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REQUIREMENT UNDER MASTER OF LAWS DEGREE**

**WOMEN REPRESENTATION IN THE HIGHEST COURTS: THE  
IMPELEMENTATION OF THE CONSTITUTIONAL GENDER QUOTA IN THE  
SUPREME COURT OF KENYA**

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**AUGUST 2018**

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## **ACKNOWLEDGMENT**

First, I thank God for the gift of life and for making it possible for this work to be completed.

I wish to express my sincere gratitude to my supervisor, Dr. Agnes Meroka of the University of Nairobi without whose guidance the quality, form and content in which this work has been presented would not have been possible. Many thanks too, for her patience. Further, I thank my reader, the former Deputy Chief Justice and Vice President of the Supreme Court of Kenya, the Hon. Lady Justice (Dr.) Nancy Baraza, for her assistance in achieving this work. I am most grateful.

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## **DEDICATION**

To my mother, Phyllis Murungi, a woman, a pillar.

To my dad (the late Mr. Moses Murungi), thank you for instilling a culture of hard work.

To my husband, Sam and my children – Brian, Viane, Allan and Joan; for the conducive environment and the great support you offered during the period of my study.

You are the reason behind my energy.

## ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women.
CJ	Chief Justice.
CKRA	Constitution of Kenya Review Act.
CKRC	Constitution of Kenya Review Commission.
CoE	Committee of Experts.
CoK	Constitution of Kenya
COVAW	Coalition on Violence against Women
DCJ	Deputy Chief Justice.
ELC	Environment and Land Court.
ELRC	Employment and Labour Relations Court.
FEMNET	National Council of Women of Kenya and Africa Women's Development and Communication Network.
FIDA	Federation of Women Lawyers of Kenya (FIDA)
FLS	Forward Looking Strategies.
IEBC	Independent Electoral and Boundaries Commission.
IERC	International Environmental Law Research Centre.
JSA	Judicial Service Act.
JSC	Judicial Service Commission.

KHRC	Kenya Human Rights Commission.
KNHREC	Kenya National Human Rights and Equality Commission.
KTN	Kenya Television Network
KWJA	Kenya Women Judges Association.
MDAs	Ministries, Departments and Agencies.
NGEC	National Gender & Equality Commission.
PSC	Public Service Commission.
SA	South Africa.
SCOK	Supreme Court of Kenya.
UK	United Kingdom.
UK	United Kingdom.
UN	United Nations.



## LIST OF LEGAL INSTRUMENTS

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Government of Kenya, *Supreme Court Act* No. 7 of 2011 (Government Printers 2011).

Government of Kenya, *The Constitution of Kenya Review Act* Chapter 3A of the Laws of Kenya (Government Printers 2009).

## CASE LAWS

1. *Federation of Women Lawyers of Kenya (FIDA) & Others v Attorney General & Another (FIDA Case), Petition 102 of 2011, High Court at Nairobi [2011] eKLR.*
2. *Florence Wairimu Kanyora vs Njoroge Kinyanjui, Civil Suit 11 of 2001, at High Court at Nairobi [2005] eKLR.*
3. *General Manager S Rly v Rangachari, (1962) 2 SCR 586.*
4. *Government of the Republic of South Africa & Others vs Grootboom & Others Case No.11 of 2000 LRC 2001 Vol 3*
5. *In the Matter of the Estate of Veronica Njoki Wakagoto (Deceased), Succession Cause No. 1974 of 2008 High Court of Kenya at Nairobi [2013] eKLR.*
6. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Advisory Opinion No.2 of 2012, In the Supreme Court of Kenya [2012] eKLR.*
7. *Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others, Petition 4 of 2012, Supreme Court of Kenya [2013] eKLR.*
8. *Kidero and 4 Others v Waititu and 4 Others, Petition No. 18 of 2014, Supreme Court of Kenya [2014] eKLR.*
9. *Marilyn Muthoni Kamaru & 2 Others vs Attorney General & Another, [2016] eKLR*
10. *National Gender & Equality Commission & Another v Judicial Service Commission & 2 Others (NGEC Case), Petition No 446 of 2016, High Court at Nairobi [2017].*
11. *Peter Gatirau Munya v. IEBC & 2 Others, Petition No.2B of 2014, Supreme Court of Kenya [2014] eKLR.*
12. *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others, Presidential Petition No. 1 of 2017, Supreme Court of Kenya [2014] eKLR.*

*13. Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others, Petition No. 5 of 2013, Supreme Court of Kenya [2013] eKLR.*

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## **ABSTRACT**

The promulgation of the 2010 Constitution of Kenya (CoK) brought with it new realm of governance. Amongst the changes that the CoK introduced in enhancing the role of women in leadership was not only the entrenchment and recognition of gender equality as a fundamental consideration in the political, social and economic spheres of life, but the introduction of the gender quota system. Article 27(8) of the CoK requires that not more than two thirds of members of the appointive and elective bodies should be of the same gender. Following the promulgation of the CoK, the judiciary embarked on judicial reforms and one of them was to ensure that women representation in the judiciary was enhanced. So far, the judiciary has to a large extent ensured that not more than two-thirds of the judicial officers in the Courts are of the same gender in Kenya. However, in the past two recruitment of the judges of the Supreme Court of Kenya (SCOK), concerns have been raised that the Judicial Service Commission (JSC) failed to comply with the two-third gender principle in appointing the judges of the SCOK leading to legal contestations. It is based on this legal contestations in regard to the use of the gender quotas in the appointment of the judges of the highest courts that this study seeks to interrogate. It seeks to answer the question whether gender quotas should be adopted during the appointment of judges of the SCOK by analysing the arguments for against.

## CHAPTER ONE

### 1.0 INTRODUCTION

#### 1.1 Background to the Study

The need to ensure gender equality within the judiciary has gained momentum.<sup>1</sup> While women have broken the judicial glass ceiling generally in court representation, there is national variation when it comes to representation in the highest court.<sup>2</sup> In most jurisdictions gender representation in the higher courts and senior positions in the judiciary is at stark.<sup>3</sup> For instance since independence no woman has been appointed as the Chief Justice (CJ) or Attorney General (AG) in Kenya. In the Supreme Court of Kenya (SCOK), out of the seven positions available only two are women.<sup>4</sup> In India, out of the 29 judges in the Supreme Court, only one is a woman.<sup>5</sup> The Indian Supreme Court has had only five women appointed since it was established in 1950.

Underrepresentation of women is not only rampant in developing democracies. In the United Kingdom (UK), the lack of gender diversity on the bench has raised concerns calling for the need to increase the number of women representation.<sup>6</sup> In July 2017, a historic appointment was made

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<sup>1</sup> Kirsten Adams and Andrew Byrnes (eds), *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl Child at the National Level* (Commonwealth Secretariat 2000).

<sup>2</sup> Melody E Valdini and Christopher Shortell, 'Women Representation in Highest Court: A Comparative Analysis of the Appointment of Female Justices' (2016) 69(4) Sage Journals 1.

<sup>3</sup> Geoffrey Bindman and Karon Monaghan, *Judicial Diversity: Accelerating Change* (Report of the Judicial Appointments Commission 2014).

<sup>4</sup> Ochiel Dudley, 'Unpacking the Gender Rule and the Supreme Court Advisory Opinion of December 2012: Quotas Options for the Representation of Women in Kenya' (A publication in partnership between the Heinrich Böll Stiftung, East and Horn of Africa and the African Women's Studies Center at the University of Nairobi, Policy Brief 2016).

<sup>5</sup> Arijeet Ghosh, Diksha Sanyal, Nitika Khaitan and Sandeep Reddy, 'Tilting the Scale: Gender Balance in the Lower Judiciary' (Report of the Vidhi Centre for Legal Policy 2018).

<sup>6</sup> Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (1st edn, Routledge 2014); Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: Selected Findings and Recommendations on the Implications of Gender within the Judiciary of Bosnia and Herzegovina*, (DCAF/Atlantic Initiative 2014).



in the UK as the first woman was appointed as the President of the Supreme Court.<sup>7</sup> This has been termed as historic calling for the need to increase women representation in the higher courts.<sup>8</sup> A number of countries have made steps in ensuring that at least a third of the judges of the Supreme Court are women. For instance in the United States and Canada, 3 out of the 9 judges of the Supreme Court are now women.<sup>9</sup> In countries such as Benin, Niger, Rwanda, Ghana, Nigeria, Sierra Leone, two women have served as the presidents of their highest courts.<sup>10</sup> This is a clear indication that ensuring gender representation in the Supreme Court is possible.

Supporters of gender equality in the Supreme Court argue that women bring a gender perspective in decision making enhancing the rights of women, it enhances the legitimacy of the judiciary and in doing so the judiciary is seen to provide equal opportunity to both men and women.<sup>11</sup> Critics on the other hand argue that the Supreme Court is not like any other court and it is not for everyone.<sup>12</sup> The concept of gender equality is therefore misplaced. The appointment of judges to the Supreme Court positions should be based on merit and gender is just one of the many factors that the appointive body has to take into consideration. Gender equality comes after the qualifications and the merit of applicants has been evaluated. In South Africa (SA), while the Constitution recognizes the need to take into consideration gender equality in public appointments, Dawuni and Kang indicate that in practice gender considerations is subordinate to merit and racial considerations

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<sup>7</sup> The Independent, 'Baroness Hale of Richmond becomes first woman appointed as UK's most senior judge' <<http://www.independent.co.uk/news/uk/home-news/baroness-hale-of-richmond-first-woman-appointed-britains-supreme-court-president-most-senior-judge-a7852661.html>> Accessed 2 March 2018.

<sup>8</sup> Elizabeth Gibson-Morgan, 'Gender Equality in the Judiciary in England and France: Making it a Living Reality' (2015) <<http://www.revuemiroirs.fr/links/femmes/volume2/article7.pdf>> accessed 15 January 2018.

<sup>9</sup> Fionnuala Ní Aoláin, 'More Women – But Which Women? A Reply to Stéphanie Hennette Vauchez' (2015) 26(1) The European Journal of International Law 229.

<sup>10</sup> Josephine Dawuni and Alice Kang, 'Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa' (2015) 62(2) Africa Today 44.

<sup>11</sup> Rosemary Hunter, 'More than Just a Different Face: Judicial Diversity and Decision Making' (2015) 68 Journal of Current Legal Problems 119; Ruth Cowan, 'Women's Representation on the Courts in the Republic of South Africa' (2006) 6(2) University of Maryland Law Journal of Race, Religion, Gender and Class 291.

<sup>12</sup> Julie C Suk, 'Gender Quotas After the End of Men' (2013) 93 Boston University Law Review 1123.

undermining the number of women in the Supreme Court.<sup>13</sup> These arguments continue to persist as the need to increase women representation in the Supreme Court gains more momentum.

In Kenya, the Supreme Court was established in the 2010 CoK after a long constitutional process and it is comprised of seven members, the CJ, DCJ and five judges. The Judicial Service Commission (JSC) is established under Article 171 of the CoK to recommend judges of the SCOK to the President for appointment and approval by the Parliament. In selecting the judges, the JSC is required to be guided by the principle of gender equality under Article 172(2) (b) of the CoK in addition to competitiveness. Further at the statutory level, Section 3 of the Judicial Service Act (JSA) requires the JSC and the judiciary to enhance gender equity and protection of human rights.<sup>14</sup> Section 14(1) of the Schedule of JSA further requires the JSC after the conclusion of interviews to deliberate and nominate the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya. The JSC therefore plays a critical role in the selection and appointment of judges as gatekeeper and its commitment in enhancing gender equality during the interview and the selection of judges of the SCOK, can either enhance or impede women representation.

The Constitutional requirement that the JSC be guided by gender equality in carrying out its functions is well anchored in the CoK. Gender equality is recognized as a human right and protected under the Bill of Rights.<sup>15</sup> Article 27 of the CoK provides that every person is equal before the law and has the right to equal protection and equal benefits of the law. Women and men

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<sup>13</sup> Dawuni and Kang (n10).

<sup>14</sup> In carrying out their mandate and in their internal affairs the judiciary and JSC will be guided by considerations of social and gender equity and the need to remove any historical factors of discrimination. In doing so, the JSC is required to provide for gender mainstreaming in its Regulations.

<sup>15</sup> CoK 2010, Art 21(3).

are treated as of equal status and no one should be discriminated on the basis of sex.<sup>16</sup> Gender equality is also recognized as a fundamental principle in the public service and good governance. The values and principles of public service require that the public service must afford adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women.<sup>17</sup> The JSC is also required to take into consideration the national values and principles of good governance and in particular social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalized groups.<sup>18</sup> The JSC has an obligation to abide by the general rules of international law and any treaty or ratified by Kenya promoting gender equality as required under Article 2(5) and (6) of the CoK. So far Kenya has ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).<sup>19</sup> Ensuring gender equality in the judiciary is fundamental in protecting the women right to equality, non-discrimination and enhancing good governance.

Enhancing gender equality in all spheres of life may not occur immediately as a result of the social attitudes against women in Kenya. In order to enhance gender equality, for the first time in history, Kenya introduced constitutional gender quota to increase women representation in elective and appointive bodies. Article 27(8) of the CoK requires the 'State to take legislative and other measures to implement the principle that no more than two-thirds of the members of elective and

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<sup>16</sup> Nganga Isaiah Kimani, 'Influence of Constitutional Implementation on the Promotion of Gender Equality in Kenya: A Case of Nairobi City County' (2015) 2(87) *The Strategic Journal of Business and Change Management* 1163; Emmah Chitere, 'The Role of the New Constitution in Influencing the Women to Vie for National Assembly Seats' (Degree Thesis University of Nairobi 2013).

<sup>17</sup> CoK 2010, Art 232(i)(i).

<sup>18</sup> CoK 2010, Art 10(2)(b).

<sup>19</sup> Brenda Kombo, Rainatou Sow and Faiza Jama Mohamed, *Journey to Equality: 10 Years of The Protocol on the Rights of Women in Africa* (Equality Now 2013).

appointive bodies shall be of the same gender'. Kenya is not the first country to adopt gender quotas. Gender quotas are increasingly being used around the world to increase gender equality in elective and appointive positions.<sup>20</sup> They refer to the minimum amount of representation set for women.<sup>21</sup> They take different forms; voluntary quotas, party quotas and reserved seats.<sup>22</sup> Proponents of gender quotas argue that they are temporary measure in increasing women representation until when a level playing ground between women and men is reached.<sup>23</sup>

Critics on the other hand argue that the use of gender quotas in appointive positions should be an exception as such positions are based on merit.<sup>24</sup> It is argued that, whereas the government is required to make reservations through gender quotas to enhance gender equality in appointive positions, it must take into account the need for fair administration.<sup>25</sup> In the case of *General Manager S Rly v Rangachari*,<sup>26</sup> the court held that, 'it must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency and administration'. Equality in appointive positions refers to equality of opportunity of employment and implies equality of the same class of employees and not equality between members of separate independent class.<sup>27</sup> It is imperative that when it comes

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<sup>20</sup> Susan Franceschet, Mona Lena Krook and Jennifer M. Piscopo, *The Impact of Gender Quotas* (Oxford University Press 2012); Petra Meier and Emanuela Lombardo, 'Gender Quotas, Gender Mainstreaming and Gender Relations in Politics' (2013) 65(1) *Journal of Political Science* 46.

