Charter, 1945

The UN Charter was adopted in 1945, Preamble of the Charter provides, “to save succeeding generations from the scourge of war which twice has brought untold sorrow to mankind, and further provide to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women.”²⁹⁹

The Charter provides a legal basis for formation of international instruments to be adopted by UN member states, these instruments are adopted as best practice for promotion of human rights.

3.3.1.2 Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights was proclaimed and validated on 10th December 1948 as the best model for protection and promotion of rights. It provides “All human beings are born free and equal in dignity and rights”³⁰⁰

The UDHR recognizes the fundamental right of accessing justice however, the Declaration neither talks about the protection of Judges from arbitrary removal offices nor having an Independent commission to handle complaints against the judges.

²⁹⁹ United Nation Charter, preamble

³⁰⁰ Universal Declaration of Human Rights, 1948, art 1 see also the Bangalore Principles of Judicial Conduct, 2002, Preamble

3.3.1.3 Bangalore principles of Judicial conduct, 2003

The principles provide a model to be adopted by member states in ensuring an autonomous and accountable Judiciary in the issues involving the appointment, tenure, remuneration, discipline and dismissal of judges.³⁰¹

Bangalore principles comprise of seven principles, namely: impartiality, propriety, equality, competence, independence, diligence and integrity. These principles are required to be enshrined in the Constitution of the member state.

Judiciaries are required to have a detailed, transparent disciplinary procedure for disciplining Judges. The disciplinary process should begin only when a serious misconduct is occurred and grounds for judicial misconduct should be provided for in the laws, and succinctly define nature and procedure for ousting the Judge from office.³⁰²

The Principles places the need to have a specific body is established by the Judiciaries, to receive complaints, assess the complaints and identify if the complaints received establishes a prima facie case of misconduct, on preliminary inquiry.³⁰³ In the process of assessing the complaints judges should be heard and given an opportunity to defend themselves against the allegation brought before the judicial bodies.

The Tribunal is required to be guided by its own rules of procedure as well as, ensure an expeditious, proportionate, and fair hearing when investigating judicial misconduct.³⁰⁴

Depending on the outcome of the Tribunal, a judge will be allowed to challenge the

³⁰¹Bangalore principles of judicial conduct, 2003

³⁰² United Nation Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial conduct, Preamble 17

³⁰³ United Nation Office on Drugs and Crime Commentary on the Bangalore Principles of Judicial conduct Preamble 19

³⁰⁴ United Nation Office on Drugs and Crime Commentary on the Bangalore Principles of Judicial conduct Preamble 11

decision of the Tribunal.³⁰⁵ Through an Appeal to a court of competent jurisdiction. This safeguard ensures the removal procedure is accountable, impartial and independent.

The Bangalore principles require member state, to publish a code of conduct that provides a disciplinary process which promotes judicial independence and accountability.³⁰⁶ In addition to, Judges need to be informed of the charges, be fully represented, or appear in person and make a full defence and the outcome of the decision be communicated to the Judge.³⁰⁷

The ousting of the Judge should be vested in the Judiciary and the Tribunal solely, which is independent of the Executive or Parliament to avoid unfettered interference in matters concerning the Judiciary and to promote the doctrine of separation of powers.

Bangalore principles succinctly capture the need to guard the guardians from fettered manacles of JSC or Executive.

3.3.1.4 United Nations Basic Principles on the Independence of the Judiciary, 1985

The UN Principles expect member states to provide an elaborate safeguard that guards judicial independence, in addition to, requires governments to ensure both the observance and respect of judicial independence.³⁰⁸ By ensuring the grounds for ousting judges are

³⁰⁵ United Nation Office on Drugs and Crime Commentary on the Bangalore Principles of Judicial conduct Preamble 20

³⁰⁶ United Nation Office on Drugs and Crime Commentary on the Bangalore Principles of Judicial conduct Preamble 16

³⁰⁷ United Nation Office on Drugs and Crime Commentary on the Bangalore Principles of Judicial conduct, Preamble 12

³⁰⁸ UN Basic principles on the Independence of the Judiciary, art 1

known and fixed in law, ‘Judges are suspended or ousted only on the grounds of incapacity and bad behaviour’³⁰⁹

The initial stage of investigating judicial misconduct, the matter should be kept confidential, unless the Judge requests otherwise. The matter must be expeditiously and fairly disposed of in compliance with the accepted standards.³¹⁰ The disciplinary action should be organized in a manner that does not affect the autonomy of the Judges both decisional and institutional.³¹¹

The disciplinary process is to create assurance to the public, to appreciate the Judges are impartial, independent and dispense justice without favour, fear or ill will.³¹² The UN principles holistically capture the need to protect the autonomy of Judges from unfettered interference, by providing the standard of proof and it should entail.

3.3.1.5 International Convention on Civil and Political Rights, 1966

The Convention provides, every individual is entitled to a fair hearing by an independent public body.³¹³ The Convention buttresses a need to ensure tribunals are fair and objective in the performance of its duties and this is a fundamental right in the protection of fair hearing.

The Convention lacks specific provision on a judicial body that handles complaints against judges, the standard of proof or what is a prima facie case, however it has a general provision on the political rights and stresses on rule by law to flourish, the

³⁰⁹Ibid

³¹⁰ UN Basic principles on the Independence of the Judiciary, art 17

³¹¹ UN Basic principles on the Independence of the Judiciary, art 18

³¹² *Boulanger v The Queen* [2006] 2 SCR 49

³¹³ International Convention on Civil and Political Rights, Art 14(1)

autonomy of the Judiciary must be protected and provided in law by the member states, suffice to note, the Convention lack provision on judicial discipline, but has a provision on judicial independence and impartiality.

3.1.2 Regional level

3.1.2.1 Commonwealth Principles (Latimer House), 1988

The Principles provide for an honest, impartial, independent, and proficient judiciary is important in upholding law and administration of justice.³¹⁴ These guidelines provide an elaborate mechanism for the appointment, tenure, remuneration of Judges, and the disciplinary procedure and ousting of Judges from office.³¹⁵

Judges be subjected to removal process only if their conduct makes them unfit to serve as Judicial officers,³¹⁶ considering not all misconduct should warrant the ousting of Judges from office, at times reprimand, is appropriate.³¹⁷ In the performance of their duties, Judges are only accountable to the Constitution and at all times Judges need to be Impartial, Independent and uphold integrity when performing their duties.³¹⁸

Latimer Principles go further and provide Judges should be reprimanded, in case the complaints do not justify their ousting from office. The ousting of Judges from office should never be used as an appeal mechanism based on the decisions issued by the Judges.

³¹⁴Commonwealth Latimer House Principle, Principle VII (b) (Judicial Accountability)

³¹⁵Commonwealth Latimer House Principle, Principle II (preserving judicial independence)

³¹⁶Commonwealth Latimer House Principles, Principle IV (Independence of the Judiciary)

³¹⁷Commonwealth Latimer House Principles, principle VI (a) (judicial accountability)

³¹⁸Report of the special Rapporteur on the Independence of the Judges and lawyers, UN Doc A/HRC/26/32(2014) accessed on 5th May 2020

The body mandated to receive complaints must be vigilant and sieve out unmerited complaints from disgruntled litigants and advocates and refer them to the proper court of Appeal for the ventilation of the dispute.

“Once judges are protected from the whims of tyrants another problem is created, what to do with judges who misbehave or are incapable of carrying out their functions and bring the judiciary into disrepute?”³¹⁹

The ousting of Judges be limited to, misconduct and misbehaviour. The Judges should be given an appropriate opportunity to defend all allegations levelled against them without being victimized by the judicial body and a judicial code of conduct must be in place, and the Judges made are aware of the code and the consequences of breaching the code of conduct in advance, this promotes accountability and rule of law, failure to put in place judicial code of conduct automatically translates that, the Judges have neither security of tenure nor decisional independence in the performance of their duties.³²⁰

The guidelines provide further, whatever mechanism used to decide the suitability of a judge to serve or ousted, should ensure proper protection to promote fairness,³²¹ the judge should be heard by an impartial tribunal. The Executive Arm of Government involvement in the ousting of a judge should be limited.³²²

³¹⁹Boulanger v The Queen [2006] 2 SCR 49

³²⁰ Report (n 251) 10

³²¹ Commonwealth Latimer House Principle, Principle VII (b) (Judicial Accountability)

³²² UN Human Rights Committee, General Committee 32 on Article 14: Right to equality before courts and to a fair Trial, UN Doc CCPR/C/G32 Accessed on 5th May2020

3.1.2.2 The African Union Constitutive Act, 1999

The Act was adopted in Lome, Togo during the OAU Summit in 1999 and came into force in May 2002 making African Union the new regional body, replacing the Organization of African Union. The authority of the Act was, advance democratic principles and institutions, and encourage respect for people's rights.³²³

The Act however does not provide the mechanism of protecting the Independence of Judges when initiating their removal from office. It has set in place good governance and guiding principles by ensuring the autonomy of Judges and the Judiciary.³²⁴

3.1.2.3 African Charter on People and Human Rights, 1981

The Charter was adopted in Banjul, Gambia 1981, being the principal treaty for people rights in the African region, provides, "every individual shall have a right to have his case heard, within a reasonable time by an impartial Court or Tribunal,"³²⁵ entitled to defence (which includes right to lawyer, challenge and adduce evidence and cross-examine witnesses).³²⁶

The Charter further mandates states to promote the autonomy of the Courts, ensure appropriate institutions are established.³²⁷ The Charter does not name the institution to be formed but leaves us to guess. The African Commission developed guidelines and principles on the right to a fair trial and legal assistance in Africa.³²⁸ The principles are

³²³ Constitutive Act of the African Union, art 3

³²⁴ Constitutive Act of the African Union, Preamble

³²⁵ African Charter on Human and People's Rights, art 7

³²⁶ African Charter on Human and People's Rights, art 7(3)

³²⁷ African Charter on Human and People's Rights, art 26

³²⁸ African Charter on Human and People's Rights, art 45(c)

aimed at strengthening the autonomy of the Judiciary. The principles emphasize Judges be ousted from office for gross misconduct.³²⁹

3.1.2.4 The American Convention on Human Rights, 1978

This convention lacks provision on judicial bodies that handle complaints against judges, standard of proof and a prima facie case however it has general rights on fair hearing.