<sup>21</sup> Morgan Clark, 'Gender Quotas: A Path to Women's Empowerment?' (2015) 10 *Vanderbilt Undergraduate Research Journal* 1.

<sup>22</sup> A good example is the 47 elective posts at the County level for women representatives in Kenya and the reserved seats for women in elective posts and public service. For instance the CoK requires that the JSC shall consist of two advocates, one a woman and one a man and one woman and one man representing the public not being lawyers.

<sup>23</sup> Susan Franceschet and Jennifer M. Piscopo, 'Gender Quotas and Women's Substantive Representation: Lessons from Argentina' (2008) 4 *Journal of Politics and Gender* 393.

<sup>24</sup> Anisa A Somani, 'The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go?' (2013) 54(4) *William & Mary Law Review* 1451

<sup>25</sup> Mona Lena Krook and Diana Z O'Brien, 'Are all President's Men? The Appointment of Female Cabinet Ministers Worldwide' (2012) 74(3) *Journal of Politics* 840.

<sup>26</sup> (1962) 2 SCR 586.

<sup>27</sup> Paula A Monopoli, 'Gender and Justice: Parity and the United Supreme Court' (2007) 8 *The Georgetown Journal of Gender and the Law* 43.

to appointive positions in the Supreme Court, gender equality is seen as subordinate to merit, qualifications and experience.

In Kenya, the requirement of gender equality in the appointment of judges was informed by the lack of gender equality in the judiciary under the old constitutional regime. The 2010 Taskforce on Judicial Reforms found that women were underrepresented in the justice sector.<sup>28</sup> It noted that there was equitable distribution of gender at the magistrate and paralegal level but not at the higher level in the judiciary.<sup>29</sup> There were no women designated as CJ, Court of Appeal judges and in the Kadhis' Courts.<sup>30</sup> Mbote and Aketch note that 'indeed women were underrepresented in the higher echelons of the judiciary and predominate in the lower cadres'.<sup>31</sup> The Taskforce on Judicial reforms recommended the need for the JSC to ensure gender parity at all levels in the judiciary as stipulated in the CoK.<sup>32</sup>

When the CoK was promulgated in 2010, the JSC embarked on the implementation of the judicial reforms under the new constitutional dispensation to enhance public confidence in the justice sector.<sup>33</sup> One of the reforms was the appointment of judges and magistrates.<sup>34</sup> In its annual reports, the JSC has indicated that it has been able to abide by the gender equality and the constitutional

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<sup>28</sup> Government of Kenya, 'Final Report of the Taskforce on Judicial Reforms (Government Printer 2010)106-107. <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf> accessed 26 February 2018.

<sup>29</sup> 2010 Taskforce on Judicial Reforms (n ) 107.

<sup>30</sup> *ibid.*

<sup>31</sup> Patricia Kameri Mbote and Migai Aketch, *Kenya: Justice Sector and the Rule of Law* (Open Society Foundations 2011) 113.

<sup>32</sup> See also Kithuri Kindiki, *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives* (Kenya Section of the International Commission of Jurists 2007); Philip Kichana (ed), *Judiciary Watch Report: Judicial Reform in Kenya, 1/2005* (Issue 3 of Judiciary Watch Series, Kenya Section of the International Commission of Jurists 2005).

<sup>33</sup> Government of Kenya, *Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017-2021* (Judiciary 2017).

<sup>34</sup> Maya Gainer, 'Transforming the Courts: Judicial Sector Reforms in Kenya, 2011-2015' (Trustees of Princeton University 2015).

gender quota that not more than two thirds of members of an elective or appointive body should be of the same gender.<sup>35</sup>

Indeed in the 2015/2016 annual report, the JSC indicates that it complied with the two-third gender principle as 61% of the judges in courts of superior courts are male while 39% are female.<sup>36</sup> Women accounted for 32% in the Court of Appeal, 43% in the High Court, 38% in the Environment and Land Court (ELC) and 23% in the Employment and Labour Relations Court (ELRC) while men accounted for 68%, 57%, 62% and 67% respectively. In the SCOK, 71% of the judges were male while women accounted for 29% according to the JSC 2015-2016 annual report. At the subordinate level, the gender gap between the male and female was very small, male accounted for 50.4% while the female magistrates accounted for 49.6%. The distribution by gender in the magistrate courts indicate that women were more than men in the Chief Magistrates Court, (54%), Resident Magistrates Court (61%) and Senior Principal Magistrates Court (54%).<sup>37</sup>

While the JSC has to a large extent ensured that it abides by the constitutional gender quota, the appointment of judges of the SCOK has raised concerns as to whether its representation reflects the two-third gender principle. Since the SCOK was established, the JSC has recommended judges for appointment on two occasions. The JSC in July 2011 recommended five persons to the President for appointment as judges of the SCOK, one of whom was a woman. In June 2016 three vacancies occurred in the Supreme Court following the retirement of the CJ, DCJ and a judge. On these two occasions these recommendations triggered constitutional petitions on the grounds that the recommendations did not comply with the two-third gender principle.

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<sup>35</sup>CoK 2010, Article 27(8).

<sup>36</sup> Government of Kenya, *Annual Report and Financial Statements: 2015-2016* (Judicial Service Commission 2017)13.

<sup>37</sup> *ibid* at p14.

In the first occasion, the Federation of Women Lawyers of Kenya (FIDA) approached the Court alleging that the JSC had failed to meet the constitutional threshold of the two-third gender principle when appointing the judges of the SCOK. In the case of the *Federation of Women Lawyers of Kenya (FIDA) & Others v Attorney General & Another (FIDA Case)*,<sup>38</sup> FIDA argued that the JSC had failed to take into consideration the ‘correct arithmetic/mathematics of the Constitutional requirements of gender equality’.<sup>39</sup> In rejecting the petition, the Court held that the JSC had conducted the shortlisting, the interviews and the recommendations of the five SCOK in accordance with the Constitution, Part V and Section 30 of the JSA 2011. The court provided that judicial appointments should be based on merit first and not on the concept equality alone. The Court stated that, ‘we reckon that judicial appointments should be based on merits, nondiscrimination and they must reflect the diversity of our people but in this case we have no evidence that JSC in the exercise of its functions under Article 172 as read together with the JSC Act failed to comply with Article 27’<sup>40</sup>. The court further asked the petitioners to keep their ‘feminine missiles to their launch pads’ until the State puts in place the legislative and other measures to implement the two-third gender rule in appointment positions.

In the second scenario, in the case of *the National Gender & Equality Commission & Another v Judicial Service Commission & 2 Others (NGEC Case)*,<sup>41</sup> the petitioners targeted the recommendation of Hon Mr. Justice Lenaola on the ground that a lady should have being recommended for the appointment instead. The Respondents argued that the implementation of the two-third gender principle had already being addressed in the FIDA Case and asked the court to be guided by the said decision. The Petitioners relying on the decision in the case of *Marilyn*

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<sup>38</sup> Petition 102 of 2011, High Court at Nairobi [2011] eKLR.

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid* p 38.

<sup>41</sup> Petition No 446 of 2016, High Court at Nairobi [2017].

*Muthoni Kamaru & 2 Others vs Attorney General & Another*,<sup>42</sup> argued that appointive positions do not require a legislation to comply. The Court agreed with the petitioners that indeed it is easier to achieve gender parity in appointive positions in the absence of a legislation since all that is required are ‘policies and affirmative action based on good will’.<sup>43</sup> In dismissing the above petition, the Court held that the JSC did not breach the provisions of the CoK or the JSC Act when recommending Hon. Mr. Justice Lenaola as the judge of the Supreme Court. Neither did the JSC breach the two-thirds gender principle as contemplated by the CoK. The court held thus:

...it is difficult to fault the 1<sup>st</sup> Respondent for recommending the interested party for appointment to the Supreme Court making the number of men 5. It would have been ideal to recommend a woman for appointment, but that is not to say an ideal situation is the same as a clear breach of the Constitution or the law on the two-thirds gender [principle]. Even if one applied a mathematical formula to the question at hand, the result would invariably have been the same, that two thirds is 5 while one-third is 2. The number of judges being uneven, the figure can only be approximate and not exact’.<sup>44</sup>

It is based on the above cases that this study seeks to interrogate women representation in the SCOK, the effectiveness of the implementation of the gender quota and analyze the issues and concerns raised. Whilst in the FIDA Case the Court held that it was upon the government to take legislative steps in ensuring gender equality in appointive positions, the enactment of the said legislation has been futile. In the NGEC case, the court on the other hand held that appointive positions do not require a legislative step alone but the need to put in place affirmative actions and other measures based on good will. However, in the two decisions the court stressed that

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<sup>42</sup> [2016] eKLR

<sup>43</sup> *Petition No. 446 of 2016 para 39.*

<sup>44</sup> Para 41.



appointive positions in the SCOK are based on merit and are not for everybody and therefore there was no evidence against the JSC that it had not recommended the most qualified persons. The second argument is that women are not the only disadvantaged groups in the CoK, and whereas there is need for gender equality, this will only be progressively realized.<sup>45</sup> In the FIDA case the court held that, ‘applying the dangerously wide and vague language of equality and non-discrimination to the concrete facts of life in a doctrinal approach should be avoided’.<sup>46</sup>

This research focuses on women representation in the SCOK because it is the highest court and most influential in the development of law to the extent that its decisions are binding, and second, literature indicate that it is at the highest court and senior positions in the judiciary that women representation is stark. The objective of this study is to discuss in detail women representation in the highest court and the effectiveness of the gender quotas. In doing so, it interrogates the legal contestations through the review of court decisions on gender equality in the SCOK.

## 1.2 Problem Statement

The current composition in the Kenyan Courts reflects the quest that the Kenyan people had in ensuring that the JSC in performance of its functions be guided by not only the competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary, but also the promotion of gender equality. Whereas at the subordinate level, the JSC can be applauded for ensuring that not more than two-thirds of the courts judicial officers are of the same gender, at the highest court of the land, the SCOK, concerns have been raised that its representation does not abide by the gender quota. Currently at the SCOK, women representation account for 29% while

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<sup>45</sup> Waruguru Kaguongo, ‘Introductory Note on Kenya’ <[http://www.icla.up.ac.za/images/country\\_reports/kenya\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf)> accessed 22 January 2018.

<sup>46</sup> *FIDA Case* p 15.

men account for 71%, raising legal contentions.<sup>47</sup> The question whether the JSC has complied with the two-thirds gender principle was litigated in the FIDA and NGEC cases. However, in the two cases it is apparent that the Court has indicated that the appointment of judges in the SCOK is first based on merit, qualification and experience and gender equality is considered amongst other factors. Further, gender equality will be progressively realised. While the Court has asked the Parliament to enact a legislation to enhance gender equality, this has remained futile calling for the need to have policy and affirmative actions. While the Court in the NGEC case recognised that appointive positions do not require a legislation but good will, it went ahead and called for the JSC to put in place policy measures.

In Kenya, it is apparent that many women have taken the legal profession. However, for a person to be appointed as a judge of the SCOK, she/he has to meet the requirements stipulated under Article 166 of the Constitution. It is, therefore, not enough to possess a law degree from a recognised university. That said, and going by the number of women who applied for the position of a judge of the SCOK, it is evident that we have qualified women that JSC can select from. Analysis of the FIDA and NGEC cases clearly show that the Court has not taken a bold step in calling for the need to have more women representation in the SCOK. The evidence that the JSC has been able to comply with the two-third gender principle in other positions of the judiciary is a clear indication that the same can apply in the highest court of the land and there exists wide pool of qualified women judges. This study therefore seeks to address the challenge of increasing women representation in the Supreme Court through the use of gender quotas.

### **1.3 Study Justification**

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<sup>47</sup> JSC 2015-2016 Annual Report p13.

This study is justified on many reasons. First, whereas there is a constitutional gender quota that the membership of elective and appointive positions should not be more than two-thirds, most of the literature in Kenya on its implementation has focused on elective positions. There is scarce scholarly literature interrogating the implementation of the two-third gender principle in appointive positions. Second, the CoK requires that the JSC be guided by the gender equality when carrying out its functions. In the appointment of judges and magistrates, data from the JSC annual reports indicate that indeed the JSC has to a large extent complied with the two-third gender rule in the subordinate courts and superior courts to the exception of the Supreme Court. This study is justified as it seeks to critically analyze the reasons as to why the JSC has not been able to comply with the said constitutional quotas in the Supreme Court. Third, the Supreme Court being the highest court of the land calls for the need for diversity and this study will focus on the same. Fourth, this study in analyzing the FIDA and NGEK cases seeks to determine how the court as a gatekeeper of gender equality plays a critical role through judicial interpretation of the implementation of the gender quotas. This will determine the legal contestations on women representation in the Supreme Court. Sixth, this study recognizes that the low or lack of women representation in the Supreme Court or the highest positions in the judiciary is not a Kenyan or developing countries problem alone. Through comparative study, this study brings to the fore a number of countries such as Canada and Slovenia which have more than a third of their Supreme Court judges as women. In so doing, it will draw lessons from the said countries which Kenya can borrow and implement in a bid to enhance judicial diversity in the Supreme Court. Finally, this study is justified as it will provide policy and legal considerations which if implemented by stakeholders will be key in not only enhancing gender equality in the Supreme Court, but in other appointive and elective positions.

## **1.4 Research Objectives**

### **1.4.1 Main Objective**

The main objective in this study is to critically discuss women representation in the SCOK and analyze the legal contestations on the use of gender quotas in increasing women representation in the highest courts.

### **1.4.2 Specific Objectives**

In order to meet the main objective, this study will be guided by the following specific objectives:

- a) To discuss gender equality in the judiciary by analyzing the arguments for and against women representation in the judiciary generally.
- b) To interrogate women representation in the highest courts with reference to the SCOK.
- c) To discuss the legal contestations in the use of the gender quota system in enhancing women representation in the judiciary.
- d) To provide legal and policy considerations on the implementation of gender quotas and the enhancement of women representation in the SCOK.

## **1.5 Research Questions**

This study will be underpinned on three key research questions?

- a) What are the legal contestations and arguments that have bogged women representation in the highest courts and how have they influenced the number of women in the highest court in the judiciary?
- b) Does the selection method of judges of the SCOK affect the number of women judges?

- c) How can the gender quota system be used in increasing women representation in the SCOK?

## **1.6 Research Hypothesis**

This study shall be guided by the following research hypothesis:

- a) Lower women representation in the highest court in the judiciary is mainly influenced by existing cultural values and beliefs coupled with a lack of political goodwill in the institutions.
- b) The arguments against the appointment of judges in the Supreme Court that such positions are not for everyone and should be based on merit taking into consideration women is not the reason behind the few number of women judges in the Supreme Court because we have more qualified women judges. This is as a result of stereotypes and myths against women coupled with the lack of good will in enhancing gender equality in the Supreme Court by male dominated gatekeepers.
- c) Enhancing gender equality in appointive positions requires goodwill by the appointive institution and it is not necessarily impinged on a legislative framework.
- d) Gender quotas are effective in enhancing gender equality within the judiciary.

## **1.7 Theoretical Framework**

This study is underpinned on the theory of liberal feminists. Liberal feminists question the discriminatory practices on the basis of sex.<sup>48</sup> Liberal feminism theory traces its history as far back as the 18<sup>th</sup> Century. The main proponents of this theory include, Helen Taylor, Mary Wollstonecraft, Gloria Steinem, John Stuart and Betty Friedan. Liberal feminists such as Mary

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<sup>48</sup>R Delmar, 'Defining Feminism and Feminist Theory' in A Herrmann and AJ Stewart (eds), *Theorizing Feminism: Parallel Trends in the Humanities and Social Sciences* (West View Press 1994)11.

Wollstonecraft questioned those viewpoints about women that are damaging and discriminatory.<sup>49</sup>

Liberal feminists are of the view that women's subordination is rooted in legal constraints, which prevent the full participation of women in the public sphere. Therefore, liberal feminists demanded "equal" opportunities and equal participation in the management of the societies.<sup>50</sup>

Liberal feminists argue that all people are created equal and should not be denied equality of opportunity because of their gender differences.<sup>51</sup> They sought increase of their participation in the political organs.<sup>52</sup> Further, liberal feminists fought for the greater participation of women in education and training.<sup>53</sup> Among their main concerns include the provision and protection by the state of civil and political liberties to enable individuals realize their full potential in any given market. Liberal feminists stress on the similarities rather than the differences, between individual women and men as well as the need to increase freedom for all people by eliminating group-based roles and stereotypes. They argue that "society has a false belief that women are by nature less intellectually and physically capable than men hence see no need to educate girls."<sup>54</sup>

Liberal feminism has been criticized on the basis that they have ignored the existing social structures that feminists see as the cause of inequality in a capitalist structure. It has been argued that capitalism itself is hinged on a patriarchal system (rather than a neutral, gender-free system).<sup>55</sup> They have also been criticized for failing to understand that 'equality of opportunity' is not

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<sup>49</sup> R Tong, *Feminist Thought: A More Comprehensive Introduction* (Westview Press 2009).

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid p2

<sup>55</sup> V Bryson, *Feminist Debates: Issues of Theory and Political Practice* (Macmillan 1999)14-15.

attainable in the current social structure where societies are naturally divided along class lines, and are driven by economic exploitation of those who are disadvantaged.<sup>56</sup>

Liberal feminism proponents expound that gender discrimination that has for a long time locked out women in rising into, and holding influential administrative government positions is a manifest of differentiated treatment that is not based on justified inherent biological grounds but rather societal beliefs and stereotypes that have portrayed and positioned women as weaker and vulnerable than men thus characterizing them as incompetent to hold top governmental administrative positions that are commonly characterized by enormous pressure and public scrutiny.<sup>57</sup> Liberal feminists attribute gender disparities to a number of factors such as culture and the way men and women are socialized within that culture and the attitudes of the individual. Proponents of liberal feminism, such as Barbara Bergmann argue against any practice, whether a legal or cultural rule, that might decrease incentives for women's employment and movement into the so called male-typical occupations.<sup>58</sup>

Liberal feminists have moderate objectives as their views do not radically challenge the existing values but rather aim for gradual change in the political, economic and social landscapes of the society.<sup>59</sup> They advocate for equality of both genders in educational and work opportunities, and argue strongly against laws that promote unjustified differentiated treatment between men and women.<sup>60</sup> They do not subscribe into inferior thoughts and wrong perceptions that characterize

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<sup>56</sup> Ibid.

<sup>57</sup> Lorber, J., *The Variety of Feminisms and their Contributions to Gender Equality*, Bis, 1997.

<sup>58</sup> England, P., *Toward Gender Equality: Progress and Bottlenecks*, *The Declining Significance of Gender* 63 (2006), p. 245-265, p. 260.

<sup>59</sup> Samkange, W., *The Liberal Feminist Theory: Assessing its Applicability to Education in General and Early Childhood Development (ECD) in Particular Within the Zimbabwean Context*, *Global Journal Advanced Research* 2 (2015): 1172-1178, p. 1174.

<sup>60</sup> Ibid.

women as weaker than men. To them, this belief of women inferiority is farfetched as hitherto there is no proponent who has well expounded and comprehensively justified an inherent feature in men that makes them better in reacting to the said pressure and public scrutiny that are associated with top governmental positions.

This narrative can be expounded as a narrow cover up by the firm believers and implementers of these discriminatory and outdated stereotypes that have caused more harm than good by locking and shielding all avenues that women can use in ascending to top influential and administrative government positions. This expounds the reason why the efforts for enacting a statute with enabling provisions for realization of article 27 (8) of the Constitution has never yielded any fruits. To a large extent, this study agrees with liberal feminists that women and men should not only be treated equally but they should be granted equal opportunities. Where opportunities arise in the highest courts, qualified women should be encouraged to apply. Judicial positions in the highest courts are not a preserve of men. Women should not shy away from applying. That in the modern society, social attitude against women ability to take leadership positions has no place in this society.

## **1.8 Literature Review**

The literature in this study is reviewed along three themes: the representation of women in the judiciary and highest courts; the use of gender quotas in enhancing women representation in the judiciary; gender equality in Kenyan judiciary

### **1.81 Women Representation in the Supreme Court.**

Due to the fewer number of women judges in the highest positions of the judiciary there is call for the judiciary to enhance gender equality to improve the quality of justice delivered and the



adjudication process.<sup>61</sup> Hunter has discussed extensively on the justification of having women representation in the Supreme Court.<sup>62</sup> In her article, *More than Just a Face: Judicial Diversity and Decision Making*, she has argued that women representation in the judiciary is not a token or just a face. Women representation in the judiciary: increases democratic legitimacy of the judiciary; it symbolizes equal opportunity to both men and women in the judicial profession; by appointing women in the judiciary this acts as encouragement to young women to aspire to seek and obtain judicial appointment; and women judges bring gender perspective into decision making.<sup>63</sup> She refutes claims that women judges in the Supreme Court tend to be biased and only represent the needs of the women. This paper focuses on the justification of having judicial diversity and decision making but does not discuss the use of gender quotas in enhancing women representation in the Supreme Court. Neither does it focus on how the selection method of judges by the judiciary influences the numbers of women in the Supreme Court which is the ambit of this study.

Kennedy,<sup>64</sup> while discussing why women in the judiciary matter argues that women judges receive hostility not only from fellow judges but also from the litigants and lawyers. The backlash on women authority position on the ground of biasness affects the gender diversity in the judiciary. In this book, Kennedy provides that women judges are easily disciplined than their male counterparts and are likely to be removed in the office. This book is recent and provides a deep understanding of the challenges that women judges serving in higher courts have faced. In

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<sup>61</sup> Elizabeth Halka, 'Madam Justice Bertha Wilson: A Different Voice in the Supreme Court of Canada' (1996) 35(1) *Alberta Law Review* 242.

<sup>62</sup> Rosemary Hunter, 'The High Price of Success: The Backlash against Women Judges in Australia' in Elizabeth Sheehy and Sheila McIntyre (eds), *Calling for Change: Women, Law, and the Legal Profession* (Ottawa University Press 2006)281-301.

<sup>63</sup> Hunter (n 11).

<sup>64</sup> Sally Jane Kenny, *Gender and Justice: Why Women in the Judiciary Matters* (Routledge 2013).

conclusion she provides that, having women representation in the judiciary enhances ‘democracy and legitimacy, recognize the symbolic role of judges, call for simple non-discrimination, and draw analogies between gender and geographic representation’.<sup>65</sup> She warns against justifying women equality in the judiciary based on sex reference. Rather, she recommends the need to view gender as a social process. While this book is rich, it fails to interrogate the use of gender quotas and the selection methods. It focuses generally on the judiciary while this study focus on women representation in the highest courts and interrogates whether gender quotas can be effective in enhancing women representation in the highest court.

Podgorny,<sup>66</sup> argues that there is need to have gender equality at the Supreme Court bench in order to add the missing perspective in jurisprudence and law to alleviate gender discrimination in legal reasoning. Podgorny discusses the concerns raised against women representation in the Supreme Court which include: it leads to bias judging and politically motivated partiality; there is a concern that women are not a homogenous group and appointing women judges does not make any difference; women will ultimately conform to the institutionalized male standards and there is no justification of adding more women to the bench; and male judges can be gender sensitive too and there is no need for gender representation. These concerns according to Podgorny are ill-informed because as more women are represented on the bench, it will allow women not to conform to male standards and will lead to male norms ceasing to exist.<sup>67</sup> Podgorny has focused on the arguments for and against women judges in the Supreme Court. This study goes beyond the reasons of having

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<sup>65</sup> *ibid* p 161.

<sup>66</sup> Monica Podgorny, ‘Gender-Equal Representation on the Supreme Court Bench: Adding the Missing Perspective to Judging’ (Paper presented at the 5th Annual Canadian Law Students Conference at the University of Windsor, Faculty of Law in March 2012).

<sup>67</sup> *Ibid* p 24.

women judges in the Supreme Court and interrogates how the Courts have interpreted the implementation of gender quotas and its impact in influencing the number of women in the Court.

Wilson, has written extensively on women judges and the need for women representation in the higher positions of the judiciary. Wilson was the first woman to be appointed as a judge of the Canadian Supreme Court in 1982. In her article, '*Will women judges really make a difference?*'<sup>68</sup> She underscores that indeed women make a difference. She analyses literature on the arguments for and against women representation which will enrich this study. However, this paper is merely descriptive and fails to provide or discuss mechanisms such as gender quotas and how they can be implemented to enhance women representation.

McCormick and Job interrogated the question whether women judges would make a difference in the judiciary.<sup>69</sup> They concluded that it does not make a difference because female professionals are the same people representing the same values as male professionals. The authors fail to recognize that in many societies women have been marginalized and denied equal opportunities to access the higher positions. They fail to recognize that women have the same potential as men and in doing so there is need to treat them equally. Hawkins and Martin argue that women judges tend to be subjective in representing the issues of marginalized groups and these would lead to social justice.<sup>70</sup> This study seeks to refute the claims by the authors and instead show that indeed women representation in the judiciary makes a difference. Women judges have used this opportunity not only to develop law that is not gender sensitive but also to protect women against unbiased cultural practices such as inheritance and forced marriages.

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<sup>68</sup> Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 20 Osgood Hall Law Journal 507.

<sup>69</sup> Peter McCormick & Twyla Job, "Do Women Judges Make a Difference? An Analysis by Appeal Court Data" (1993) 8 CJLS 135.

<sup>70</sup> Robert Hawkins and Robert Martin, 'Democracy, Judging and Bertha Wilson' (1995) 41 McGill U 54.

Rackley's survey of a number of high courts demonstrates that, there does not appear to be a particular geographic region that fails in terms of gender diversity in the judiciary more than others and female representation remains far from equal in most judiciaries.<sup>71</sup> However, achieving gender equality remains an important goal because of the effect that the judiciary can have on enforcing policies intended to enhance the status of women.

In the above reviewed literature, the authors have focused on the arguments for and against having gender equality in the judiciary and specifically in the Supreme Court. While these arguments are stemmed on the basis of increasing women representation in the Supreme Court, this study interrogates how women representation can be enhanced, the effectiveness of gender quotas, the impact of the selection method and the role of the gatekeepers such as the JSC and the court, in enhancing women representation in the Supreme Court.

### **1.82 The Use of Gender Quotas in Enhancing Women Representation in the Supreme Court**

Gender quotas are increasingly being used to enhance women representation. However, there exists concerns as to the effectiveness of gender quotas in enhancing women representation in the highest courts. Somani,<sup>72</sup> argues that judicial appointments in the Supreme Court should be solely on merit taking into consideration other factors such as gender. Gender is viewed as subordinate to merit and merit comes first. They argue that even when gender quotas exist, voluntary quotas can be likely effective than reserved positions.

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<sup>71</sup> Rackley (n 6).

<sup>72</sup> Somani (n 24).

Dahlerup,<sup>73</sup> on the other hand argues that due to the patriarchal nature of the society, it will take long for society to embrace the role of women in politics. Introduction of gender quotas is an effective tool in enhancing women political representation. It will invoke the recognition that women representation in decision making is critical. However, the author has focused on elective positions while this study focuses on appointive positions.

Bindman and Monaghan argue that the concept of merit in the appointment of Supreme Court judges is ill defined.<sup>74</sup> They provide that the creation of a diverse judicial in itself should be regarded as an element of merit. Obstacles such as the culture of exclusivity which stereotypes ‘the judge as a white male barrister’ whether real or imagined is an impediment to potential candidates coming from underrepresented groups.<sup>75</sup> They provide that the requirement that judges of the Supreme Court have sufficient judicial experience does not favour the marginalized groups such as women because it reinforces the stereotypes. They recommend the need to have diversity in the pool of candidates for selection, enhance training and mentoring to improve opportunities for qualified people from diverse backgrounds. They conclude that quotas are now important towards realization of the representation of the other underrepresented and they should be implemented immediately. This paper enriches this study though it has not interrogated case law and the court’s interpretation. This study analyzes the court’s interpretation of the two-third gender principle in the FIDA and NGEC cases.

Valdini and Shortell,<sup>76</sup> admit that indeed there exists a cross-national variation when it comes to the presence of women in the highest courts. However, they refute the argument that gender quotas

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<sup>73</sup> Drude Dahlerup, ‘Quotas — A Jump to Equality?: The Need for International Comparisons of the Use of Electoral Quotas to obtain Equal Political Citizenship for Women’ Paper prepared for workshop hosted by International Institute for Democracy and Electoral Assistance (IDEA) on 25 September 2002 in Jakarta, Indonesia.

<sup>74</sup> Bindman and Monaghan (n 3).

<sup>75</sup> *ibid* p 6.

<sup>76</sup> Valdini and Shortell (n 2).

are key in enhancing women representation and instead argue that the selection method is vital. In this paper, they focus on the impact of the court power, the selection method, culture and availability of qualified women judges on women representation in the Supreme Court. They note that this variation is as a result of the selection mechanisms in place. They argue that unlike the ordinary courts, the highest courts have unique traits and visibility hence the appointment of women will operate differently in the higher courts. These courts are also courts of high visibility and therefore the ‘appointment of a justice to the highest court is a moment of high visibility for those in the selectorate’.<sup>77</sup> They identify two selection mechanisms that will identify the presence of women in the highest courts: sheltered versus exposed. According to the authors, if the appointing body is sheltered from electoral accountability, they will less likely select women judges because they do not benefit from credit claiming. This reflects a merit-based selection model and only those qualified will be selected. However, if the selecting body is subject to electoral accountability, the visibility of the court in itself and public confidence in the court can trigger the appointment of women in the highest court. The authors therefore conclude that, the exposed selection method is key to enhancing women representation in the highest courts. This paper is key in enhancing this study in the Kenyan context by analyzing the Kenyan selection method and how it influences the selection of women judges in the Supreme Court.