3.3.2 National Level

Kenya has placed sufficient safeguards to protect the autonomy of the Judiciary by ensuring transparency, accountability, and integrity, in the suspension and discipline of Judges, in compliance with both international and regional standards.

3.1.3.1 Constitution of Kenya, 2010

The Constitution is the supreme law,³³⁰ it establishes a Government with three arms, Parliament, Executive and Judiciary. Each arm has power and authority to perform its function independently and impartially, the power is donated by citizens to the respective arms of Government.³³¹

Judges ensure access to justice, promote rule by law, and ensure technology promotes access to Courts.³³² The Constitution provides how Judges should interpret and promote the growth of Constitutionalism,³³³ national values and principles.³³⁴ Considering the judiciary is answerable to the Constitution and the law.³³⁵

³²⁹ Principles and Guidelines on the right to fair trial and legal assistance in Africa, r 4(P)

³³⁰ Constitution of Kenya, 2010, art 2(1)

³³¹ Constitution of Kenya, 2010, art 1(3)(a), (b), (c)

³³² Constitution of Kenya, 2010, art 159(2)(a), (d), (e)

³³³ Constitution of Kenya, 2010, art 259(1)(a), (b), (c), (d)

³³⁴ Constitution of Kenya, 2010, art 10 (2) (a), (b), (c), (d),

³³⁵ Constitution of Kenya, 2010, art 160 (1)

Judges are state officers who hold the office in the trust of the Citizens when performing judicial duties, bearing in mind duty and responsibility is placed on them as state officers. They must comply with the Constitution.³³⁶ For every duty, they is a correlative right.

The removal of judges from office must be on strict grounds of misconduct on the part of the Judge.³³⁷ Rules of fair administrative action apply when investigating judicial misconduct.³³⁸ The role of the President is a ceremonial role, when ousting a judge, upon receiving recommendations from JSC is to suspend the judge and to form a Tribunal to inquire into their misconduct and to receive recommendations of the Tribunal after the inquiry (functional independence).³³⁹

Functions of the JSC have been enlarged, it recommends the appointment judges;³⁴⁰ reviewing and recommending terms service of judicial officers;³⁴¹ it initiates the ousting of Judges from office,³⁴² and implements programs towards the training of judges.³⁴³

3.1.3.2 Judicial Service Act, 2011

The Act provides for standard of service,³⁴⁴ rules of procedure to guide when initiating the removal of judges from office, judicial code of conduct which regulates the behaviour of the Judges.³⁴⁵

³³⁶ Constitution of Kenya, 2010, art 73 (1) (a), (i), (ii), (iii), ‘respect the people; bring dignity to the office’; and ‘promotes public confidence and integrity in the office

³³⁷ Constitution of Kenya, 2010, art 168 (1) (a), (b), (d), (e), (f)

³³⁸ Constitution of Kenya, 2010, art 47(1),(2)

³³⁹ Joseph Mbalu Mutava v Tribunal appointed to investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya [2019] eKLR [8]

³⁴⁰ Constitution of Kenya, 2010, art 172 (1) (a)

³⁴¹ Constitution of Kenya, 2010, art 172 (1) (b), (i), (ii)

³⁴² Constitution of Kenya, 2010, art 172 (1) (c)

³⁴³ Constitution of Kenya, 2010, art 172 (d)

³⁴⁴ Judicial Service Act, No.1 of 2011, s 4

³⁴⁵ Judicial Service Act, No.1 of 2011, s 3

3.1.3.3 Leadership and integrity Act, 2012

The Act ensures public officers and state officers respect the national values, principles and live to the expectation of the Constitution of Kenya.³⁴⁶ The Act requires every Arm of Government to publish a code of conduct, to regulate the conduct and behaviour of their members.³⁴⁷

Judiciary published and gazetted, judicial code of conduct and Ethics,³⁴⁸ to ensure that Judges are accountable, impartial, and act with integrity while discharging their judicial duties. The code of conduct is in line with Bangalore principles, which expects judiciaries to provide a mechanism for suspending and discipline judges.³⁴⁹ The Constitution penalizes state officers, dismissed from office due to gross misconduct are not supposed to hold any state office.³⁵⁰

3.1.3.4 Fair Administrative Action Act, 4 of 2015

The Act requires all public bodies, including JSC are cognizant of their functions in line with the Fair Administrative Action, bearing in mind, the Act has reformed the common law principles of *Audi alteram partem* (no man should be condemned unheard). This is a principle of natural law justice.³⁵¹

³⁴⁶ Constitution of Kenya, 2010, art 75 (1) (a), (b), (c)

³⁴⁷ Constitution of Kenya, 2010, art 75(2) (a), (b)

³⁴⁸ Legal Notice 132/2016

³⁴⁹ Constitution of Kenya, 2010, art (2) (a)

³⁵⁰ Constitution of Kenya, 2010, art 75 (3)

³⁵¹ Apollo Mboya vs Judicial Service Commission & 6 Others (2016) eKLR[30]

The ousting of a judge from office must strictly follow the laid down principles of the Fair Administrative Action.³⁵² Failure, the decision will be challenged in a court of law through judicial review.³⁵³

3.1.3.5 The Public Officer Ethics Act, 4 of 2003

The Act set in place the expected conduct of public officers in Kenya, by living to the oath of office, and avoiding corruption and misuse of public office.³⁵⁴ The Act mandates every public officer to follow a prescribed code of ethics, put in place by the relevant commission.³⁵⁵ The statute provides JSC as the responsible institution for the affairs of Judges, magistrates and judicial officers.³⁵⁶ It exercises discipline over them. JSC formulated the Judicial Service Code of Conduct and Ethics,³⁵⁷ to promote an ethical working environment in the Judiciary.

3.3.3 Institutional framework

3.1.4.1 International level

International Conventions, Declarations, and treaties have laid down the mandates and Countries demonstrate consent or political will by signing the treaty as a formal act of ratification, acceptance, or approval.

3.1.4.2 High Commissioner on Human Rights

The United Nations established the Office of the United Nations High commissioner on human rights (OHCHR) with the main role to uphold and protect human rights, by working

³⁵² Ibid

³⁵³ Constitution of Kenya, 2010, s 7(1)

³⁵⁴ Public officer Ethics Act, No 4 of 2003, Preamble

³⁵⁵ Public officer Ethics Act, No 4 of 2003, s 3(4)

³⁵⁶ Ibid

³⁵⁷ Legal Notice 132/2016

closely with States by encouraging, to develop policies and institutional framework that promotes, respect and protects human rights and providing technical assistance.

3.3.4 Regional Level

African Leaders adopted the strategic policy framework in Lusaka, Zambia in July 2001, the policy framework set in place a new vision for the development of Africa, it was renamed the New African Initiative (NAI) that later changed to New Partnership for African Development (NEPAD).³⁵⁸ Develops values and monitors its implementation within the framework of the African Union.

3.1.5.1 African Peer Review Mechanism

The African Peer Review Mechanism (APRM) is a self-monitoring tool within the NEPAD.³⁵⁹ The objective of the APRM is to agree on values, practices and standards of stability both politically and economically, and sustainable development.³⁶⁰ The APRM consists of the following structures; African Peer Review, the highest decision making organ, and involves all head of State and Government.³⁶¹

3.1.5.2 African Commission on Human and People`s Rights

The African Commission on Human and People`s Rights is a quasi-judicial body, established under the African Charter on Human and People`s rights.³⁶² The African

³⁵⁸ UN General Assembly Declaration A/RES/57/2, A/RES/57/7

³⁵⁹ African Peer Review Mechanism, Adopted at the 6th Summit of the NEPAD Heads of State and Government Implementation Committee, 9 March 2003, Abuja, Nigeria, NEPAD/HSGIC/03-2003/APRM/Guidelines/OSCI

³⁶⁰The African Peer Review Mechanism (APRM): Africa`s Innovative Thinking on Governance,3, (2007)

³⁶¹Guidelines for Countries to Prepare for and to Participate in the African Peer Review Mechanism (APRM), NEPAD/APRM/Panel3/guidelines/11-2003/Doc8, adopted by the Panel Nov. 2003, 37

³⁶² African Charter on Human and People`s Rights, art 30

Commission became operational on 21st October 1986 and has a Secretariat that is based in Banjul, Gambia.

The functions of the Commission are promotion of human and people's rights, interprets the African Charter or any functions entrusted by the assembly of Head of state and government. To promote human rights in Africa, the commission collects, undertakes studies, and research through a seminar, reports submitted by state parties.³⁶³

The African Commission on Human and People's Rights, provides a special mechanism for rapporteurs, committees, and working groups, that assist the commission in the performance of its functions. This enables the Commission to have an excellent working tool, better understanding of the human rights in Africa in line with African Commission and Human and People Rights rules of procedure, 2020.³⁶⁴

3.1.6 National Level

3.1.6.1 Judicial Service Commission

The removal of judges from office by JSC is twofold, either by receiving petitions from the Public,³⁶⁵ or on self-initiative of JSC (*suo moto*).³⁶⁶ JSC receives petitions from the public on the misconduct of a judge and the petition must be in writing, spelling out the misconduct committed by the Judge.³⁶⁷ The allegations are inquired by JSC on a

³⁶³African Charter on Human and People's Rights, art 62

³⁶⁴ Rule 1, 3, 7, 24

³⁶⁵ Constitution of Kenya, 2010, art 168(2)

³⁶⁶ Ibid

³⁶⁷ Constitution of Kenya 2010, art 168(3)

preliminary basis to establish a prima facie case.³⁶⁸ The process guided by fair administrative action.³⁶⁹

When judicial misconduct is established through preliminary inquiry and JSC is satisfied,³⁷⁰ the petition is sent to the head of state with recommendations to purge the Judge and establish a Tribunal within 14 days.³⁷¹

3.1.6.2 The Tribunal

The Tribunal is constituted by the President and published in a Gazette notice,³⁷² by appointing seven members, within 14 days of receiving recommendations from JSC. The Tribunal expeditiously hears the matter and reports back to the president.³⁷³ The Tribunal is guided by its own rules of procedure,³⁷⁴ provides the guidelines for the Tribunal to follow, when investigating the conduct of a Judge.