Scholars like Bonthuys,<sup>78</sup> Johnson,<sup>79</sup> Cowan,<sup>80</sup> argue that the appointments of women representation in the court of South Africa is gender biased despite the Constitutional provisions

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<sup>77</sup> *ibid* p 8.

<sup>78</sup> Elsje Bonthuys, ‘Gender and the Chief Justice: Principle or Pretext?’ (2013) 39(1) *Journal of South African Studies* 56.

<sup>79</sup> Rachel E Johnson, ‘Women as a Sign of the New: Appointments to South Africa’s Constitutional Court Since 1994’ (2014) 10(4) *Journal of Politics and Gender* 595.

<sup>80</sup> Cowan (n11).

on gender equality and gender quotas. Cowan,<sup>81</sup> discusses women representation in South Africa's judiciary. Despite the provision of gender quotas in South African Constitution, the author provides that it has not enhanced women representation. She provides that indeed women law graduates in South Africa are of a significant number. According to Cowan, continued patriarchy and sexism by the gatekeepers, assumption that women are not qualified, gender equality is considered as subordinate to racial equality, underrepresentation of the women in the bar which dominates the appointments and women invisibility the main obstacles to women representation in the Supreme Court. Cowan argues that although the JSC as a gatekeeper positioned at the door of the courts, if not committed to gender parity, will act as an impediment by blocking women appointments.<sup>82</sup> She advocates for the need to ensure that the composition of the JSC and other gatekeepers is gender sensitive. This paper focuses on South Africa while this study focuses on the women representation in the SCOK. It enriches this study.

Abrahamson,<sup>83</sup> interrogates the four questions which women appointed to the highest court of the land are asked.<sup>84</sup> These questions include: were you appointed because you are a woman?; do you think you were appointed as the token woman on the bench?; do you view yourself as representing women in court?; and do you think women would make a difference in the administration of justice? These questions raise pertinent issues that continue to persist even today. She argues that the society's expectation is that a woman cannot make it on her own merit and she was appointed as a token and to represent the interests of women. She provides that while gender quotas can

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<sup>81</sup> *ibid.*

<sup>82</sup> *ibid* p 313.

<sup>83</sup> Shirley S Abrahamson, 'The Woman has Robes: The Four Questions' (1984) 14(3) Golden Gate University Law Review 489.

<sup>84</sup> In this paper, she indicates that she had been appointed as the first woman justice in the Wisconsin Supreme Court. This was historic as for the first time, a woman, had been appointed to the male dominated Wisconsin Supreme Court. Following her appointment, the press asked her four questions which she later interrogated in her work.

enhance women representation such stereotypes if not addressed will hinder the success of gender quotas. This paper does not interrogate the role of the selection method and gatekeepers such as the Court and JSC in enhancing women representation.

Arrington and others,<sup>85</sup> argue that there is need for increased diversity in the highest courts. They connote that the need to have more women serving in higher courts is because the presence of women may influence the law as because women understand the law in particular context and develop jurisprudence. The diversity of the court provides it with legitimacy. The authors further indicate that the underrepresentation of women on peak courts is as a result of ‘deeply complicated social cultural including limited availability pools that follow from gendered appointments to lower courts, elite networks that fail to identify qualified candidates and culturally structured role perceptions that make a prestigious judicial career simply easier for men to pursue’.<sup>86</sup> Indeed they agree that even in the existence of gender quotas if the above impediments are not addressed then it will not be effective.

Dawuni and Kang,<sup>87</sup> focus on women judicial representation in the leadership positions within the judiciary in Africa focusing on the position of the CJ. They argue that the legal system,<sup>88</sup> the selection method,<sup>89</sup> commitment of gatekeepers and regional diffusion is likely to influence the number of women in top positions in the judiciary. On the question of whether gender quotas

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<sup>85</sup> Nancy Arrington, Leeann Bass, Adam Glynn, Jeffrey K Staton, Brian Delgado, and Staffan I Lindberg, ‘Gender Diversity on High Courts’ (Working Paper Series No. 74/2017 University of Gothenberg 2017).

<sup>86</sup> *ibid* p 5.

<sup>87</sup> Dawuni and Kang ( n 10).

<sup>88</sup> They argue that civil law countries have a higher number of judges in the highest court than common law. This is attributed to the fact that unlike the common law countries which select judges from experienced legal practitioners or academicians, in civil law countries, women and men enter ‘the judiciary by taking an examination and attending a postgraduate judges’ school following their undergraduate studies’

<sup>89</sup> Selection methods include informal process of internal selection or formal presidential nomination subject to legislative approvals. The authors found out that in Benin and Niger more women were being selected through internal selection. In addition most judges though appointed on merit, the seniority principle amongst judges also applies and it may or not favour women.



influence the selection of female judges, the authors argue that it necessarily do not. They provide that in countries such as Kenya and South Africa which have in place gender quotas yet women have been discriminated unlike Ghana which lacks gender quota yet women have been appointed to high position in the judiciary. The power and composition of the gatekeepers and their commitment towards gender equality will ultimately affect women representation.<sup>90</sup> Dawuni and Kanga focused on the selection of women to the positions of the CJ or President of the highest courts. They found out that indeed women are qualified for these positions and it is not a token. In Kenya, since independence no woman has being appointed as the CJ. This study focuses on women representation in the SCOK and how, through the Court's interpretation of the two-third gender rule, the issue and concerns raised, can be identified.

The UNDP in its study carried out in Uganda found out that gender equality in public service was hindered because recruitment, appointment and promotion was based on merit and was gender neutral.<sup>91</sup> This study focuses on the SCOK but uses the UNDP report to enrich the discussion. Gass,<sup>92</sup> discusses a number of issues on the issue of gender equality and equal representation in the judiciary. She discusses the reasons that lead to the problem of gender inequality. The key problem, according to her, is the selection process by which judges are appointed. She purports that the system favors men than female judges.

Jackson,<sup>93</sup> writes that for a judicial selection to be considered fair and impartial, it must be seen as representative of the community. He recommends that it is important for a selection system insofar

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<sup>90</sup> The authors argues that if the JSC , Judicial Councils and the legislature involved in the appointments of judges are gender sensitive then they will play a great role in enhancing gender equality in the judiciary.

<sup>91</sup> UNDP, *Gender Equality and Women's Empowerment in Public Administration: Uganda Case Study* <<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Women-s%20Empowerment/UgandaFinal%20-%20HiRes.pdf> > accessed 24 February 2018.

<sup>92</sup> Meaghan Gass, *Women in the Judiciary: An Analysis of Selection Process* (St. Louise University 2012).

<sup>93</sup> Jeffrey D Jackson, 'Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System' (2007) 34 *Fordham Urban Law Journal* 125.

as it is possible to advance methods that provide for a judicial bench that reflects the diversity of its qualified applicants.<sup>94</sup> He proposes that for there to be judicial diversity including the issue of gender, there has to be changes in the selection process, including: implicit bias has to be dealt with properly; there has to be increased strategic recruitment; keep the application and interviewing process transparent; maintain high standards and quality; improve record keeping, among other measures.<sup>95</sup>

### **1.83 Gender Equality in Kenya**

Since the promulgation of the CoK, the issue of implementation of the two-third gender principle has come to the fore. Kamau,<sup>96</sup> argues that gender inequality has been there during the pre-colonial and postcolonial era. As a result of the patriarchal nature of the society it continued to discriminate women from political, social and economic arena. Kamau focuses on the history of gender equality in Kenya and women political representation. While this study interrogates gender equality, its scope is limited on women representation in appointive positions and specifically the SCOK.

Baraza,<sup>97</sup> interrogates the conceptual artillery and strategies in the gender equality discourse. Baraza reveals the spaces and sites where inequality is perpetrated, specific attention being paid to the private sphere. She further examine the human rights framework for challenging gender inequality, its effectiveness and defects. She concludes in her paper that whereas the law and human rights are important, perhaps the most effective sites for redressing gender inequality, primacy and complementarity should be had on social engineering and the reconstruction of the

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<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> Nyokabi Kamau, *Women and Political Leadership in Kenya* (Heinrich Boll Stiftung East and Horn of Africa 2010).

<sup>97</sup> Nancy Baraza, 'Lost Between Rhetoric and Reality: What Role for the Law and Human Rights in Redressing Gender Inequality?' ( Kenya Law Reports 2008).

processes and institutions that result in inequalities between women and men, ‘without this, the achievement of gender equality may be lost between rhetoric and reality’.<sup>98</sup>

In the book, *Gender Equality and Political Processes in Kenya: Challenges and Prospects*,<sup>99</sup> edited by Biegon, he argues that implementing the two-third gender principle in Kenya remains a struggle. It analyses the affirmative action and measures taken by the government to guarantee equal representation in the Kenyan political process. However, this book focuses on gender representation in the political process while this study focuses on gender equality in appointive bodies using the SCOK as a case study.

NGEC in its report on the *Status of Equality and Inclusion in Kenya*,<sup>100</sup> focused on the extent to which the principles of equality and inclusion have been implemented in four sectors since the promulgation of the CoK. This report focused on employment, political presentation, social protection and education at the National and County government levels in addition to the public and private sectors. This report does not focus on the judiciary. Further it focuses on the general special interest groups as identified in the CoK.<sup>101</sup> This study focuses on women and enhancing their representation in the Supreme Court. The NGEC report indicates that 70 per cent of the Ministries, Departments and Agencies (MDAs) complied with the two-thirds gender principle in overall distribution of employment by gender. However, the position was different when it came to job groups. The constitutional threshold was not met within the upper job groups R to T. This

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<sup>98</sup> Ibid.

<sup>99</sup> Japhet Biegon (ed), *Gender Equality and Political Processes in Kenya: Challenges and Prospects* (Strathmore University Press 2016).

<sup>100</sup> NGEC, *Status of Equality and Inclusion in Kenya* (NGEC 2016).

<sup>101</sup> They include women, children, youth, persons with disabilities (PWDs), older members of society, minority and marginalized communities

study is key in answering the hypothesis that there exists gender inequality when it comes to higher positions.

Mbote has written extensively on gender equality<sup>102</sup> However, most of her literature has focused on gender equality in political representation.<sup>103</sup> Mbote argues that gender is only one form of marginalization among many and it is not possible to address gender fully in isolation of other special interest groups.<sup>104</sup> In this article Mbote has focused on women political representation in Kenya and has discussed the historical development that led to the inclusion of gender equality in the CoK. She avers that while the implementation of the two-third gender principle remains elusive as a result of lack of political will, there is need for the court to chart pathways towards gender equality where the law is clear but with different narratives. She argues that the Kenyan Supreme Court has not been bold enough as evidenced by its decision on the advisory opinion on the two third gender rule.

Kamau,<sup>105</sup> has interrogated gender representation in the Kenyan judiciary. According to her, the top positions in the judiciary are male dominated and this explains why Kenya has never had a female Attorney General or Chief Justice. She provides that most women are appointed in the subordinates courts and not higher court. She posits that this is due to a number of structural and institutional barriers which hinder women appointment and mobility in the judiciary. This article

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<sup>102</sup> Patricia Kameri-Mbote, 'Women, Land Rights and the Environment: the Kenyan Experience' (2006) 49(3) *Journal of Development* 43.

<sup>103</sup> Patricia Kameri-Mbote, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses', Inaugural Lecture delivered on 24 January 2013.

<sup>104</sup> Patricia Kameri Mbote, 'The Quest for Equal Representation in Kenya's Parliament: Past and Present Challenges' in Japhet Biegon, *Gender Equality and Political Processes in Kenya: Challenges and Prospects* (Strathmore University Press 2016).

<sup>105</sup> Winnie Kamau, 'Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Oxford Hart publishers 2013)

is merely descriptive and does not address the issues and concerns regarding women appointment in the Supreme Court which is the ambit of this study.

### **1.9 Research and Methodology**

In order to meet the objectives of this study, it employs a qualitative research method. Qualitative research method draws on both the extensive literature by legal scholars, civil society and academicians on gender equality, gender equality in the judiciary, the use of gender quotas in enhancing gender equality and affirmative action. It also reviews court decisions in order to identify the legal contestations on the use of gender quotas in enhancing women representation in the SCOK. Due to the availability of literature, case laws and legislation, this study is desk based.

Sources of data are both primary and secondary. Primary data involved the analysis of the Constitution and legislations on gender equality. Legislations includes Maputo Protocol, CEDAW and UN Conventions that seek to enhance gender equality. At the national level, this study reviewed national laws and case laws on gender equality. The purpose of primary sources is to use the data collected as a basis for analyzing the situation under study and come up with the appropriate position and policy recommendations with regard to the subject.

Secondary data involved the reading, discussion and analysis of policy papers and publications of different institutions charged with policy formulation or the actual implementation of gender equality. It also included the analysis of reports made by official bodies established by the government of Kenya and international bodies to inquire into the situation under study as well as any other data with a government department, agency or other credible organizations that have conducted inquiry into the situation. The secondary data collection technique entailed going

through the relevant books, articles, journals, conference papers and information from the internet on enforcement of environmental law.

### **1.10 Scope and Limitation**

While the need to enhance gender equality in all spheres of life is well articulated in the CoK, this study limits its discussion to women representation in the judiciary. Since the promulgation of the CoK data from the judiciary indicates that so far it has complied with Article 27(8) of the CoK which requires that not more than two-thirds of members of an appointive position should be of the same gender. However, it is at the SCOK that the issue of gender quota in selection of the judges has led to legal contestations. This study is therefore further limited to the discussion on women representation in the highest courts and particularly in the SCOK.

### **1.11 Chapter Breakdown**

This study comprises five chapters.

This chapter introduces the topic under study. It discusses the background, problem statement, justification, objectives, research questions, research hypothesis, literature review, research methodology, limitations and hypothesis.

The second chapter analyses the historical developments that informed the need to promote gender equality in the Kenyan judiciary. It is divided into two parts. The first part analyses the historical development of gender equality in Kenya in order to provide an understanding of the strides that the Kenyan women have undergone through towards gender equality. The second part, discusses the debate that informed the need to promote gender equality in the judiciary as an institution.

The third chapter focuses on women representation in the highest courts. This chapter interrogates women representation in the Supreme Court of Kenya. It focuses on the selection and appointment of women in the Supreme Court and how it affects women representation.

The fourth chapter interrogates and discusses the use of gender quotas in enhancing women representation in the highest courts. It analyze the Court decisions in the FIDA and NGEC cases in order to answer the question whether gender quota system is effective in enhancing women representation in the highest courts.

The fifth chapter provides the conclusions and recommendations of the study.

## CHAPTER TWO

### 2.0 HISTORICAL DEVELOPMENT OF GENDER EQUALITY IN THE KENYAN JUDICIARY: DOES WOMEN REPRESENTATION IN THE JUDICIARY MAKE A DIFFERENCE?