3.1.6.3 The Supreme Court

Judges dissatisfied with the findings of the Tribunal has a right of an Appeal to the Supreme Court within 10 days.³⁷⁵ The petition should set out concisely, the errors committed by the Tribunal and the decision of the Court is final.³⁷⁶

The Judge is dismissed from office after all appellate remedies are exhausted, suffice to note the High court of Kenya has supervisory jurisdiction against all judicial and quasi-judicial bodies except the Appellate Court and Supreme Court due to the doctrine of

³⁶⁸ Constitution of Kenya, 2010, art 168(4)

³⁶⁹ Article 47(1), Constitution of Kenya, 2010, art 47(1)

³⁷⁰ Constitution of Kenya, 2010, art 168 (4)

³⁷¹ Constitution of Kenya, 2010, art 168 (5)

³⁷² Constitution of Kenya, 2010, art 168 (5) (a), (b)

³⁷³ Constitution of Kenya, 2010, art 168 (9)

³⁷⁴ Judicial Service Act, No.1 of 2011 see also the second schedule

³⁷⁵ Constitution of Kenya, 2010, art 168 (8)

³⁷⁶ Constitution of Kenya, 2010, art 163 (7)

precedent.³⁷⁷ All persons are allowed to invoke the Jurisdiction of the High Court,³⁷⁸ especially when they are apprehensive their fundamental rights have been violated, threatened or infringed by JSC.

3.2 Analysis

The Constitution of Kenya recognizes international law forms part of the laws of Kenya.³⁷⁹ International instruments have provided the necessary institutional framework in place to govern judicial independence and accountability consequently, The Constitution of Kenya has an elaborate JSC, with the authority to discipline judges by initiating their ousting, however the removal process has been a case of controversy.

Justice Nancy Barasa was appointed as the Deputy Chief Justice and Judge of the Supreme Court of Kenya, after promulgation of the Constitution 2010, which established the Supreme Court. She was accused of gross misconduct and abuse of office,³⁸⁰ after threatening to shoot a guard at a village market after she requested to inspect her bag. Justice Nancy Barasa denied her the permission and thereafter pinched her nose.

The Chief Justice formed a subcommittee of JSC, which independently investigated her conduct, and reported the findings to the JSC with the verdict that a prima facie case was established. The Deputy Chief Justice filed a constitutional petition in the High Court,³⁸¹ arguing that the recommendations of JSC were unconstitutional, lacked merit both in substance and in the procedure, fair hearing was denied and the need of the court

³⁷⁷Owners of Motor Vessel Lilian S vs Caltex oil (Kenya) Limited [1989] eKLR

³⁷⁸ Constitution of Kenya, 2010, art 165(2) (a), (b), (d)

³⁷⁹ Constitution of Kenya, 2010, art 2(5) stipulates all international conventions, treaties signed and ratified by Kenya shall form part of the Laws of Kenya

³⁸⁰Nancy Makokha Barasa v Judicial Commission Service & 9 Others [2012] eKLR [5]

³⁸¹ Ibid

to establish the appropriate standard for the ousting of a Judge from office. The High court held that it had sufficient jurisdiction to handle the matter, since the court was sitting as a constitutional court and not as an appellate court, regarding the findings of the JSC.

Justice Philip Tunoi, a Supreme Court Judge, was suspended from office by the President on allegation of receiving 200 Million Kenyan Shillings, to rule in favour of Hon. Evans Kidero in an election petition.³⁸² Hon. Evans Kidero was then Governor Nairobi County. JSC initiated the process of removing the Judge from office after the allegation of corruption sparked an outburst in the mainstream media.

The Judge opted to retire and the Tribunal suffered a natural death. A lot of questions were left unanswered from the initial process of receiving complaints, assessing the veracity of the evidence of a single witness and finally, recommending the suspension of the Judge and formation of the Tribunal by the President. The process of establishing a prima facie case of judicial misconduct in the Tunoi case by JSC has puzzled the minds of various constitutional scholars.

The Tribunal shared a confidential report with the President. The report has never been made public and the contents of the report is still a mystery. The task of the Tribunal was limited to investigating the conduct of the Judge and the findings were to be made public, despite the Judge retiring at the age of seventy years as stipulated by the Constitution of Kenya.

³⁸² Evans Odhiambo Kidero & 4others v Ferdinand Ndungu Waititu & 4 Others (2014) eKLR.

Justice Ojwang, a supreme court Judge,³⁸³ JSC initiated his removal process from office after the Judge failed to appear in person to defend the allegations levelled against him, instead, the judge choose to send his counsel to represent him before JSC. The allegations included issuing a favourable order against the Governor of Migori County, Hon. Obado after the Governor built a tarmac road leading to the Judge`s Private residence in Migori, as a form of bribe, failure to honour summons, issued by JSC to appear in person.

The President formed a tribunal to inquire into the conduct of the Judge based on the recommendations of the JSC. The tribunal deliberated on the allegations levelled against the Judge and observed as follows, JSC received the complaint in March 2016 and the deliberations were done in March 2019 an inordinate delay for three years was never explained satisfactorily, the process of removing the Judge was devoid of fairness, substantive and procedural justice, lack of regulation to investigate the complaints of judges had left the judges exposed to interference, intimidation by JSC, if left unchecked will substantially erode the independence of the Judges as held in *Rees v Crane*.³⁸⁴

3.3 Conclusion

The JSC is a constitutional institution charged with the function of initiating the removal of Judges from office. No clear parameters and guidelines exists to guide the process of initiating the removal of Judges from office, despite the International instruments calling

³⁸³Gazette Notice No. 3035 of 29th March, 2019 Appointment of Chairperson and Members of a Tribunal to Investigate the Conduct of Justice Jackton Boma Ojwang Judge of the Supreme Court of Kenya (Government Printers, 2019)

³⁸⁴ “The commission before it represents must be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively, the equivalent of impeachment proceedings. Both in deciding what material it needs in order to make such a decision and in deciding whether to represent to the President, the commission must act fairly.”

upon judicial bodies to be independent and impartial, promote fair hearing and rules of natural justice (procedural fairness).

The International legal instruments expect the removal of judges from office to be limited to gross misconduct and misbehaviour which brings disrepute to the judiciary and causes public trust to dwindle, this includes corruption moreover, the Impartiality of a judge should be beyond reproach, and petitions that cast aspersion on the integrity of the Judge should not be entertained rather JSC should undertake to conduct a factual and legal basis investigation on preliminary inquiry where unmerited petitions are thrown out.

The sufficiency of laws is never prevention to an institution that desires to act with diligence but the political environmental plays a vital role, considering JSC as an institution that deals with the affairs of the Judges, ranging from recruitment, promotion, and transfer and initiating their removal from office due to judicial misconduct.

CHAPTER FOUR

CASE STUDY ON THE REMOVAL OF JUDGES FROM OFFICE BY JUDICIAL SERVICE COMMISSION IN KENYA

4 Introduction

4.1 Case law on procedural fairness under fair Administrative action

This chapter argues, although the Constitution grants JSC power to initiate the ousting of Judges from office when satisfied with the judicial grounds, nevertheless, Constitutional scholars hold the removal of judges from office is shrouded in mystery, and lacks a clear standard of proof because the courts of law are reluctant to hold JSC as their employer, accountable.

This chapter is divided into three thematic areas, irrationality, procedural impropriety and illegality to sufficiently address the research objectives. The themes capture the core elements of Administrative action and it explain the fragmented jurisprudence by Court of law are as a result of avoiding to hold JSC accountable to the law.

Case study on irrationality will be demonstrated in the case of *D.K Njagi Marete v Judicial Service Commission*,³⁸⁵ and *Martin Muya v Judicial Service Commission*,³⁸⁶ while procedural impropriety will be explained in the decision of *Joseph Mbalu vs Attorney General & Another*,³⁸⁷ and finally, the case on illegality will be manifested in

³⁸⁵ (2019) eKLR

³⁸⁶ (2019) eKLR

³⁸⁷ (2014) eKLR

the case of *Philomena Mwilu vs Director of Public Prosecutions & 3 Others*,³⁸⁸ and *Apollo Mboya vs Judicial Service Commission & 6 Others*.³⁸⁹

4.3.1 Irrationality

Denotes a decision that is so outrageous and defies logic, such that a sensible person directing his or her mind to the question cannot arrive at that particular outcome.

4.3.2 D. K Njagi Marete v Judicial Service Commission³⁹⁰

The firm of Kaplan and Straton Advocates filed a complaint to JSC, questioning the conduct of Justice Njagi Marete, in the manner the Judge handled the following two cases in Kericho, ELRC Misc. Application No.6 of 2017 and ELRC Misc. Application No.7 of 2017. The Judge was aware of an injunctive order issued by a different court preserving the status quo of the two suits.

Justice Njagi Marete disregarded the injunctive order and issued ex parte orders which had the repercussion of setting aside the injunctive orders. No reasons were offered by Justice Marete, despite the Advocates informing him of the consequences of the orders he issued.

JSC investigated the matter and found the conduct of the judge questionable and requested the head of state to constitute a tribunal to investigate his conduct. Justice Marete filed an Injunction at the Employment and Labor Relations Court in Nairobi, praying for the following orders that an injunction is issued against JSC sending

³⁸⁸ (2019) eKLR

³⁸⁹ (2016) eKLR

³⁹⁰(2019) eKLR

recommendations to the President to constitute a Tribunal and secondly, if the Tribunal has already been constituted be stopped from investigating his conduct.

The issues before the court were whether JSC violated fundamental freedoms of the Petitioner, whether the petitioner established a prima facie case and whether the judge was entitled to the orders sought.³⁹¹

The Court held that failure to be given written reasons by JSC never violated the constitutional rights of Justice Marete. JSC acted accordingly by sending the petition to the head of State to constitute a Tribunal since the role of JSC was only limited to forwarding the petition to the president after being satisfied the grounds for judicial misconduct had been established as provided in the Constitution.³⁹²

The court further provided that, JSC had no mandate of providing written reasons to the Judge after conducting its preliminary investigation. Justice Marete claimed he learnt of a tribunal being constituted through a press statement issued on 9th May 2019 by the Chief Justice, Hon.David Maraga.³⁹³ The Court held the function of the head of State was to inform the Judge of his suspension through a Gazette notice when constituting a Tribunal.³⁹⁴ The Court never interrogated whether a prima facie case of judicial misconduct was established.

The Court adopted a narrow interpretation of the Constitution, as opposed to holistic interpretation by limiting itself to article 168(4) of the Constitution, despite article 259

³⁹¹ D.K Njagi Marete v Judicial Service Commission [(2019) eKLR.

³⁹² Constitution of Kenya, 2010, art 168 (1), (2), (4)

³⁹³<https://citizentv.co.ke/news/jsc-recommends-removal-of-3-judges-over-misconduct-244753/> Accessed on 25th June, 2020

³⁹⁴Article 168 (9) constitution of Kenya, 2010

providing the manner of interpreting the constitution however, the Court still chose the narrow approach, it overlooked Articles in the Constitution,³⁹⁵ despite the fact that right to be issued with written reasons which is emphasized by the next Article.³⁹⁶ The court is usually called upon to elucidate the Constitution harmoniously, holistically and purposively.³⁹⁷

The judgment of the Court brought into sharp focus the interpretation of the Constitution by the Judge. No satisfactory reasons were issued as to why the petition was filed at the Employment Court.³⁹⁸ Yet it was never an employment dispute rather a Fair administrative action dispute within the judicial review jurisdiction. The question of Jurisdiction was never sufficiently addressed. The above issues were raised in the Tribunal. The Tribunal vindicated Justice D.K Marete and he was reinstated as a Judge.

4.3.3 Martin Muya v Judicial Service Commission & another³⁹⁹

Justice Muya was accused of gross misconduct in the manner in which he handled the following cases in Bomet: **High Court Civil Case No.4 of 2016, Alfred Kipkorir Mutai & Kipsigis stores limited vs NIC Bank Limited and HCCC No.2 of 2016, Alfred Kipkorir Mutai & Another vs KCB Bank Limited.** The judge issued an unfavourable ruling to the detriment of the Banks, without giving any reasons. There were an inordinate delay of five months but still the Judge never availed the reasons for the ruling, despite numerous requests.

³⁹⁵ Constitution of Kenya, art 47(1) calls for administrative action that is expeditious, efficient, lawful, reasonable under

³⁹⁶ Constitution of Kenya, 2010, art 47 (2)

³⁹⁷In the Matter of Interim Independent Electoral Commission [2011] eKLR

³⁹⁸ Constitution of Kenya, 2010, art 162 (2) (a)

³⁹⁹[2019] eKLR

Counsel representing NIC Bank (Onyinkwa & Company Advocates), wrote a letter to the CJ requesting his intervention in the matter by ‘recalling the file and taking requisite administrative action to remedy the situation.’⁴⁰⁰ The Chief Justice referred the letter to JSC and JSC requested the Judge to respond to the allegations through the subcommittee of JSC. After the deliberations of the subcommittee of JSC. The judge was found to have misconducted himself.

The second complaint was brought by KCB Bank through the firm of Mukite Musangi, the facts were similar to NIC Bank, with the same party (Alfred Kipkorir Mutai) and it was presided by Justice Martin Muya.

The allegations were found to have established a prima facie case of judicial misconduct,⁴⁰¹ and consequently a petition was sent to the President to constitute a Tribunal. Justice Martin Muya filed a petition at the court, claiming his constitutional rights were violated, including fair hearing and administrative action. JSC filed an objection questioning the authority of the High court to handle the matter.

The court held the ousting of a judge from office is a constitutional function of the JSC. It initiates the process, and in case of any dispute, the matter lies at the Employment Court as opposed to the High Court since the bone of contention was Employment. The High Court held a judge is an employee for the reason that, JSC exercises some form of special supervision and control over the judge. The dispute between an employer and

⁴⁰⁰Martin Muya v Judicial Service Commission & Another [2019] eKLR.

⁴⁰¹Muya (n 326)30.

employee is properly handled by the Employment Court and the High Court lacks jurisdiction to handle employment matters.⁴⁰²

The consequences of the decision caused the Petition to be transferred to the Employment and labour relations court, considering the doctrine of precedent, the case of *D.K Njagi Marete vs Judicial Service Commission*.⁴⁰³ Was litigated at the Employment Court. The danger of the decision was, all disputes involving Judges and JSC were to be resolved at the Employment and Labour Relations Court. This was a bad law set by Justice Weldon Korir in 2019 and upheld by Justice Maureen Onyango of the Labour and Relations Court in Nairobi.

Justice Weldon Korir failed to address himself to the consequences of transferring the case to the Employment and Labour Court, despite the articles of the Constitution providing a contra view.⁴⁰⁴ Previous disputes between Judges and JSC were litigated at the High court, further Justice Korir, misdirected himself to what is a justifiable claim.

4.3.4 Martin Mati Muya v Judicial Service Commission & another⁴⁰⁵

Following orders of the High Court, the matter was transferred to the Employment and Labour Relations Court for determination. Through an amended plaint, the Petitioner sought for the protection of the following rights; fair hearing, administrative action and a

⁴⁰² Constitution of Kenya, 2010 Art 165 (5) (b), see also Owners of Motor Vessel Lilian S vs Caltex Oil (Kenya) Ltd [1989] eKLR. considering jurisdiction is everything without it, a court has no power to make one more step, it downs its tool.`

⁴⁰³ [2019] eKLR.

⁴⁰⁴ Constitution of Kenya,2010 Art 23(1) and Art 165

⁴⁰⁵ [2019] eKLR

declaration that the report by the subcommittee of the JSC offends the Constitution of Kenya.⁴⁰⁶

The following issues arose for analysis before the Court; whether JSC violated the rights of the Petitioner while investigating the allegation of judicial misconduct?, Whether the report by the JSC was tainted with illegality, unfairness and abuse of due process? And finally at what point does JSC become *functus officio*?

The Constitution of Kenya provides for the process of initiating ousting of judges from office. JSC receives petitions from the members of the public or acting on its motion, it ensures the petitions establish grounds for the ousting of Judges from office. If satisfied the facts disclose grounds for judicial misconduct, it forwards the petition to the President with recommendations to purge the Judge from office and constitutes a Tribunal within 14 days. Further, the Court relied on the Rule in the *Nancy Barasa Makokha vs Judicial Service Commission*,

*“JSC’s role is not that of a conveyor belt or messenger but plays the role of a sieve, that before sending the petition to the president, either from any person or its investigation, it must evaluate the veracity of the allegations made against the judge that it discloses grounds for removal of a judge and the complaint merited to be forwarded to the next stage”*⁴⁰⁷

The court held that the function of JSC is limited to initiating the removal of Judges from office in line with Article 168, meaning JSC received the petition from the public through the firm of Mukite Musangi and the firm of Onyinkwa and company Advocates. The

⁴⁰⁶ Constitution of Kenya, 2010 art 168(1)

⁴⁰⁷ [2012] eKLR

allegations were investigated on a preliminary basis and a prima facie case of judicial misconduct was established. The role of JSC was completed by forwarding the Petition to the President and inevitably JSC became functus officio.

The court was of the view since the petition was sent to the Chief Justice as opposed to JSC, was of no consequence considering the Advocate wanted an audience with the Chief Justice in line with the civil procedure rules, 2010.⁴⁰⁸ The Advocate never contemplated the ousting of the Judge from office rather sought the intervention of the Chief Justice additionally, JSC initiated the removal of the Judge on its motion.⁴⁰⁹

The court's decision brought great ramifications by holding that, JSC when investigating the conduct of the judge, does not need to provide written reasons for its decisions, or allow examining of the witnesses or the evidence by the Judge and the principles of fair administrative actions are not binding, especially on JSC when initiating the ousting of the Judges from office and this is in conflict with the Constitution.⁴¹⁰

Lady Justice Maureen Onyango in her judgement in the case of Justice *D.K Marete* and *Justice Martin Muya* misdirected herself by considering irrelevant and ignoring relevant facts in the two judgements, it is expected that the provisions which protect rights and freedoms. The judge is required to give a generous interpretation to enjoy full benefit.⁴¹¹

The judge lacked Jurisdiction to handle the dispute in question and the judge ignored the principles of legitimate expectation, proportionately and most importantly, the judge

⁴⁰⁸ Order 21 Rule 1

⁴⁰⁹ Constitution of Kenya, 2010 art 168 (2)

⁴¹⁰ Constitution of Kenya, 2010 art 172(1) JSC promotes and facilitates the independence and accountability of the Judiciary through efficient, effective, and transparent administration of Justice in Kenya.

⁴¹¹ *Mumo Matemu v Trusted Society of Human Rights Alliance and others* [2013] eKLR see also Constitution of Kenya, 2010 art 259

never addressed whether JSC should be guided by rules of fair administrative action when initiating the removal of Judges from office.

4.4 Illegality

Decisions made are required to be understood correctly within the law that regulates the power to make the decisions so as to avoid the temptation of overstepping its mandate (*ultra vires*) or failing to act when called upon (*intra vires*). Discretion must be exercised judiciously and not capriciously.