#### 2.1 Introduction

The need to promote gender equality by the Judicial Service Commission (JSC) in Kenya when carrying out its functions under the CoK and the JSC Act is preceded by a number of historical developments. This chapter analyses the historical developments that informed the need to promote gender equality in the Kenyan judiciary. It is divided into two parts. The first part analyses the historical development of gender equality in Kenya in order to provide an understanding of the strides that the Kenyan women have undergone through towards gender equality. The second part, discusses the debate that informed the need to promote gender equality in the judiciary as an institution.

#### 2.2 Gender Equality in Kenya: Historical Overview

In the recent past, more women are been appointed as judges and magistrate across the African continent.<sup>106</sup> Yet, the need for the JSC to promote gender equality when carrying out its functions did not evolve on its own. It is as a result of efforts at both the national level and the international arena that sought to enhance equality of all genders in all spheres of governance and dismantle the patriarchal structures which have continued to inform the role of the woman and men embedded in gender stereotypes.<sup>107</sup> Indeed, the debate on gender equality is as old as the Old Testament where

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<sup>106</sup> Gretchen Bauer and Josephine Dawuni (eds), *Gender and the Judiciary in Africa: From Obscurity to Parity* (Routledge 2016).

<sup>107</sup> Suk (n 12).



the Jews prayed thanking God that they were not borne women.<sup>108</sup> However, the historical development of the wave on gender equality in itself has always centered on the role of women in the society vis-a-vis men.<sup>109</sup>

Traditionally, in most societies gender power relations and identities were informed by the culture and customs of a given society.<sup>110</sup> Culture is more than just beliefs and practices of a society because it is part of the fabric of a society which shapes how things are done and provides an understanding of how it should be so. In most traditional settings, cultural values and norms recognized women as a weaker sex and inferior to the male gender.<sup>111</sup> This shaped the cultural attributes towards the behavior of the male and female gender, the communities' perceptions and beliefs giving explanations towards such believes and experiences.<sup>112</sup> The end result was gender stereotypes.<sup>113</sup>

Universally gender stereotypes view women as interdependent while men remain independent.<sup>114</sup> These gender stereotypes are then endorsed by men and women and shape the day to day life. The role of women and men is limited to what the cultural norms and beliefs perpetuate. In the traditional settings, women were not recognized to have strong straits to be involved in key

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<sup>108</sup> Ethan Tucker and Micha'el Rosenberg, *Gender Equality and Prayer in Jewish Law* (Urim Publications 2017); Ruth Halperin-Kaddari and Yaacov Yadgar, 'Religion, Politics and Gender Equality among Jews in Israel' (United Nations Research Institute for Social Development 2010); W Brown, 'Tolerance and/or Equality? The "Jewish Question" and the "Woman Question"' (2004) 15(2) *A Journal of Feminist Cultural Studies* 1.

<sup>109</sup> PM Wald, *Women in the Law: Stage Two*, 52 *UMKC L. Rev.* 45, 45 (1983)

<sup>110</sup> OECD, 'Culture, Gender Equality and Development Cooperation' <<http://www.oecd.org/social/gender-development/1896320.pdf>> accessed 10 April 2018.

<sup>111</sup> 'Men, Masculinities and Changing Power' (A Discussion Paper on Engaging Men on Gender Equality from Beijing 1995 to 2015)< <https://www.unfpa.org/sites/default/files/resource-pdf/Men-Masculinities-and-Changing-Power-MenEngage-2014.pdf>> accessed 5 March 2018.

<sup>112</sup> SH Schwartz, 'Beyond Individualism/Collectivism: New Cultural Dimensions of Values' In U Kim, HC. Triandis, Kagitcibasi, SC Choi and & G Yoon (eds.), *Individualism and Men as Cultural Ideals Collectivism: Theory, Method and Applications* (Sage 1994) 85-117.

<sup>113</sup> RW Cornell, 'Change Among the Gatekeepers: Men, Masculinities and Gender Equality in the Global Arena' (2005) 30 (3) *Journal of the University of Chicago Press* 1801.

<sup>114</sup> Amy JC Cuddy, Susan Crotty, Jihye Chong and Michael I Norton, 'Men as Cultural Ideals: How Culture Shapes Gender Stereotypes' (Harvard Business School Working Paper Series 2010).

decision making that affected the society.<sup>115</sup> When it came to making serious decisions that affected women, this remained the purview of men.<sup>116</sup> So men made decisions on issues that affected women and once it is culturally accepted, that remains the norm and everyone is required to be bound by the norms and values.<sup>117</sup> It is based upon these rules without the inclusion of women, which every member of the society is required to adhere to and they were passed from one generation to another.

In Kenya and in Africa generally, the society is inherently patriarchal.<sup>118</sup> The patriarchy is so much deeply entrenched that a boy child grows knowing that they are superior to the girl child and need to act differently due to their masculinity. Bvukuta notes that patriarchy is, ‘so deeply entrenched in most African settings – in our norms, values and customs – that trying to separate it from our humanness and culture is not only unfathomable for most, but a deeply unsettling and unwelcome “impossibility”: a very difficult process’.<sup>119</sup> She has argued that it is difficult to dismantle patriarchy in Africa because men have benefited from the systems and structures of patriarchy which has worked and favored them and they are not ready to change this position.<sup>120</sup>

Secondly, patriarchal system continues to use women as guardian of the patriarchy against their fellow women arguing that gender equality is a notion of the West and has no place in African setting. Women will perpetuate cultures that discriminate against women such as female circumcision, early marriage and wife inheritance by playing fundamental roles. Any attempts that

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<sup>115</sup> Aydon Edwards, ‘It is a Man’s World: The Effect of Traditional Masculinity on Gender Equality (2015) <<http://www.e-ir.info/2015/03/29/its-a-mans-world-the-effect-of-traditional-masculinity-on-gender-equality/>> accessed 10 April 2018.

<sup>116</sup> David Slawson, ‘Constitutional and Legislative Considerations in Retroactive Lawmaking’ (1968) 48(2) California Law Review 216.

<sup>117</sup> CL Ridgeway, ‘Gender, Status, and Leadership’ (2001) 57 Journal of Social Issues 637.

<sup>118</sup> Ibid.

<sup>119</sup> Godess Bvukutwa, ‘Gender Equality is not a Western Notion’ <<https://thisisafrika.me/gender-equality-western-notion/>> accessed 10 April 2018.

<sup>120</sup> Ibid.

seek to go against such cultural practices that tend to discriminate against women are opposed by the same women in an effort to preserve the patriarchal system. This explains the reason why whereas the CoK of Kenya requires that not more than two thirds of members of elective body should be of the same gender, so far in the last two general elections since the promulgation of the CoK despite Kenyan women making more than half of the registered voters the two third gender rule was not reached. Kenyan women make more than 50% of the population and registered voters. This is an indication that despite women having the numbers to elect their fellow women, women fail to elect women because they don't believe in their capabilities due to gender stereotypes on the capability of women in decision making.

Gender discrimination in Kenya stems from the cultural practices illuminated in the patriarchal nature of the Kenyan society during the precolonial period and colonial period.<sup>121</sup> Men set the rules to govern the society through council of elders in which no woman was appointed. It was the role of the men to determine what was permissible and not. In a few communities, women in a bid to change the status quo played a key role in fighting for independence against gender stereotypes that it was only men who could play the role of society warriors and heads of the family. During the pre-colonial period, women formed self-help groups to agitate for their rights in the decision making process in all spheres of life.<sup>122</sup> However, it was until 1952 that the Maendeleo ya Wanawake self-help group with national composition was formed.<sup>123</sup> The role of the Maendeleo

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<sup>121</sup> Institute for Education in Democracy, 'The Gender Rule Quagmire: Implementing the Two-Thirds Gender Principle in Kenya' <<http://iedafrica.org/index.php/policy-legal-reforms/143-the-gender-rule-quagmire-implementing-the-two-thirds-gender-principle-in-kenya>> accessed 15 February 2018.

<sup>122</sup> K Kibwana, 'Constitutional Development in Kenya' in K Kibwana and CM Peter (eds), *Constitutionalism in East Africa: Progress, Challenges and Prospects in 1999* (Fountain Publishers 2001) 2–3.

<sup>123</sup> M Ndeda, 'Luo Women Voters/Aspirants and the New Constitutional Dispensation in the March 2013 Kenya elections: The case of Siaya and Kisumu counties' in C Thibon, MA Fouéré, M Ndeda and S Mwangi (eds), *Kenya's Past as Prologue: Voters, Violence and the 2015 General Election*, (Twaweza Communications 2015) 212-232.

ya Wanawake Group did not seek to agitate for women political inclusion but was rather entirely domestic and paternalistic. However due to its mobilization of rural women, it became a training ground for women who would later become politicians.<sup>124</sup>

Despite the fact that women played a great role in emancipating Kenya from the colonial period, upon independence, the Kenyan government was generally masculinized.<sup>125</sup> In the first cabinet appointed by the late President Kenyatta, no woman was appointed. The situation remained the same until 1969 when the first woman was elected in Parliament.<sup>126</sup> Women political representation remained low and between 1969 and 1974, women representation in political positions constituted one per cent.<sup>127</sup> In 1975, the First World Conference on Women was held in Mexico and Kenya sent a delegation consisting of a number of women leaders such as Julia Ojiambo and Eddah Gachukia.<sup>128</sup> While the Mexico conference discussed the role of women in governance, the Kenyan delegates on coming back home noted that the issues discussed during the conference which focused on equality did not resonate with the ideals of the African woman.<sup>129</sup>

In fact Gachukia noted that:

Although the themes of the conference – equality, development and peace – were and remain important, our priorities in Kenya were different. While for women from developed

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<sup>124</sup> Effie Owuor, 'Women and Political Inclusion in Kenya: A historical Overview, 1963 – 2016' in Japhet Biegon (ed) *Gender Equality and Political Process in Kenya: Challenges and Prospects* (Strathmore University Press 2016) 7.

<sup>125</sup> M Nzomo 'Kenyan Women in Politics and Public Decision Making' in G Mikell (Ed), *African Feminism: The Politics of Survival in Sub-Saharan Africa* (University of Pennsylvania Press 1997).

<sup>126</sup> 'Grace, Kenya's First Iron Lady in Politics' <<https://www.nation.co.ke/news/politics/Kenyas-first-Iron-Lady-of-politics/1064-1932162-100u2cfz/index.html>> accessed 8 April 2018.

<sup>127</sup> National Democratic Institute, 'Kenya: Supporting Women's Political Participation' <[https://www.ndi.org/sites/default/files/82\\_ke\\_womenfp95.pdf](https://www.ndi.org/sites/default/files/82_ke_womenfp95.pdf)> accessed 8 April 2018.

<sup>128</sup> United Nations Entity for Gender Equality and the Empowerment of Women, *The four global women's Conferences 1975 - 1995: Historical perspective* (United Nations Entity for Gender Equality and the Empowerment of Women 2000).

<sup>129</sup> D Jain, *Women, Development and the United Nations: A sixty Year Quest for Equality and Justice*, (Indiana University Press 2005).

countries, the issue that resonated most was equality, in most provinces of Kenya the priority was bringing water closer to homes.<sup>130</sup>

It is apparent that from the First World Conference on women, Kenyan women delegate did not want to deviate from the status quo. The Second World Conference on Women held in Copenhagen in 1980 focused on the steps taken by countries on the Plan of Action culminating from the first Conference in Mexico.<sup>131</sup> Kenya was well represented. It was recognized that not so much had been done to implement the decisions of the first conference. In 1985, the Third World Conference on Women was held in Nairobi bringing the discussion on gender discrimination closer home.<sup>132</sup> This culminated in the Forward Looking Strategies (FLS) which agitated for position of women concerns not only in leadership but also in development. The Nairobi Conference provoked women to assert their rights and inclusion by drawing lessons from women in developing countries. In 1992, the Women Convention was held in Kenya under the umbrella of National Council of Women of Kenya and Africa Women's Development and Communication Network (FEMNET) at Uhuru Park to spearhead gender equality.<sup>133</sup> It was during this Convention in Nairobi that triggered a wave of gender equality in Kenya, as woman realized that the status quo needed to be dismantled. Women continued to push for their inclusion and representation in social, economic and political spheres of life focusing on gender mainstreaming in the institution framework.

Following the efforts of women to call for gender inclusion in government policies, the government in 1993 appointed a Task Force to review all the laws relating to women and determine

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<sup>130</sup> Ibid p 70.

<sup>131</sup> United Nations Entity for Gender Equality and the Empowerment of Women, *The Four Global Women's Conferences 1975 - 1995: Historical Perspective* (United Nations Entity for Gender Equality and the Empowerment of Women 2000).

<sup>132</sup> Ibid.

<sup>133</sup> Wanjiku Mukabi Kabira and Elishiba Njambi Kimani, 'The Historical Journey of Women's Leadership in Kenya' (2012) 3(6) *Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS)* 842.

how they impaired the enjoyment of women rights.<sup>134</sup> The purpose of the taskforce was to review all the ‘existing laws, regulations, practices, customs, and policies’ that impaired women recognition, enjoyment and exercise of their human rights.<sup>135</sup> The need to review all the laws in place was informed by the argument that a legal system is a mirror of the society’s values and norms. These norms are usually entrenched in the legal system and reflect what the society perceives as acceptable and unacceptable. Where gender stereotypes against women exist, these are embedded and reflected in most of the laws enacted by the legislature. In its report, the Taskforce noted that indeed Kenyan laws had to be repealed or reformed to reflect rights of women and the need for affirmative action and gender mainstreaming.<sup>136</sup> These efforts resulted in the establishment of the National Gender Commission, a Ministry in charge of women, children and social services and mostly a directive that 30% of public positions should be represented by women. At this point, government policies had recognized that indeed women had been marginalized in the society and affirmative action was necessary to enhance gender representation in governance.

While the Report by the Taskforce provided a strong basis upon which women sought equality and amendment of the laws that perpetuated gender discrimination, in Kenya the fight for gender equality was more prevalent in the political sphere as women sought to increase their representation through affirmative action.<sup>137</sup> Affirmative action had been recognized during the 1995 UN Fourth World Conference on Women in Beijing which culminated into the Beijing Declaration of Platform for Action. Kenya participated in the Beijing Conference and had ratified

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<sup>134</sup> Gita Gopal and Maryam Salim (eds), *Gender and Law: Eastern Africa Speaks* (World Bank 1998).

<sup>135</sup> Government of Kenya, *Report of The Task Force Appointed to Review Laws Relating to Women* (Government of Kenya 1999).

<sup>136</sup> *Ibid* p 329-346.