4.4.1 Philomena Mwilu vs Director of Public Prosecutions & 3 Others⁴¹²

Deputy Chief Justice and the Vice President of the Supreme Court of Kenya.⁴¹³ Lady Justice Philomena Mbete Mwilu was charged in the Chief Magistrate Court in Nairobi, jointly with Stanley Muluvi Kiima,⁴¹⁴ for the following offences; failure to pay stamp duty to Kenya Revenue Authority amounting to Ksh 12 Million, abuse of office and obtaining execution documents by pretence. The Deputy Chief discontented by the criminal Charges filed a Constitutional petition at the Court in Nairobi.⁴¹⁵ Pleading with the Court to grant her the following orders.

The criminal charges against her are declared unconstitutional, unlawful and an abuse of court process, prohibit the Director of Public Prosecution from proceeding with criminal case No.38 of 2018. Republic vs Philomena Mwilu.

⁴¹²[2019] eKLR.

⁴¹³ Constitution of Kenya, 2010 art 163 (1) (b)

⁴¹⁴ Criminal case No.38 of 2018

⁴¹⁵ Philomena Mwilu vs Director of Public Prosecutions & 3others[(2019) eKLR

The court framed the following issues for determination; whether a factual or legal foundation exists, for the criminal charges against the Deputy Justice, or were politically instigated by the Executive? Whether the Director of Public Prosecution, Directorate of Criminal Investigation did follow the proper laid procedure in considering the criminal charges against the Deputy Chief Justice? And finally, whether the DPP should have reported the conduct of the Judge to JSC first, before arraigning her in Court?

The court adopted the rule on purposive and harmonious interpretation, which provides when interpreting the Constitution, any conflicting provisions of the Constitution, should be interpreted harmoniously, not in isolation or allowing the Articles in the Constitution to defeat each other, but sustain each other, further the court relied on the rule in *Joyce Cherop v Kenya power and lighting company*,⁴¹⁶ which held;

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and how they are alleged to be infringed.”

The Court held that illegally obtained evidence cannot be sustained in the court of law. The Director of Criminal Prosecution used a different court order to search the Accounts of the Deputy Chief Justice, and that was abuse of court process and lack of professionalism on the part of the Detectives, when conducting the investigation the evidence was illegally obtained by the detectives.

⁴¹⁶ [2019] eKLR 154

The Court held that Charges of forgery and failure to pay stamp lacked factual and legal basis for prosecution considering; the transfer of land can never take place without paying stamp duty unless exemption is sort. It is the duty of the Government through, relevant agencies or Departments to ensure stamp duty is paid by the buyer before a Title deed is processed and issued.

The Court further held that the Prosecutorial power belongs to the DPP and that power must be exercised with discretion not to cause suffering or embarrassment to innocent members of the Public or to settle scores. In such moments the authority of the High court is invoked to remedy excess power of the DPP. The Courts must strike balance not to hinder the DPP from exercising their constitutional duties and protecting innocent Kenyans from unfair prosecutions.

The court held that the Deputy Chief Justice failed to show and prove how the hand of the Executive, would find itself in the allegations facing her despite the President threatening the Judiciary to revisit after the Supreme Court Nullified the Presidential election 2017.

The High court's ruling found the Judge, to have abused her office in the manner in which she obtained the loan facility amounting to over Ksh. 140Million. It was processed without delay, accompanied by favourable interests and zero collateral security. The court held there was an element of suspicious transactions. The court was careful to warn itself on the danger of assessing the veracity of the evidence presented by DPP. It was not the trial court, but assessing evidence on a preliminary inquiry.

The Court ruled with finality that, a judicial officer is only immune from prosecution on matters done faithfully or omitted to be done in good faith. There can be sued for acts that go against the letter and spirit of the Constitution or violate any statute or International law since Judges are not above the law and are called upon to uphold the law both in their public and private lives.⁴¹⁷

The Director of Public Prosecution is a constitutional office thus not subject to any state organ or authority. The prosecutorial powers should be exercised in good faith and with impartiality to promote public confidence and Judges being state officers should act in a manner that promotes respect and dignity to the office.⁴¹⁸

The decision of the court brought out the meaning of a preliminary inquiry and assessing the evidence on a prima facie basis. The two concepts have evaded JSC for a long time, since its inception in 2010. The Court warned itself on the dangers of questioning the veracity of evidence as that is the function of the trial court. Their role was limited to assess whether there was a factual and legal basis in the charge sheet and whether evidence on record merited on face value, though some charges were thrown out and remained only two criminal charges abuse of office,⁴¹⁹ and obtaining of execution documents by pretence contrary to section 314 of the Penal code Cap 63.

The Court although allowed the Petition to succeed for the reason that DCI used a wrong court order to access the accounts of the Deputy Chief Justice and courts have held illegally obtained evidence is inadmissible, however relevant. The court held that offences committed by the judge outside the scope of judicial functions shall be

⁴¹⁷ Constitution of Kenya, 2010, art 75 (1) (a), (b), (2) (a)

⁴¹⁸ Constitution of Kenya, 2010, art 73(1) (a), (i), (iii), (iv), 2 (c) (i), (ii)

⁴¹⁹ S46, The Anti-Corruption and Economic Crimes Act, 2003

investigated by the DCI without reporting first to the JSC, while those offences which are committed by the Judge in the normal cause of duty and relate to the status of the Judge must be reported to the JSC.

The court demonstrated that it is not proper for both disciplinary hearing and criminal trial to run concurrently, one should be pursued and followed to its logical conclusion, despite the Court`s ruling the following questions remained unanswered. Why has JSC on its motion,⁴²⁰ not initiated the removal of Justice Philomena Mbete Mwilu from office? Despite the overwhelming evidence against her on gross misconduct and abuse of office?

4.4.2 Apollo Mboya vs Judicial Service Commission & 6 Others⁴²¹

Justice Njoki Ndung`u a Supreme Court Judge, together with her colleagues Justice Mohamed Ibrahim, Justice Jackton Ojwang, and Justice Smoking Wanjala participated in an illegal strike, on the week of 28th September 2015 to 2nd October 2015, as a way of airing their grievances to JSC, in the manner it had handled the retirement of their colleagues Justice Kalpan Rawal and Justice Philip Tunoi, both were Judges of the Supreme Court.⁴²²

Lawyer Apollo Mboya filed a Petition challenging how JSC had handled the petition and reached a decision to admonish the three Judges, particularly, Justice Njoki Ndung`u. According to Lawyer Mboya, the acts of the three Judges, amounted to gross misconduct and misbehaviour and was shocked when JSC reprimanded the three Judges instead of

⁴²⁰ Constitution of Kenya, 2010, art 168 (2)

⁴²¹ [2016] eKLR.

⁴²² Apollo Mboya vs Judicial Service Commission & 6 others [2016] eKLR.

petitioning the President to purge the Judges and form a Tribunal to investigate their conduct.

Justice Njoki Ndung`u filed a Constitutional Petition, claiming the procedure in which JSC used to admonish her was devoid of fair hearing, fair administrative action and was denied an opportunity to be heard by JSC. The two petitions were consolidated by the court and the following issues arose for determination.

Whether JSC had the discretion to admonish a judge after deliberating on the conduct of the judge at the preliminary stage? Whether allegations of misconduct against a judge can be postponed by JSC to a futuristic date or be heard in piecemeal? Whether the failure of JSC to supply the outcome of its decision to Justice Njoki amounted to inordinate delay? Whether JSC can review a matter that has been lawfully concluded by the Judges?

The court extensively relied on the rules of natural justice to answer the above issues,⁴²³ further the court adopted the literal interpretation. In light of the functions of the JSC when initiating the ousting of the Judges.

The High Court held that the ousting of a judge from office lies with JSC,⁴²⁴ as read together with the Judicial Service Act.⁴²⁵ The role of JSC is limited to initiating the removal by receiving petitions from the public or on its initiative, investigates petitions, by analyzing the petitions, whether they disclose judicial misconduct or not, when

⁴²³ the right to be heard by an unbiased tribunal, the right to have a notice of charges, and the right to answer to those charges,

⁴²⁴ Constitution of Kenya, 2010 art 168 (4)

⁴²⁵ No.1 of 2011

satisfied they recommend to the head of State to purge the Judge and constitute a Tribunal within 14 days.

The function of JSC ends at the point where a representation to the head of State to form a Tribunal (*functus officio*), besides that, JSC cannot admonish a sitting Judge for two reasons, first, it Lacks Jurisdiction to punish a judge since Jurisdiction is everything, where the constitution or Statute is silent, then JSC cannot abrogate itself the authority to punish a judge.

The court of law was of the view that JSC needs to publish regulations.⁴²⁶ These regulations ensure Judges are aware of the procedure at hand and be able to predict the outcome of the procedure. A clear disciplinary procedure with an adequate mechanism for a fair hearing, is the hallmark of fair administrative action.⁴²⁷

JSC role is limited to initiating the removal of the Judges from office. It has no role to review the decisions of Judges issued by a competent judge. JSC must resist the temptation of police marking judges, judges have decisional independence to hear and determine cases impartially, without fear or coercion from internal and external forces. JSC is neither an appellate court nor a judicial organ with powers to evaluate the decisions of Judges.

The Court issued the above decision for the following reasons, the constitution of Kenya established JSC, with the duty of ensuring efficient and effective administration of Justice in Kenya and JSC must be accountable by ensuring all judges are given the right to be heard, fair hearing and prompt ruling with written reasons for a decision.

⁴²⁶ Judicial Service Act, S47(2) (c)

⁴²⁷ Constitution of Kenya, 2010 art 47(1),(2)

JSC is answerable to the people of Kenya, by ensuring transparency in the manner in which the discipline of Judges is conducted. The public perception of the Judiciary dwindles when Kenyans feel Judges are unfairly targeted for removal, especially after issuing unfavourable decision against JSC.

The above decision exposed the weakness in JSC, how it recommended the following judges to be admonished Justice Njoki Ndung'u, Justice Jacton Ojwang and Justice Mohammed Ibrahim after finding the Judges have misconducted themselves and their behaviour unbecoming, not expected of Supreme Court Judge. JSC decided to cloth itself with excessive powers by reprimanding the judges through a letter. The same Letter was leaked to the media to embarrass the Judges and cause public ridicule, in contravention of Section 43 of the Judicial Service Act.⁴²⁸

JSC overstepped its mandated by punishing the Judges which was an exclusive domain of the Tribunal, suffice to note JSC disregarded the law in punishing the Judges. The court was at pain to understand where JSC got the power to punish the three judges since that power was foreign in the Constitution nevertheless, the court was reluctant to grant the wishes of Lawyer Apollo Mboya, of directing JSC to forward the recommendations to the President, to constitute a Tribunal.

The same will amount to sanitizing the errors done by JSC when the whole process of punishing the judges was tainted with illegality. The Court shied away from compelling JSC to reconsider its position, by repeating the inquiry into allegations of misconduct

⁴²⁸ No.1 of 2011

against the justices. The Three Judges are in office courtesy of the disregard of the substantive and procedural law by JSC.

4.5 Procedural Impropriety

Refers to the authority tasked with making decision failing to comply with the procedural rules.

4.3.1 Joseph Mbalu vs Attorney General & Another⁴²⁹

Justice Joseph Mbalu, a Judge of the High Court was accused of gross misconduct and abuse of office after various complaints were filed to JSC. The complaints arose in the manner in which the Judge had handled the following cases, Nairobi High Court Misc (JR) Application No.305 of 2012, *Republic vs Attorney General and 3 others Ex parte Kamlesh Mansukhal Damji Pattni*; Justice Mbalu caused the file to be allocated to him without knowledge and consent of duty judge and presiding Judge of the Judicial Review Division further, wrote a judgement without consent of the duty judge and presiding Judge of the Judicial review. Nairobi HCCC No.705 of 2009, *Sehit Investments ltd vs Josephine Akoth Onyango & 3others* and Nairobi HCCC No.5 of 2012, *East African Portland Cement Company vs. PS Ministry of Industry & others*. Justice Mbalu sought to influence the ruling in favour of the plaintiff through oral and text messages to Justice Leonard Njagi who was presiding over the matter.

The Judge being aggrieved with the decision of the JSC, filed a constitutional petition in the High Court at Nairobi, praying for orders of certiorari to quash the decision of JSC, an order of prohibition, stopping the Tribunal constituted from investigating his conduct

⁴²⁹[2014] eKLR.

breached his fundamental rights and freedom in the manner in which the inquiry was done by a subcommittee of JSC, for it lacked fair hearing and fair administrative action.

The following issues arose for determination; whether fair administrative action is inapplicable when initiating the removal of a judge from office? Whether JSC was culpable of undue delay in determining the complaints against the Petitioner? Whether the Judge had an entitlement to cross-examine the evidence and the witnesses during the preliminary inquiry stage before JSC? And whether the JSC was under duty avail reasons and the report of the findings?

The court adopted the Principle of harmonization, which provides a particular subject be construed as a whole in relying on the case by Kenya *Hotel properties limited v Attorney General & 5 others*.⁴³⁰ The above principle entails, where a provision in law is clear the court should never depart from (literal meaning).⁴³¹

The Court held, the roles of JSC are purely administrative, as it involves decision-making process, to assess whether the complaints received have met the standards of the commission and that would affect the rights of the Petitioner, consequently, the administrative decision must be followed to its logical conclusion as provided in the Constitution of Kenya.⁴³²

The High Court held, the decision to cross-examine witnesses is a vital right, the function of the JSC is to verify complaints, by assessing the veracity of supporting evidence received and this can be done if the Commission provides an opportunity to the Judge, to

⁴³⁰[2018] eKLR [51].

⁴³¹ Constitution of Kenya, 2010 art 259 an entrenched fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the rights guaranteed in the Constitution.

⁴³² Constitution of Kenya, 2010, art 47(1)

challenge the evidence through oral or written statements. The Commission then decides whether satisfied that grounds for judicial removal have been established or not.

The right to be given reasons is a fundamental right in an Administrative process. The affected individual must be cognizant of the evidence and facts the decision-making body relied on upon, what evidence was considered or omitted in arriving at a particular decision. The court held that to be given reasons is part of accountability, transparency and good governance as stipulated by Article 10.

The Court in its wisdom held that the power to discipline a judge is enormous and JSC must exercise it discretionary and not capriciously, by ensuring legitimate expectation, procedural fairness and accountability are placed into consideration by JSC and Judge by extension have their career, livelihood and reputation at stake.

The reasoning of the Court was JSC is an office established by the Constitution. The Constitution being the Supreme Law has established fundamental principles to guide JSC in conducting its duties, including the national values and principles; how to interpret the Constitution, and how to conduct an investigation as a constitutional office. JSC must protect fundamental human rights and the integrity of Judges when initiating their removal.

The Court set out the following procedure; the Judges be given a notice together with the allegations and supporting evidence to the allegations, given an opportunity to challenge the evidence or adduce evidence in support of their defence and if possible cross-examine witnesses and finally, the Commission to issue a written ruling with reasons and inform the judge promptly. The court called this process the hallmark of fair hearing.

The decision of the High court elaborated what is an administrative process, legitimate expectation and due process in light of judicial removal. The Court settled the role of JSC, is not to act as a conveyor belt in processing the removal of judges rather JSC should be satisfied that the petition under consideration has established a prima facie case of judicial misconduct and clear any doubts in its mind, before petitioning the President to constitute a tribunal and purge the judge.

The decision of the superior court was appealed by JSC, at the appellate court. The findings of the High Court were overturned in whole and a new Precedent was created that, the role of JSC is limited to investigating judicial misconduct on preliminary inquiry and the rest is done by the tribunal. The cross- examination of witnesses and any reservation by the Judge will be handled at the Tribunal and not by the JSC.

4.4 Lessons from other jurisdictions

The Previous section has demonstrated how the courts have interpreted the duty of JSC in initiating the ousting of Judges from office. The courts have agreed the role of JSC is to initiate the removal of Judges by analyzing the complaints on preliminary inquiry to establish a prima facie case of misconduct and it becomes functus official however during the inquiry it neither interrogates the veracity of the evidence nor employs administrative principles during the preliminary hence complicating the standard of proof.

This section will provide the best practices from New Zealand, South Africa, Trinidad and Tobago, when initiating the removal of judges from office. The selected countries have a judicial body tasked with disciplining judges and both are common law countries.

a) New Zealand

The Judicial Conduct Commissioner and Judicial Conduct Panel Act,⁴³³ (JCCJCPA) is the main legislation which establishes the Office of the Judicial Conduct Commissioner,⁴³⁴ with the duty to initiate the ousting of judges from office by receiving complaints from the Public. The Act contemplates two set of complaints, those of serious nature and those less serious in nature.⁴³⁵

The Commissioner conducts a preliminary inquiry into the allegations to ascertain whether the complaints have substance,⁴³⁶ and in the process, the Commissioner notifies the judge of the allegations and invites the judge to respond.⁴³⁷ The commissioner avails all the evidence, allows the judge to cross examine the witnesses and challenge any evidence before the Commissioner.

⁴³³ 2004

⁴³⁴ The Judicial Conduct Commissioner and Judicial Conduct Panel Act, 2004 s 7, 8

⁴³⁵ S 14,15

⁴³⁶ [https://books.google.co.ke/books?id=QxO-tWuWknUC&pg=PA73&lpg=PA73&dq=Judicial+Conduct+Commissioner+and+Judicial+Conduct+Panel+Act+2004+\(JCCJCPA\)&source=bl&ots=NT6VMIVwld&sig=ACfU3U3rRW9I5k3GdBh_PWWr7Lz7CE_TtNw&hl=en&sa=X&ved=2ahUKEwi_YG_6PnxAhXTAGMBHTRcArsQ6AEwBnoECAGQAw#v=onepage&q=Judicial%20Conduct%20Commissioner%20and%20Judicial%20Conduct%20Panel%20Act%202004%20\(JCCJCPA\)&f=false%20accessed%20on%20](https://books.google.co.ke/books?id=QxO-tWuWknUC&pg=PA73&lpg=PA73&dq=Judicial+Conduct+Commissioner+and+Judicial+Conduct+Panel+Act+2004+(JCCJCPA)&source=bl&ots=NT6VMIVwld&sig=ACfU3U3rRW9I5k3GdBh_PWWr7Lz7CE_TtNw&hl=en&sa=X&ved=2ahUKEwi_YG_6PnxAhXTAGMBHTRcArsQ6AEwBnoECAGQAw#v=onepage&q=Judicial%20Conduct%20Commissioner%20and%20Judicial%20Conduct%20Panel%20Act%202004%20(JCCJCPA)&f=false%20accessed%20on%20) accessed on 23rd July 2021

⁴³⁷ Section 14(1),(3), 15(2)(4)

After the preliminary inquiry the Commissioner can either, dismiss the complaint, refer the complaint to the head of the Bench or recommend the Attorney General to constitute judicial conduct panel to investigate the conduct of the Judge.⁴³⁸ The Commissioner must clear his/her mind when recommending the formation of a panel before the Attorney General. The representation must be necessary and justified.⁴³⁹ This powers must be exercised with a lot of discretion, considering the allegations must warrant the removal of a judge from office.⁴⁴⁰

In New Zealand the Commissioner cannot receive complaints based on the determination of the case, as it is believed that Judges have a lot of discretion when determining a dispute. Any interference in the personal independence of the judges then is a collective attack on the judiciary, hence complaints are limited to incapacity arising out of the mind or misbehaviour which puts the judiciary in disrepute.

New Zealand has published guidelines for judicial conduct, 2019 which provides how judges should carry themselves both in public and private. The Judicial Conduct Commissioner enjoys a lot of independence both financial and functional from the judiciary and Government.