<sup>137</sup> Catherine Kaimenyi, Emelda Kinyi and Chege Macharia Samuel, ‘An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya’ (2013) 3(6) *International Journal of Business, Humanities and Technology* 91.

the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which requires Member States to promote gender equality in all spheres of governance. Following the Beijing Conference, in 1997 Honorable Phoebe Asiyo tabled a motion in Parliament requiring the need for affirmative action in elective positions.<sup>138</sup> Honorable Asiyo called for the Parliament in the spirit of affirmative action to introduce a legislation to reserve two Parliamentary positions for women, require political parties to ensure that a third of those nominated were women and a legislation on public funding to be determined by the number of women nominated by the political party.<sup>139</sup> This motion was defeated by male chauvinists in Parliament and it did not see the light at the end of the day. In 2000, Honorable Beth Mugo tabled the same motion and this time it was referred to the Constitution of Kenya Review Commission (CKRC).<sup>140</sup>

During the constitutional review process, the call for gender equality in political, social and economic life was one of the top of the agenda.<sup>141</sup> The independent Constitution did not have provisions on gender equality in appointive positions such as judicial positions neither did it recognize that women and men be treated as equal before the law as an inherent human right. The CKRC notes that the need to ensure gender equality in the new constitutional dispensation had been informed by the unfair treatment of people in accordance with their gender.<sup>142</sup> The Constitution of Kenya Review Act (CKRA),<sup>143</sup> mandated the CKRC to review the 1963 Constitution of Kenya with a view of establishing a free and democratic system of government that enshrines good governance, constitutionalism, rule of law, human rights, gender equity,

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<sup>138</sup> Government of Kenya, *Parliamentary Hansard, April 23rd 1997* (Parliament 1997).

<sup>139</sup> Biegon (n 95).

<sup>140</sup> Kenya Human Rights Commission (KHRC), *Wanjiku's Journey: Tracing Kenya's Quest For a New Constitution and Reporting on the 2010 National Referendum* (KHRC 2010).

<sup>141</sup> CKRC, *The Final Report of the Constitutional of Kenya Review Commission* (CKRC 2005).

<sup>142</sup> *Ibid.*

<sup>143</sup> Government of Kenya, *The Constitution of Kenya Review Act Chapter 3A of the Laws of Kenya* (Government Printers 2009).

gender equality and affirmative action.<sup>144</sup> To ensure that the Constitutional review process envisaged gender equality, the CKR Act required the nomination and appointment of the members of the Parliamentary Select Committee (PSC), the Committee of Experts (CoE), to take into consideration the principle of gender equality. In qualifying for the appointment of the CoE one had to prove knowledge and experience in a number of issues including women and gender issues.<sup>145</sup> Gender parity was treated with the seriousness it deserved. The recognition of gender equality in the constitutional review process in Kenya is an indication that indeed, gender inequality had been a thorn in the flesh in the Kenyan governance and a time had come for the Kenyan man and woman to be treated equally.

The inclusion and requirement of women representation in the constitutional review process in itself gave the process legitimacy. For the first time in history, since independence, Kenyan women had been given a chance to participate in constitutional making and determine their fate in a new constitutional dispensation. Women remained active participants in the Bomas Constitutional Conference held in 2003-2004, spearheaded by organizations such as FIDA Kenya, KHRC, League of Women Voters and the Institute of Education and Democracy ensuring that their needs were addressed.<sup>146</sup> Women were adequately represented in the CoE and PSC. This gave them an opportunity to address the pressing issues facing them and call for their entrenchment in the CoK. FIDA and other civil society organizations played a great role in lobbying for women representation. The Bomas Conference collapsed when the government delegates walked out of the conference. However, this did not discourage women who worked close together with a common goal, to ensure gender equality in the Kenyan governance. In the 2010 Constitutional

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<sup>144</sup> Ibid, s 4.

<sup>145</sup> The other areas of experience as indicated in section 10 of the CKR Act are comparative constitutional law, human rights, public finance, governance, ethics, accountability and electoral system.

<sup>146</sup> Owuor (n 120).



referendum, women came out to vote in large numbers for the adoption of the CoK. In August, 2010, the CoK of Kenya was promulgated.

The promulgation of the CoK culminated in a supreme law of the land which recognized gender as critical element in the constitutional dispensation. Since then, the term ‘gender equality’ in Kenya has become a common term since the promulgation of the CoK which brought in a new realm in governance recognizing the central role that women play in decision making. It is not surprising that the term ‘gender equality’ runs throughout the CoK recognizing the need for the new governance structure to enhance and promote gender equality and equity by putting in place both a legislative and policy framework. Indeed, the right to equal treatment and freedom from discrimination and the two-third gender rule require that not more than two thirds of those appointed in the elective and appointive positions should be of the same gender is now well anchored in the CoK.<sup>147</sup> The Kenya National Human Rights and Equality Commission (KNCHR),<sup>148</sup> political parties,<sup>149</sup> the JSC,<sup>150</sup> and all the Commissions and Independent Offices established in the CoK must adhere to the two-third gender rule.<sup>151</sup> Further a number of provisions require that membership of public elective bodies such as the National Assembly,<sup>152</sup> the Senate<sup>153</sup> and the County Assembly meet the two-thirds gender rule.<sup>154</sup>

The Constitutional provisions on gender equality is a clear indication that indeed, the need to elevate the position of women in decision making has been recognized as critical in the new

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<sup>147</sup> CoK 2010, Art 27; George Mworio Kurea, *The Implementation of the Two Third Gender Rule in the Devolved Government as Stipulated in the Kenyan Constitution: The Case Study Of Meru County* (Masters’ Degree Thesis, University of Nairobi 2015).

<sup>148</sup> CoK 2010, Art 59.

<sup>149</sup> CoK 2010, Art 91 (1) (f).

<sup>150</sup> CoK 2010, Art 172 (2) (b).

<sup>151</sup> CoK 2010, Art 250

<sup>152</sup> CoK 2010, Art 97.

<sup>153</sup> CoK 2010, Art 98.

<sup>154</sup> CoK 2010, Art 177.

constitutional dispensation. It is no longer a mere directive but a constitutional requirement that needs to be implemented. Kenyans expectations is that the judiciary as a guardian of the CoK vested with judicial authority will play a fundamental role through judicial decisions to ensure that the principles and the spirit of the CoK on gender equality is upheld in all spheres of life. In doing so, the government is required to ensure that the laws enacted and the policies implemented reflect the Constitutional requirement that seeks to promote gender equality. Any person can approach the Court to seek enforcement of gender equality in all the spheres of governance.

### **2.3 Women and Judging: Gender Equality in the Judiciary**

Constitutional provisions is usually a product of economic, social, political and legal considerations.<sup>155</sup> Whereas Kenyan women have come a long way in fighting for gender inclusion, the entrenchment of gender equality provisions is a clear indication that the Kenyan society values the principle of gender equality. In enhancing gender equality, the CoK requires that the JSC should take into consideration gender equality when appointing judicial officers. This is a recognition that indeed gender equality in judicial appointments is fundamental. However, the wave for gender equality in the judiciary has been as a result of activism towards women rights and the recognition of the role of the women in decision making by human rights activists and women organization such as the Kenya Women Judges Association (KWJA) making gender inequality a legitimate topic for gender discussion. Before the promulgation of the CoK, gender inequality in the judiciary was apparent. Since the Kenyan judiciary was established, the UN Women in 2015 when launching the HeForShe Solidarity movement noted that:

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<sup>155</sup> Slawson (n 112).

From the inception of the Judiciary system in Kenya, it took 96 years for the first woman magistrate, Retired Honorable Judge Ephie Owuor to be sworn in, 98 years for the second and 106 years for the third. The first Lady Deputy Chief Justice in Kenya was appointed after 124 years. These positions were availed to women only in the mid 70's after the professionalization of the bench prior to which the few Lady Judges were not African.<sup>156</sup>

It is in no doubt that, the need to promote gender equality within the judiciary did not evolve on its own but was as a result of the women's endeavor for representation since the precolonial period.<sup>157</sup> The need to increase women representation in the judiciary has always been pegged on one key question: do women representation in the judiciary make any difference?<sup>158</sup> Supporters of increased women representation in the judiciary have primarily focused on the differentiation, legitimacy, diversity and representation arguing that women representation in the judiciary makes a difference.<sup>159</sup> Critics on the other hand argue that gender equality in the judiciary makes no difference at all as women tend to be subjective and bias towards issues.<sup>160</sup> These arguments are very important, because despite many countries enhancing gender equality at the subordinate courts in modern democracy, at the highest courts the debate for and against increasing women representation still persist in the 21st Century.<sup>161</sup>

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<sup>156</sup> UN Kenya, 'Kenyan Judiciary Pushing the Wheel of Justice in Gender Equality: HeForShe' <<http://daogewe.org/index.php/blogs-k2/item/284-kenyan-judiciary-pushing-the-wheel-of-justice-in-gender-equality-heforshe>> accessed 9 March 2018.

<sup>157</sup> Dawuni and Kang (n 10).

<sup>158</sup> Halka (n 57).

<sup>159</sup> Sean Cooney, 'Gender and Judicial Selection: Should there be More on the Courts' (1994) 19 Melbourne University Law Review 20.

<sup>160</sup> Neal Devins, 'Gender Justice and Critics' (1988) 76 California Law Review 1377.

<sup>161</sup> Kombo and Others (n 19).

It is in no doubt that, whether a judge is a woman or a man, the judicial process requires that judges be impartial, objective and independent.<sup>162</sup> This increases the legitimacy of the judicial process. Wilson notes that, ‘the judge must not approach his or her task with preconceived notions about law or policy, with personal prejudice against parties or issues, or with bias toward a particular outcome of a case’.<sup>163</sup> A judge is expected to judge cautiously based on the law and the facts and not personal prejudices. In most jurisdictions, where a judge believes that there exists a conflict of interest that would affect their judgment they are required to recuse themselves from the judicial process.

Theoretically, a judge should be impartial and independent. However, supporters of judicial diversity provide that, practically this is not possible as judges do not operate in a vacuum.<sup>164</sup> Judges’ interpret the law that reflects the norms and values attached to the society. It is very difficult for judges to exercise pure impartiality because they are human beings and have been socialized in a certain way that will be reflected in their decisions.<sup>165</sup> Griffith has argued that for a judge to be purely impartial it means that the judge has to be like a political, economic and social eunuch who has no interests in what happens outside the court.<sup>166</sup> Practically this is impossible. Every judge brings with them attitude, values, assumptions and beliefs which to them reflect what is embedded in their society.<sup>167</sup> A judge socialized in a patriarchal society is likely to reflect his perceptions in decision making.

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<sup>162</sup> LR Yankwich, 'The Art of Being a Judge' in GR Winters (ed), *Handbook for Judges* (The American Judicature Society 1975).

<sup>163</sup> Wilson (n 64).

<sup>164</sup> Ibid.

<sup>165</sup> Yankwich (n 158).

<sup>166</sup> JAG Griffith, *The Politics of the Judiciary* (Manchester University Press 1977).

<sup>167</sup> RS Abella, 'The Dynamic Nature of Equality' in S Martin and K Mahoney (eds), *Equality and Judicial Neutrality* (Carswell, 1987) 8-9.

Even if judges were to be purely impartial, the legal system in itself reflects the norms, functions and aspects of societal norms at different levels of governance which judges apply in decision making. As a result of men dominating the social, political and economic spheres of life, the rules and laws enacted will reflect the patriarchal system and structure.<sup>168</sup> Petitioners approach the court to litigate on the most pressing issues or disputes that arise in their day to day life. The judges are required to adjudicate the disputes based on the legal texts and the facts of the cases. Yet the legislative process, is a culmination of the society's values and their implementation.<sup>169</sup> The legal process therefore reveals judicial perceptions on the place of women in the society.<sup>170</sup> This begs the question as to the role of the women in enforcing the laws that govern them in a system developed without them.<sup>171</sup>

At the onset, if women are excluded from the legal process in itself, the male dominated bench is likely to agree with the laws enacted in a patriarchal system. Supporters of gender equality therefore argue that increasing women representation therefore brings a gender perspective and in doing so alleviates gender discrimination in the adjudication process.<sup>172</sup> As a result of gender biasness in the judiciary reflected by the gender stereotypes, Podgorny notes that it has led to creation of legal doctrines that are gender bias and purported to be neutral.<sup>173</sup> Having women judges in the judiciary will alleviate women stereotyping and instead advocate for contextual

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<sup>168</sup> Christine M Durham, 'Gender Equality in the Courts: Women's Work is Never Done' [1989] 57 Fordham Law Review 981.

<sup>169</sup> John Stuart, *The Subjugation of Women* (1989) London Longmans, Green, Reader, And Dyer 1989.

<sup>170</sup> Simone de Beauvoir, *The Second Sex* (1st edn, Vintage 2011).

<sup>171</sup> JS Kaye, 'Women Lawyers in Big Firms: A Study in Progress Towards Gender Equality' (1988) 57 Fordham Law Review 111, 126.

<sup>172</sup> McCormick & Job (n 65).

<sup>173</sup> Podgorny (n 62).

approach to adjudication.<sup>174</sup> If more women are represented at the judiciary, they will therefore enhance gender justice.<sup>175</sup>

Kennedy notes that, having women representation in the judiciary enhances ‘democracy and legitimacy, recognize the symbolic role of judges, call for simple non-discrimination, and draw analogies between gender and geographic representation’.<sup>176</sup> As a result of gender stereotypes perpetuated in a patriarchal society, gender equality in the judiciary will add to missing perspective that has existed and in doing so will alleviate gender discrimination in the legal reasoning.<sup>177</sup> A woman judge can dispel the stereotypes of the society against women. Through analysis and the peculiar characteristics of women issues, it helps in the development of the women rights and social justice.

Supporters of the increased women in the judiciary argue where a society is patriarchal, a male dominated judiciary will seek to enhance the patriarchal ideologies and gender stereotypes. Increased women representation in the judiciary brings on board gender perspective. In doing so having women in the bench is likely to bring a gender perspective in the analysis of the law. Indeed, the stereotypes against women affect the development of the law. Judicial opinions then reflect these cultural stereotypes. It worsens when the bench is male dominated. Lord Hale has argued that when it comes to rape in marriage, it is exempted as a form of rape in most laws because of the cultural stereotype that once a woman is married she becomes a property of the husband.<sup>178</sup> However, as a result of social and cultural developments where a married woman is now

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<sup>174</sup> Josephine Dawuni, ‘Breaking the Veil of Masculinity? Women in Ghana’s Legal Academy’, in Ulrike Schultz (ed), *Women in the Legal Academy* (Hart Publishing 2018).

<sup>175</sup> Halka (n 57).

<sup>176</sup> Kenny (n 60).

<sup>177</sup> Podgony (n 68).