⁴³⁸ Section 15(5), 17

⁴³⁹ Wilson V Attorney General [2011] NZLR 399 [42] see also Rees v Crane[1994] 2AC [193]

⁴⁴⁰ Ibid

b) South Africa

The Constitution of South Africa and the Judicial Services Commission Act,⁴⁴¹ establishes the Judicial Service Commission as the legal institution tasked with initiating the removal of judges after receiving complaints from the public.⁴⁴² The grounds for removal are two incapacity and gross misconduct.⁴⁴³ Any complaint failing outside the two parameters is considered less serious complaint and is dismissed.⁴⁴⁴

JSC investigates the complaint on a preliminary inquiry and when the complaints are affirmative then a prima facie case of judicial misconduct is established.⁴⁴⁵ During the inquiry the respondent is invited to respond to the allegations, either in writing or orally. The respondent is also given an opportunity to challenge and cross examine the witnesses and evidence, respectively.

The investigation is done by the subcommittee of JSC, which reports back to JSC after the inquiry, if the finding is affirmative it recommends for hearing by the Tribunal and when the complaint is unmerited then is dismissed.⁴⁴⁶ The fair administrative principles are taken into consideration when investigating the complaints against the Judges.

⁴⁴¹ No. 9 of 1994, see also the Preamble` provide procedures for dealing with complaints about judges; to provide for the establishment of a Judicial Conduct Tribunal to inquire into and report allegations of incapacity; gross incompetence or gross misconduct against judges`

⁴⁴² Judicial Services Commission Act,s14(1)

⁴⁴³ Constitution of South Africa, s177(1)

⁴⁴⁴ Constitution of South Africa S 15(1)

⁴⁴⁵ <https://www.athensjournals.gr/law/2016-2-3-2-Ally.pdf> accessed on 26th July 2021.

⁴⁴⁶ Judicial Services Commission Act, s 17(4)(c)

JSC has insisted the complaints must warrant the removal of the judge from office, meaning frivolous complaints concerning the merits of the case must not see the light of the day, since disgruntled parties will raise complaints for losing the case hence the grounds for removal a judge are just two.

The Court in *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province*,⁴⁴⁷ held JSC is duty bound to act in a rational and accountable manner. It should give reasons to assist rationalize the ousting of judges and allow the rebuttal of evidence by the aggrieved party. The same was held in *Judicial Service Commission v Cape Bar Council*.⁴⁴⁸

The Court held that judicial power should be exercised judiciously and not whimsically. All public authority is subject to the law and can be reviewed by the court and public bodies are not exempted from judicial review.⁴⁴⁹

c) Trinidad and Tobago

The Constitution of Trinidad and Tobago,⁴⁵⁰ establishes Judicial and Legal Service Commission with an authority to exercise disciplinary control over the judges and

⁴⁴⁷ [2011] (3) SA 538 (SCA)

⁴⁴⁸ [2012] ZASCA 115 ‘A public body created to serve the public’s interest must perform its functions openly and transparently and only reach decisions which are not irrational or arbitrary. That is consistent with a ‘culture of justifications and a central principle of accountable governance’

⁴⁴⁹ *Premier, Western Cape v Acting Chairperson, Judicial Services Commission* 2010 (5) SA 634 (WCC) [17 – 18]

officers holding the following offices, Solicitor General, Chief Parliamentary Counsel, Director of Public Prosecutions, Registrar General or Chief State Solicitor who should consult with the Prime Minister office.⁴⁵¹

The grounds for the ousting of a judge from office, include incapacity of the body, mind and misbehaviour. Judicial and Legal Service Commission receives complaints concerning the judges and investigates the complaints within a reasonable time. It informs the judge of the accusations and requests the judge to respond to the allegations. The investigations must be done on a preliminary inquiry to establish a prima facie case.

The case of *Rees v Crane*,⁴⁵² which is a celebrated case in the area of administrative law in Trinidad and Tobago. The court held that the role of Judicial and Legal Service Commission is to establish a prima facie case by assessing the evidence on a preliminary inquiry. The inquiry should not only evaluate the veracity of the evidence but also whether the evidence can lead to removal on the face value.

In *Durity v Attorney General for Trinidad and Tobago*,⁴⁵³ a distinguished magistrate, was suspended from office by the Commission because it found him guilty of misconduct, despite the suspension, there was inordinate delay in hearing the allegations.

⁴⁵⁰ 1976

⁴⁵¹ Constitution of Trinidad and Tobago, s111

⁴⁵² [1994] 2 A.C

⁴⁵³ [2008] UKPC 59

The Board held that “the constitutional right to the protection of the law and the principles of natural justice demand that particular attention must be paid to the need for fairness in the investigation based on the findings of *Rees v Crane*.⁴⁵⁴

Most importantly, the Commission must clear any doubt in its mind before representing the President to constitute a Tribunal, based with the changing nature of administrative law which has been institutionalized in many Constitutions. Fair administrative action needs to be expeditious, fair, reasonable and proportionate.

Based on the above safeguard, judges in Trinidad and Tobago are not unfairly removed from office, considering the highest court. The Privy Council established clear mechanism for the Tribunal when initiating the removal of a judge from office. The commission must be guided by fair administrative action.

4.5 Conclusion

The removal of Judges from office is still a mystery. The standards of proof vary from one case to another. The Courts were to develop principles to guide JSC when initiating the removal of Judges from office, further the courts were to effectuate the Constitutional provision on the removal of Judges from office.

The rules of natural justice provide that, no person should be condemned unheard, allowed to defend themselves, and be issued with written reasons, detailing why a

⁴⁵⁴ *Rees* (n374)

particular decision was taken. The judicial removal as per Article 168 (4) is not exhaustive. It must be read together with Article 47(1) and (2) of the Constitution of Kenya.

The Courts failed to provide answers to the following questions, what is the standard of proof to be considered by JSC?, What is the test that a prima facie case of judicial misconduct is established? And at what level is JSC satisfied that grounds of judicial misconduct have been established?

Bearing in mind, the reason the Judges filed constitutional petitions in court was to challenge the decision of JSC recommending the formation of Tribunal and mere apprehension of biases on the part of JSC.

The Court in *Rees v Crane* held that,⁴⁵⁵ JSC is under a duty to appear impartial, independent in the eyes of reasonable fair-minded people, however, Justice Ojwang failed to appear before JSC to answer to allegations of judicial misconduct but chose to send his Advocate to represent him.

JSC chased away the Advocate and petitioned the President to suspend the Judge and form Tribunal to inquire into his conduct. The Tribunal rescued the Judge, and Tribunal observed, that JSC took 3 years to consider the Petition, which was an inordinate delay, JSC acted with ulterior motives in considering the removal of the Judge from office and JSC lacked proper guidelines, when initiating the removal of the Judge from office.

⁴⁵⁵ “The commission before it represents must be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively, the equivalent of impeachment proceedings. Both in deciding what material it needs in order to make such a decision and in deciding whether to represent to the President, the commission must act fairly.”

Justice Maureen Onyango, in *Martin Muya vs Judicial Service Commission*⁴⁵⁶ and *D.K Marete v Judicial Service Commission*,⁴⁵⁷ misinterpreted the constitution and developed a shocking Jurisprudence, despite the matter being erroneously transferred to the Employment and Labor Relations Court, yet no dispute existed between JSC and Justice Martin Muya, to render it an employment dispute, preferably it was a constitutional question, challenging his removal process by JSC.

JSC filed an objection challenging the jurisdiction of the High court to handle the matter, notwithstanding Article 23 (1) and Article 165 which provides the High court with the Jurisdiction to promote, uphold and defend human rights in Kenya, Justice Weldon Korir misinterpreted the Constitution by declaring judicial removal is an employment dispute.

Justice must not only be done but must be seen to be done,⁴⁵⁸ the decision in Martin Muya was issued in per incuriam, relevant facts and precedent were never considered, when the decision was issued, additionally, the court in *Martin Muya vs Judicial Service Commission*,⁴⁵⁹ set a bad precedent but the striking one was, at the court of Appeal in *Judicial Service Commission vs Joseph Mbalu*,⁴⁶⁰ it watered down the gains made in *Joseph Mbalu vs Attorney General*.⁴⁶¹ On fair administrative action.

The Appellate Court held that the role of JSC is limited to receiving complaints, investigating the complaints at a preliminary level and when satisfied, the complaints

⁴⁵⁶ [2019] eKLR

⁴⁵⁷ [2019] eKLR

⁴⁵⁸ R vs Sussex Justices ex parte McCarthy KB256, EWHC KB1.

⁴⁵⁹ [2019] eKLR.

⁴⁶⁰ [2015] eKLR.

⁴⁶¹ [(2014) eKLR.

under inquiry establishes grounds for judicial removal, they petition the President to purge the Judge and constitute a Tribunal within 14 days.

The court further held, in case a Judge has a reservation in the manner the investigations were conducted by JSC, then those reservations will be answered by the Tribunal and not JSC, moreover, the Judge cannot cross-examine witnesses brought by JSC, since the preliminary investigation is not a trial, but to assess whether the complaint raises grounds for removing the Judge from office.

The Court held, Fair Administrative action is not under the purview of JSC when initiating the removal of Judges from office, JSC should only consider the petition and sent recommendations to the President, form a Tribunal when satisfied grounds for judicial misconduct are established then at that level JSC becomes functus official.

Justice Njoki Ndung`u, Justice Ibrahim Mohamed and Justice Jackton Ojwang were saved by JSC, despite being found to have misconducted themselves by the same JSC. JSC decided to discipline the three Judges, Justice Jackton Ojwang, Justice Njoki Ndungu and Justice Ibrahim Mohamed, all Supreme Court Judges.

JSC ignored the Constitutional provision and adopted unprocedural law to discipline the Judges, powers reserved for the Tribunal, the acts of JSC were illegal, unconstitutional and unprocedural.