<sup>178</sup> Patricia Kameri-Mbote, ‘Violence Against Women in Kenya: An analysis of Law, Policy and Institutions’ (International Environmental Law Research Centre, IELRC Working Paper 2000-1).

considered as an equal in the marriage institution, marital rape is no longer to be considered as an exemption.<sup>179</sup>

In Kenya, some of the laws enacted after independence reflected the myths against women and the patriarchal nature of the Kenyan society. These were reflected in laws concerning inheritance, child custody, burial and land ownership.<sup>180</sup> In judicial adjudication, the male dominated judiciary continued to interpret the gender biased laws, to reflect the customs of the society leading to gender discrimination.<sup>181</sup> For instance, for a long period of time, Kenyan courts in application of customary law, strictly applied the customs that for the purposes of inheritance, a girl child who had gotten married could not inherit. This was the position, until in 2005 when a woman judge, Lady Justice Koome in a ground breaking decision in the case of *Florence Wairimu Kanyora vs Njoroge Kinyanjui* held that daughters just like sons have the right to inherit property departing from the customary law.<sup>182</sup> In 2008, Lady Justice Rawal holding against the Maasai community custom on inheritance, held that women have the right to inherit their father's property.<sup>183</sup> In both these judgments while the courts recognized the role of customary law, they concluded that customary law should not be repugnant to justice. With the promulgation of the CoK which provides that any customary law inconsistent with the CoK shall be null and void, the judiciary

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<sup>179</sup> Article 45 of the CoK which reflects the equal position of women and men in marriage.

<sup>180</sup> Detho Jessica Nabuire, 'Equality under the Succession Act Cap 160' (Thesis, Strathmore University 2017); FIDA Kenya, *Women's Land and Property Rights in Kenya* (FIDA Training Handbook 2012); The International Women's Human Rights Clinic, Georgetown University Law Center and the Federation of Women Lawyers, 'Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation' (2009) 40, Georgetown Journal of International Law 127.

<sup>181</sup> Mbote and Aketch (n 31).

<sup>182</sup> *Civil Suit 11 of 2001, at High Court at Nairobi [2005] eKLR*.

<sup>183</sup> *In the Matter of the estate of Veronica Njoki Wakagoto (Deceased), Succession Cause No. 1974 of 2008 High Court of Kenya at Nairobi [2013] eKLR*.

has asserted that indeed a female child is a child for the purposes of inheritance and will not be discriminated.

As a result of having women judges in Kenya, they have continued to play a great role in bringing gender perspective in adjudication and development of law. In Kenya, the push to enact the Sexual Offences Act,<sup>184</sup> had been largely by the judicial attitudes when adjudicating sexual offences in Kenya.<sup>185</sup> Initially sexual offences were governed by the Penal Code and recognized as offences against morality.<sup>186</sup> When it comes to sexual offences, the prosecution must prove beyond reason doubt that the victim did not consent. However, the issue of consent in sexual offences act has remained contentious and Kamau notes that, it involves ‘perception, interpretation of feelings and reactions, and is a reflection of societal attitudes and values, policy considerations and gendered power relations’.<sup>187</sup> Cultural practices such as widow cleansing, wife inheritance and religious practices in Kenya continued to condone sexual relations even where the woman did not consent. However, women judges have continued to bring in a gender perspective in the adjudication process of sexual offences and in doing so enhancing the rights of women.

Further supporters of gender parity in the judiciary provide that, in a democratic society, where equality is upheld, women representation in the judiciary increases its legitimacy.<sup>188</sup> Women representation is not only a token to women. It symbolizes equal opportunity to all the gender and encourages the young women to seek and aspire to become legal practitioners.<sup>189</sup> In Kenya and across the world, more women are entering into the legal profession and it will be absurd if judicial

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<sup>184</sup> Government of Kenya, *Sexual Offences Act No. 3 of 2006* (Government Printers 2006).

<sup>185</sup> Coalition on Violence against Women (COVAW), *Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases: A Digest* (COVAW 2005).

<sup>186</sup> *Ibid.*

<sup>187</sup> Winfred Kamau, ‘Legal Treatment of Consent in Sexual Offences in Kenya’ <<http://theequalityeffect.org/pdfs/ConsentPaperKenya.pdf>> accessed 7 April 2018.

<sup>188</sup> Hunter (n 58).

<sup>189</sup> Hunter (n 11).



appointments do not consider women appointments. Between June 2012 and July 2013, a total number of 842 advocates in Kenya were admitted.<sup>190</sup> Female advocates were 468 while male advocates were 364. In the recent pasts the number of women advocates has increased.<sup>191</sup> If these young advocates are not given a chance to work in the judiciary, it will likely discourage the future generations into getting into the legal profession. The people have high expectations that the judiciary as the custodian of the CoK should enhance these principles. If the judiciary is not gender sensitive then the public is likely to lose confidence in it.

Critics of gender representation in the judiciary posit that women in the judiciary make no difference as they seek to represent the needs of women which male judges can as well protect.<sup>192</sup> Gender equality in the judiciary, leads to bias judging and politically motivated partiality; there is a concern that women are not a homogenous group and appointing women judges does not make any difference; women will ultimately conform to the institutionalized male standards and there is no justification of adding more women to the bench; and male judges can be gender sensitive too and there is no need for gender representation.<sup>193</sup> Women judges make no difference because female professionals are the same people representing the same values as male professionals.<sup>194</sup> Appointing female judges will make no difference at all. However, this argument has no place in the modern democracy and constitutional dispensation, where we have seen women in the judiciary dispute the gender stereotypes in the adjudication process bringing a gender

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<sup>190</sup> Government of Kenya, *State of the Judiciary Report 2012-2013* (Judiciary 2013) 21.

<sup>191</sup> Government of Kenya, *State of the Judiciary Report 2016-2017* (Judiciary 2017).

<sup>192</sup> Podgony (n 68)24.

<sup>193</sup> Ibid.

<sup>194</sup> McCormick & Job (n 65).

perspective. Women judges in the Kenyan courts have remained categorical that the patriarchal system where a woman had no say and could not own property has no place in our legal system.<sup>195</sup>

As a result of the argument that women judges bring no difference, appointment of women in the court is seen as a token. That it was some form of preference through affirmative action.<sup>196</sup> Justice Hale argues that it is not about women and what they bring on the bench, however we should focus on what the absence of women on the bench means.<sup>197</sup> When Justice Hale was appointed as the first woman to head the UK Supreme Court, despite her exemplary performance both at the professional level and academics, critics of her appointment posited that she was appointed because she was a woman. It should be noted that the appointment of judges is a rigorous activity and only those merited are appointed. A woman appointed in the judiciary is as qualified as the man. Therefore appointment of women in the judiciary should not be seen as a token.

Critics further argue that women judges tend to be subjective in representing the issues of marginalized groups and these would lead to social injustice.<sup>198</sup> If the reverse was true, then we would argue that men are subjective too and represent the interests of men. If that is true, then women representation is critical in the judiciary. The argument that women are subjective in their reasoning should be dispelled with and instead we should focus on what women bring on board. Critics of gender equality in the judiciary fail to understand that women have for a long time been denied a chance to compete equally with men. If no affirmative action is taken then the status quo will remain. As a result of the chauvinism and chauvinist attitudes' women have been conditioned

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<sup>195</sup> Mbote (n 99).

<sup>196</sup> Judiciary, 'Breaking the Glass Ceiling' (Report on the KWJA Session with Professor S Kenney, 8th August 2016) <<http://kwja.org/document/breaking-the-glass-ceiling-report-on-the-kwja-session-with-prof-s-kenney/>> accessed 9 April 2018.

<sup>197</sup> Morgan (n 8).

<sup>198</sup> Hawkins and Martin (n 68).

to think less of themselves. For instance, while the judiciary has appointed the CJ and the Deputy Justice twice since the establishment the Supreme Court of Kenya, it is not surprising that more women applied for the Deputy Chief Justice position than the CJ position. Yet the women were as qualified for the DCJ position as they were qualified for the CJ position. The women are then threatened to go against the status quo.

## **2.4 Conclusion**

In a nutshell, laws reflect the norms and values of the society. The norms reflect in the legal system. When a court interprets a given law, it is bound by the norms of that society as reflected in the given law. The judiciary plays a fundamental role in enhancing this culture. Gender inequality in Kenya stems from the customary and traditional practices. The elevation of gender equality and gender quotas to a constitutional status is a fundamental step towards realization of the right to women to be treated in a fair and equal manner in a democratic society. However, Kenyan women have had a tough time in fighting for their rights and inclusion in governance. The principle of gender equality is now part of our constitutional governance.

Despite the criticism of gender equality in the judiciary, increasing women representation in the judiciary brings a gender perspective in the adjudication process, enhances the legitimacy of the court, promotes women's rights and is fundamental in enhancing the constitutional implementation. In the current constitutional dispensation and modern democracy, discriminative laws and customs have no place in the adjudication process. The debates against gender equality in the judiciary have been taken by events. Every person irrespective of their sex has a right to equal opportunity in all spheres of governance.

## CHAPTER THREE

### 3.0 WOMEN REPRESENTATION IN THE SUPREME COURT OF KENYA: AN ANALYSIS

#### 3.1 Introduction

The quest for gender equality in the judiciary has seen more women seek for judicial appointments in the judiciary. However, whereas women have managed to break the judicial ceiling in most jurisdictions, very few women are represented in the highest court of the land. This chapter interrogates women representation in the Supreme Court of Kenya (SCOK). It focuses on the selection and appointment of women in the SCOK and how it affects women representation.

#### 3.2 The Establishment of the Supreme Court of Kenya

The promulgation of the 2010 CoK brought with it a new realm in governance. In order to ensure that both men and women are treated in an equal manner, the right to equality and freedom from discrimination is now well anchored in the new constitutional dispensation. Article 27(3) specifically stipulates that, ‘women and men have the right to equal treatment, the right to equal opportunities in political, economic, cultural and social spheres’. Since then, women have remained vocal in fighting for equality not only in political positions but in appointive positions as well. To ensure the progressive realisation of gender equality, the CoK has affirmed the role of gender quotas and requires that the State to take legislative and other measures to ensure that not more than two-thirds of the elective and appointive positions are of the same gender.<sup>199</sup>

The requirement that the JSC in performance of its functions as entrenched in Article 172 of the CoK be guided by the promotion of gender equality, in addition to the competitiveness and

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<sup>199</sup> COK 2010, Art 27(8).

transparent process of judicial officers and other staff of the judiciary is not an exception. The independence Constitution did not have provisions on gender equality in appointive positions such as judicial positions nor did it recognise that women and men be treated as equal before the law as an inherent human right.

It should be noted that, indeed the establishment of the SCOK under Article 163 of the CoK is not novel. The 1963 independence Constitution established a judiciary composed of the subordinate courts, the Supreme Court, the Court of Appeal and the Judicial Committee of Britain House of Lords.<sup>200</sup> The Supreme Court had ‘unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it’ by the Constitution or any other law.<sup>201</sup> It was the final arbiter on disputes relating to the interpretation of the Constitution and fundamental human rights.

The Supreme Court was a court of superior record and was composed of the CJ and eleven other judges.<sup>202</sup> There was no position for a DCJ. The CJ was appointed by the Governor-General in consultation with the Prime Minister. As a result of Majimboism, the Prime Minister had to consult the regional assemblies in appointment of the judges of the Supreme Court. It was required that at least four out of the seven regional assemblies support the candidates appointed as judges of the Supreme Court.<sup>203</sup> Whereas the independence Constitution envisaged the establishment of a Supreme Court, the same did not have provisions on gender equality in appointive positions. Therefore gender equality as a principle was not entrenched in the independence Constitution.

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<sup>200</sup> Government of Kenya, *The Final Report of the Constitution of Kenya Review Commission* (CKRC 2005) 200-210.

<sup>201</sup> 1963 Independence Constitution of Kenya s 173.

<sup>202</sup> *Ibid* s176 (2).

<sup>203</sup> *Ibid*.

When Kenya became a Republic, the Supreme Court was scrapped and renamed as the High Court and the Court of Appeal remained the highest court in the land.<sup>204</sup> This remained the position until during the constitutional review process when people of Kenya asked for the need to establish a Supreme Court as was envisaged in the independence Constitution.<sup>205</sup> The Supreme Court would be established as an apex court, act as the final arbiter and custodian of the constitutional supremacy.<sup>206</sup> As a result of the push to have a Supreme Court during the constitutional review process, the CoK revamped the structure of the Kenyan court system. The system of the Kenyan courts is composed of the superior courts and subordinate courts. The Supreme Court, Court of Appeal, High Court, Environment and Land Court (ELC) and the Employment and Labour Relations Courts (ELRC) are courts of superior record. The ELC and the ELRC are specialised courts with the status of the High Court established under Article 162(2) of the CoK. The ELC hears and determines matters relating to land and environment.<sup>207</sup> The ELRC on the other hand hears and determines disputes relating to employment and relations court. The Magistrate Courts, Kadhis' courts, courts Martial and any other court or local tribunal established by an Act of Parliament are subordinate courts.<sup>208</sup>

During this period the people of Kenya had no confidence in the judiciary. The 2007-2008 post elections violence was attributed to lack of confidence in the judiciary to settle presidential disputes.<sup>209</sup> It is not surprising that when the Supreme Court was established in the 2010 CoK, it

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<sup>204</sup> The Judiciary, 'Our History' <<https://www.judiciary.go.ke/about-us/our-history/>> [accessed 1 May 2018].

<sup>205</sup> Government of Kenya, *Final Report of the Taskforce on Judicial Reforms* (Government Printer 2010) 200-210.

<sup>206</sup> Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (Inaugural Distinguished Lecture Series, University of Fort Hare 2014).

<sup>207</sup> ELC Act, s 13.

<sup>208</sup> CoK 2010, Art 169..

<sup>209</sup> Government of Kenya, 'Final Report of the Taskforce on Judicial Reforms (Government Printer 2010)106-107. <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf> [accessed 26 February 2018].

was clothed with ‘exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President arising under Article 140 of the CoK.’<sup>210</sup> In addition to having exclusive and original jurisdiction in determining presidential disputes, the Supreme Court has an advisory jurisdiction at the request of ‘the national government, any State organ or any county government with respect to matters concerning the county government’.<sup>211</sup> The Supreme Court also has appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as required by national legislation.<sup>212</sup>

The Supreme Court of Kenya is not an ordinary court. It is the highest court of the land and Kenyans have high expectations in the delivery of its judgments and development of jurisprudence.<sup>213</sup> As the final arbiter of disputes, it is the last hope for Kenyans when it comes to delivery of justice.<sup>214</sup> As a court at the highest apex of the Kenyan judicial system and in accordance with the principle of *stare decisis*, all the courts of Kenya are bound by the decisions of the Supreme Court.<sup>215</sup> This is well anchored under Article 163(7) of the CoK which stipulates that, ‘all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court’. In the case of *Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others*,<sup>216</sup> the Supreme Court affirmed that indeed the decisions of the Supreme Court are final and the lower courts have no option but to abide by them. While all lower courts are bound by the decisions of the Supreme Court, the Supreme Court is not bound by its decisions and it can depart from its earlier

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<sup>210</sup>Art 163(a), CoK 2010, laws of Kenya; Sec 12, Supreme Court Act, No. 7 of 2011, laws of Kenya.

<sup>211</sup>Art 163(6), CoK 2010, laws of Kenya.

<sup>212</sup>Art 163(4), CoK 2010, laws of Kenya.

<sup>213</sup>*Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others*, Petition No. 5 of 2013, Supreme Court of Kenya [2013] eKLR.