Case analysis has demonstrated inadequate procedure on the proper standard of proof when initiating the removal of judges from office, considering JSC hires judges, transfer judges, promotes judges and disciplines judges. This explains why Justice Korir

transferred the case to the Employment Court and why an appellate court overturned the decision of the court in *Joseph Mbalu v Attorney General*.⁴⁶²

The confidence of the judiciary is severely eroded when the decision-making process is subjected to inappropriate influence both internally and externally. The removal process of a judge from office must be a clear subject of the set-out standard of proof, expeditious, efficient, lawful, reasonable and procedurally fair as required by the law. The Perception that JSC lacks independence, impartiality and operates in total disregard of the law, is disturbing and unimagined.

Judicial removal is an important aspect in the administration of justice, since judges are allowed to hold office for good behaviour until retirement. When judges infringe the code of conduct or misconduct themselves then they ought to be removed from office, however the removal process must be fair, transparent and accountable. The three countries have demonstrated that a judge must be heard and must be given an opportunity to cross examine the witnesses or challenge any evidence before the judicial body conducting the inquiry.

Judicial removal is an administrative role which must comply with the principles of fair administrative action, since the removal process is traumatizing because career, livelihood and mental health of judges is involved. The process must be fair and transparent. For South Africa and Trinidad and Tobago have regulations which guide the process initiating the removal of judges.

⁴⁶² [2014] eKLR.

Kenya should borrow a leaf from the three countries in regard to establishing a standard of proof.

Previously during the Independence Constitution, the Executive was interfering with the Independence of JSC but it was tamed by Constitution 2010 currently, JSC is interfering with the independence of judges.

Who will guard the Guardians? If JSC does not grant Judges Justice, how can judges convince the natives of this country that our courts dispense Justice with impartiality?

CHAPTER FIVE

CONCLUSIONS, FINDINGS AND RECOMMENDATIONS

5.1 Conclusion

The concern of this Research project was to investigate whether JSC is bound by rules of fair administrative action when initiating the removal of Judges from the office. The appropriate standard of proof when initiating the removal of judges and the best practice in the removal of Judges.

The central principle of fair administrative action consists of the right to be heard by an independent and impartial judicial or quasi-judicial body. The right to be given written reasons for administrative action, which has the potential to adversely affect the rights of the accused person however, certain moments JSC swayed the principles of fair administrative action from the Constitution of Kenya and the traces were found in the Courts of law, unfortunately, the Courts paint a sad picture.

5.2 Findings

5.2.1 The accepted standard of proof

The Court in the following case, *In the Matter of the Interim Independent Electoral Commission*,⁴⁶³ held that the standard of proof of removing a judge from office, is neither beyond reasonable doubt nor the balance of probabilities as required in civil cases, however, JSC should only take up the matter when satisfied the petition discloses ground for removal based on clear and convincing evidence.

⁴⁶³ [2011] eKLR

The court in the decision of *Njoki S. Ndungu v Judicial Service Commission and another*,⁴⁶⁴ held that JSC has no powers to discipline a judge, the power to discipline belongs to the Tribunal which is constituted by the President under article 168(5).

JSC must assess the complaints and evidence on a preliminary inquiry, where there are clear and convincing evidence that merits forwarding a representation to the President, which should be done within a reasonable time, with no hesitation, however in instances where the complaint is trivial and lacks merit, JSC lacks the authority to admonish the judge.

5.2.2 History on the removal of judges.

Chapter two of the Research project demonstrated that the removal of judges under the Independence Constitution of 1969, was easy since the Chief Justice had the power to send representation to the President to constitute a Tribunal. Under such arrangement, the President could exercise enormous powers in removing unfavourable judges from office, considering the Chief Justice was a direct appointee of the President, the wishes of the president were the law. Perceptual, Institutional and functional Independence of the Judiciary was lost.

The legal procedure to check the excess powers of the Chief Justice when making such representations to the president was nonexistent. The independence of the Judiciary and public trust dwindled significantly. JSC under the Independence Constitution was a rubber stamp institution and subservient to the Executive, it lacked both autonomy and independence to act on its own, advice or make recommendations to the president, on

⁴⁶⁴ [2016] eKLR

matters affecting the judiciary, since all members of the JSC were appointees of the president.

Under the Constitution 2010, JSC lacked proper guidelines and regulations for assessing the complaints received in the petitions. The prima facie case of judicial misconduct kept varying from case to case based on the nature of the complaints and some complaints were trivial, to the point JSC should not have entertained them, as they fell under the province of the Judge while hearing and determining the disputes.

5.2.3 The decisions of the courts as regards the removal of Judges

The process of removing judges from office was exacerbated by the courts when it first handled the petition of Lady Justice Nancy Barasa,⁴⁶⁵ as we saw in Chapter Four. The judge held that the role of JSC is limited to establishing a prima facie case of judicial misconduct, by assessing the complaints received or on its motion, on preliminary inquiry when satisfied, a petition is sent to the President to constitute a Tribunal.

The Court of Appeal in the Petition by Justice Joseph Mutava, as it was demonstrated in Chapter four, that a judge under investigation should not be allowed to cross-examine witnesses brought by JSC, should not be given written reasons for the decision taken by JSC, the role of JSC is to establish judicial misconduct through preliminary inquiry and JSC is not a trial court to assess the veracity of the evidence or allow the witness to be cross-examined, this was a bad law by the Appellate court.

The above decision provided JSC with an opportunity to act with impunity and to disregard well-entrenched principles of Natural Justice, both under Constitution and

⁴⁶⁵ Nancy Makokha Barasa v Judicial Service Commission & 9 others [2012] eKLR.

Common law since the court that issued the decision is the second-highest court in the country and the courts below it are bound by its decision, despite being a bad law.

The reason why Judges ran to court was the apprehension that JSC had violated the constitution by denying them the right to a fair hearing, access to justice, and an opportunity to be heard. The courts have failed to address itself on the test of apprehension since every inquiry JSC has handled has found itself in the Court of Law and a reasonable and objective person, directing his mind to the question in dispute, would be left with unanswered questions.

The principles that were set in Lady Justice Nancy Barasa were subsequently used in all other disputes, except for *D.K Marete vs Judicial Service Commission*,⁴⁶⁶ and *Martin Muya V Judicial Service Commission*,⁴⁶⁷ as demonstrated in Chapter four, in the two fairly recent disputes (2019), prior 2019 High court ordinarily handled the dispute as it was demonstrated in the Case of Justice Njoki Ndung'u,⁴⁶⁸ Justice Nancy Barasa,⁴⁶⁹ and Justice Joseph Mutava.⁴⁷⁰

The court held that judicial removal is an employment dispute and the appropriate court to handle the dispute is the Employment and Labour Relations Court. This was a new precedent established by the court, departing from the case of Justice Joseph Mutava at the Court of Appeal.⁴⁷¹

⁴⁶⁶ [2019] eKLR

⁴⁶⁷ [2019] eKLR

⁴⁶⁸ Njoki S. Ndungu v Judicial Service Commission and another [2016] eKLR.

⁴⁶⁹ Nancy Makokha Baraza v Judicial Service Commission & 9 others [2012] eKLR.

⁴⁷⁰ Joseph Mbalu Mutava v Attorney General & another [2014] eKLR.

⁴⁷¹ Judicial Service Commission v Mbalu Mutava & another [2015] eKLR

The presiding judges for fear of holding JSC accountable for gross violation of the constitution, decided to side with JSC, since JSC is their employer and can transfer, promote or institute removal proceedings against the judges.

The Research project argues, although the Constitution 2010, grants JSC the power to initiate the removal of Judges from office, nevertheless the judges are still reluctant to hold JSC accountable for the illegal and unfair removal of judges from office because Judges are afraid of being held in contempt by their employer.

The hypothesis of the study has been proven. It has been established that JSC failed to adopt principles of fair administrative action, rule of law and good governance when initiating the removal of Judges from office.

5.3 Recommendations

5.3.1 Long term recommendations

1. JSC should publish regulations as required by Section 47(2) (c) of the Judicial Service Act, 2011. These regulations provide, the procedure of handling complaints at the preliminary stages before JSC. The Regulations should detail the standard of proof to be established, fair hearing, right to be heard and provide Judges with written reasons, detailing why a Tribunal should be formed, further JSC should inform the Judge of the evidence it relied on to arrive at a particular decision and allow the Judge to challenge the evidence through cross-examining the witnesses.
2. Tribunal should be able to issue compensation, in the event Judges are found innocent before the Tribunal since the allegations were not merited and compensation

paid by JSC considering the whole process puts career of the judge at stake and this will deter unmerited investigation.

3. Parliament in compliance with Article 168(b) should pass the Code of conduct for Judges. The Code of conduct to detail the expected conduct of Judges, while on duty and in private life. The conduct to provide an opportunity for JSC to admonish Judges for the misconduct, which does not necessitate the formation of a Tribunal. At times they are allegations which do not meet the evidential basis for the formation of a Tribunal but require admonishing.

5.3.2 Medium term recommendations

1. Judges should take mandatory courses at the Judicial training institute on Judicial Review and Fair Administrative Action, which are new developments brought into play by the Constitution, 2010. The Judges occupy a very important position in solving disputes and holding the Executive in check and accountable. Constitutional Commissions are accountable to the Constitution and administrative principles bind them.

5.3.3 Short term recommendations

1. Judicial removal should be centred on the Fair Administrative Action. Judges should be involved at every stage, JSC should deliberate on the allegation be concerned with the fairness of the whole process and involve the judge at every stage before forwarding the Petition to the President only after clearing all doubts in the mind.
2. JSC should keep the whole process confidential until it concludes the hearing unless the Judge waives this Right. The public should be informed of the Tribunal being

formed when sending the Petition to the President, to suspend the Judge and form the Tribunal. JSC should act expeditiously, efficiently and effectively when investigating the dispute.

3. JSC should evaluate the complaints presented before it and when the complaints involves judgement or ruling issued by the judge then JSC should ignore the complaint and direct the dispute be heard by the competent court.

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