<sup>214</sup>Collins Odote, ‘A critique of the Raila Odinga v. IEBC Decision in Light of the Legal Standards for Presidential Elections in Kenya’ in Dr. Collins Odote & Dr. Linda Musumba (eds), *Balancing the Scales of Electoral Justice Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, ( IDLO and JTI 2016).

<sup>215</sup>Hannington Amol, ‘Revisiting *Dodhia v National Grindlays Bank*: A Search for Judicial Philosophy of *Stare Decisis*’ (2017) 13(1) *Journal of the Law Society of Kenya*

<sup>216</sup>*Petition 4 of 2012, Supreme Court of Kenya [2013] eKLR.*

decisions.<sup>217</sup> In the case of *Kidero and 4 Others v Waititu and 4 Others*,<sup>218</sup> the Supreme Court held that ‘the significance of Article 163(7) is to regulate the development and settlement of our jurisprudence through the Supreme Court as the forum entrusted with the final mandate to interpret Kenya’s transformative charter’. Similarly, in the case of *Peter Gatirau Munya v. IEBC & 2 Others*,<sup>219</sup> the then CJ Mutunga in a concurring opinion held that indeed all other courts other than the Supreme Court, are bound by the decisions of the Supreme Court. However, such departure from its own decisions must be carefully weighed by the Supreme Court as it will have a negative impact on its legitimacy.

As the court of last resort, the Supreme Court of Kenya plays a fundamental role as the custodian of the Constitution and development of jurisprudence. The expectations of the people of Kenya are that, the Supreme Court of Kenya, in exercising its judicial authority, it will seek to enhance the principles and purposes enshrined in the CoK. The legitimacy of the Supreme Court of Kenya is impinged on how it addresses the conflicts before it. One of the key principles that the Supreme Court must protect is the principle of gender equality. If the principle of gender equality as entrenched in the CoK is as fundamental as it should be, then the Supreme Court in itself should implement this principle by ensuring that women are represented in the Supreme Court. This should be seen to be done.

The judiciary plays a critical role in the implementation of the CoK values and principles. In doing so, the judiciary has an obligation to abide by those values. In implementation of the gender equality, the judiciary is not an exception. This is the reason why Article 172(2) (b) of the CoK in

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<sup>217</sup>*Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others, Presidential Petition No. 1 of 2017, Supreme Court of Kenya [2014] eKLR.*

<sup>218</sup> *Petition No. 18 of 2014, Supreme Court of Kenya [2014] eKLR para 239.*

<sup>219</sup> *Petition No.2B of 2014, Supreme Court of Kenya [2014] eKLR para 228.*



clear terms requires the JSC that in addition to competitiveness and transparent process when appointing judicial officers, it must also be guided by the promotion of gender equality. It would be absurd for the courts to adjudicate and grant orders requiring that all governance structures promote gender equality when it does not.

### **3.3 Women Representation in the Supreme Court of Kenya**

Despite the critical role that the SCOK plays in the Kenyan constitutional democracy, since the promulgation of the CoK and the judicial reforms in the judiciary, women representation in the Supreme Court has raised a number of concerns. In 2010, the judiciary embarked on judicial reforms informed by the 2010 Taskforce on Judicial Reforms Report which had found existence of gender inequality in the judiciary.<sup>220</sup> The Judicial Reforms Taskforce Report noted that, indeed at the magistrate and the paralegal level, there was equal representation between men and women. However, this position changed as one moved from the lower levels to the highest levels in the judiciary. In the Court of Appeal which was the highest court of the land then, there was no woman judge.<sup>221</sup> The Court of Appeal had eleven judges. It was a male dominated court. In the High Court 27 judges were men while 18 judges were women. At the magistrates' level, 168 judges were men while 109 judges were women. At the highest realm of the court structure, there was no woman designated as the CJ. The position of a CJ is the highest position in the judiciary and a CJ is the president of the judiciary. By then there was no position of DCJ as envisaged under the current CoK which has been held by three women since the Supreme Court became operational.

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<sup>220</sup> Government of Kenya, *Final Report of the Taskforce on Judicial Reforms* (Government Printer 2010)106-107. <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf> accessed 26 February 2018.

<sup>221</sup> *ibid.*

The judiciary embarked on fundamental reforms when the CoK was promulgated and one of them was to enhance gender parity in the judiciary. This was aimed at enhancing public confidence in the judiciary which had deteriorated during the previous constitutional regime. The road to gender equality in Kenya has been a long and arduous journey for the Kenyan women.<sup>222</sup> The Constitutional provisions on gender equality illuminated the hope of women to play a critical role in the implementation of the CoK and the Kenyan governance system. In fact, immediately after the promulgation of the CoK, the advisory jurisdiction of the Supreme Court was invoked on matters relating on the implementation of the two-third gender rule in the appointive and elective positions in Kenya.<sup>223</sup> However, the *Supreme Court in Advisory Opinion No. 2 of 2012* diminished the hope of the Kenyan woman when it held that, women representation in appointive and elective positions as required under the two-third gender rule is progressive in nature and not an immediate realization.<sup>224</sup> However, despite this advisory opinion, Kenyan women have not relented neither have their dreams to have an equal society in which women are treated in equal measure with men diminished. Kenyan women have continued to assert their role in governance and demand for equal representation.

In its annual reports, the JSC has increased the number of women representation in the courts.<sup>225</sup> In 2016, 61% of the judges of the superior courts were male, while women accounted for 39% abiding by the two third gender rule.<sup>226</sup> At the court level, 32% of the judges of the Court of Appeal,

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<sup>222</sup>Wanjiku Mukabi Kabira and Patricia Kameri-Mbote, 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise' Dr. Collins Odote & Dr. Linda Musumba (eds), *Balancing the Scales of Electoral Justice Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, ( IDLO and JTI 2016) 177.

<sup>223</sup> *Advisory Opinion No. 2 of 2012, In the Matter of an Application for Advisory Opinion under Article 163 (6) of the Constitution of Kenya.*

<sup>224</sup> Ibid.

<sup>225</sup> Government of Kenya, *Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017-2021* (Judiciary 2017).

<sup>226</sup> Government of Kenya, *Annual Report and Financial Statements: 2015-2016* (Judicial Service Commission 2017)13.

43% in the High Court and 38% in the ELC were women, surpassing the 30% mark. In the ELRC women accounted for 23%.<sup>227</sup> In the Supreme Court, 71% of the judges were male while women accounted for 29%. At the subordinate level, women representation accounted for 49.6% while men accounted for 50.4%. The gap is very small. At the court level, women representation in Chief Magistrate Court (54%), Resident Magistrate Court (61%) and Senior Principal Magistrate (54%) was more than men.<sup>228</sup> In 2018, the representation of women and men is still the same as what is recorded in the JSC 2015/2016 report. In a nutshell, the judiciary has to a large extent abided by the two third gender rule in appointive positions that arise in the judiciary; this, however, is not so for the Supreme Court.

However, despite the great steps that the JSC has undertaken in enhancing gender equality in the appointments of the judicial officers, Kenyan women feel that there is need for more representation of women in the Supreme Court. The Supreme Court is composed of seven members. Article 163(1) (a) of the CoK requires that the Supreme Court shall consist of the: Chief Justice, who shall be the president of the court; Deputy Chief justice; and five other judges. The JSC selects and recommends judges of the Supreme Court after a rigorous interview process to the President who appoints them after the approval of the Parliament. The appointment of Supreme Court judges occurred in July 2011 when the first batch was appointed and in June 2016 when three vacancies occurred in the Supreme Court following the retirement of the CJ, DCJ and a judge in the Supreme Court. In June 2011, the first ever judges of the Supreme Court of Kenya were appointed. These judges were Justice Philip Tunoi, Justice (Prof.) Jackton Ojwang, Justice Mohammed Ibrahim, Justice Njoki Ndungu and Justice (Dr) Smokin Wanjala. In this appointment, only one judge was

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<sup>227</sup> *ibid* at p 14.

<sup>228</sup> *ibid* at p14.

a woman. Former CJ Willy Mutunga and former Deputy CJ Nancy Baraza were appointed in the respective positions. Following these appointments, the Federation of Women Lawyers of Kenya (FIDA) in the *Federation of Women Lawyers of Kenya (FIDA) & Others v Attorney General & Another (FIDA Case)*,<sup>229</sup> approached the Court arguing that the JSC had failed to take into consideration the ‘correct arithmetic/mathematics of the Constitutional requirements of gender equality’.<sup>230</sup> In June 2016, the JSC recommended the appointment of Hon. Mr. Justice Lenaola to the President as a judge of the Supreme Court following the retirement of Justice Philip Tunoi. This triggered a court application in the case of *the National Gender & Equality Commission & Another v Judicial Service Commission & 2 Others (NGEC Case)*,<sup>231</sup> where the petitioners argued that the JSC would have recommended a woman instead of a man and the failure to do so was in contravention of the gender principle. In the above cases, before interrogating the courts decisions, the cases focused on the role of the JSC in recommending judges of the Supreme Court for appointment and whether in doing so the JSC took into consideration the gender equality principle. This invokes a discussion on the appointment of Supreme Court judges and how it influences the number of women that can be appointed as judges of the Supreme Court. It also invokes the role of the JSC as a gatekeeper in the appointment of the judges of the SCOK. This is very fundamental because it has an impact on women representation in the Supreme Court of Kenya.

### **3.4 The Selection and Appointment of Judges of the Supreme Court**

While the discussion on women representation in the highest courts continues to rage, it should be noted that the Supreme Court appointments depends on an appointive body. In this regard, judges of the Supreme Court are appointed if they meet the requirements as stipulated in the law. Unlike

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<sup>229</sup> *Petition 102 of 2011, High Court at Nairobi [2011] eKLR.*

<sup>230</sup> *ibid.*

<sup>231</sup> *Petition No 446 of 2016, High Court at Nairobi [2017].*

the elective positions, where those who wish to be elected campaign by going back to the electorates to seek their votes and sell their manifestos, judges of the Supreme Court must meet the academic and professional requirements. In Kenya the JSC is the body established under Article 171 of the CoK to recommend judges of the Supreme Court to the President for appointment and approval by the Parliament. In selecting the judges, the JSC is required to be guided by the principle of gender equality under Article 172(2) (b) of the CoK in addition to competitiveness. Further at the statutory level, Section 3 of the JSA requires the JSC and the judiciary to enhance gender equity and protection of human rights.<sup>232</sup> Section 14(1) of the Schedule of JSA further requires the JSC after the conclusion of interviews to deliberate and nominate the **most qualified applicants** taking into account gender, regional, ethnic and other diversities of the people of Kenya.

In appointing the judges of the SCOK the JSC is required to abide by the principles set out in the CoK and the JSA. Gender equality is therefore a requirement that the JSC cannot evade or overlook in its appointment. Yet the Supreme Court is not an ordinary court and the appointment of judges of the Supreme Court invokes a lot of interest across the board. It should be noted that, the Supreme Court having the exclusive jurisdiction to hear and determine presidential elections, in itself triggers political interest in the appointment of judges of the Supreme Court. Yet amidst all these conflicts, the JSC is required to be objective in recruiting Supreme Court Judges.

The appointment of judges of the Supreme Court starts at the application stage of the selection process, the shortlisting stage, interview stage, recommendation stage and finally the appointment stage. Once a vacancy occurs in the SCOK, the JSC will advertise the positions with the

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<sup>232</sup> In carrying out their mandate and in their internal affairs the judiciary and JSC will be guided by considerations of social and gender equity and the need to remove any historical factors of discrimination. In doing so, the JSC is required to provide for gender mainstreaming in its Regulations.

expectations that only those who qualify for those positions will apply in accordance with the First Schedule of the JSA. When such an advertisement is made, Article 166(1) and 166(3) of the CoK requires the applicants to ensure that they possess the requirements enlisted before tendering the application.

An applicant desiring to be appointed as a judge of the SCOK must hold a law degree from a recognised university or is an advocate of the High Court of Kenya or possess an equivalent qualification in a common law jurisdiction. One must be from the legal profession. It is not a must that one is an Advocate of the High Court of Kenya – possession of a law degree will suffice. Secondly each level of the superior courts requires different levels of experience which an applicant must possess. To be appointed as a Supreme Court judge one must possess at least fifteen years of experience, and ten years of experience to be appointed as a judge of the Court of Appeal and the High Court. This experience can be gained either in Kenya or in another Commonwealth common-law jurisdiction. Judges must also have a high moral character, integrity and impartiality. Whether a man or a woman, one must possess the above qualifications. This give both men and women an equal opportunity. It will be against the law if a qualified woman is denied an opportunity based on gender.

The constitutional and statutory requirements of a Supreme Court judge in Kenya envisages the position will attract only those who qualify without taking into consideration whether the said people are underrepresented or disadvantaged. This begs the question, how many women are qualified for the said position, and if so are there setbacks that intimidate women from tendering their applications? Whereas the JSC is required to enhance gender equality, it can only do so if it is represented with a diverse pool to choose from. In Rwanda, the judiciary does not wait for the women to apply for the Supreme Court positions, rather it adopts an approach known as the

‘insider-outsider collaboration’.<sup>233</sup> In this approach, the judiciary actively seeks competent women for the Supreme Court positions and encourage them to apply. This approach was also adopted in US which enabled President Jimmy Carter to appoint more women in the judiciary.<sup>234</sup> In Kenya, while the JSC will advertise for the positions, there exists no intense lobbying for women to tender applications for the said positions. This invokes the role of the KWJA the JSA, civil society organisations and the judiciary in encouraging competent women to apply for the said positions. Even if competent women existed, one would ask whether indeed from the pool of legal professions we have enough women from which the JSC can select from. This implies having women who meet the specific constitutional and statutory requirements of a Supreme Court judge. Like any other judicial officer, judges are recruited from a pool of legal professions. This forms the pool of professionals from which the JSC select judges. The pool from which the Supreme Court judges are recruited has been recognised as very fundamental in enhancing judicial diversity.<sup>235</sup> In the recent past, women in Kenya have continued to enter the legal profession. Between June 2012 and July 2013, total number 842 advocates in Kenya were admitted, and out of this female advocates were 468 while male advocates were 364.<sup>236</sup> This is likely to encourage more women to pursue the legal profession.

The judge of the Supreme Court must have the experience of aggregate fifteen years of experience.<sup>237</sup> Despite having more women pursuing the legal profession, for one to be selected as

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<sup>233</sup> Jean Marie Kamatali, ‘Rwanda: Balancing Gender Quotas and an Independent Judiciary’ <<https://poseidon01.ssrn.com/delivery.php?ID=762127125113125114098092016081064092121071009035059050117012104000078120109029092126050101098044042040042067111120074079086092104038000060086096103097070122120087005023050081020023125007122001006010104011088005014117119098119114096093099070094105126110&EXT=pdf>> [accessed 8 May 2018].

<sup>234</sup> Kenny (n 60)66.

<sup>235</sup> Bindmanand and Monaghan (n 3).

<sup>236</sup> Government of Kenya, *State of the Judiciary Report 2012-2013 (Judiciary 2013)* 21.

<sup>237</sup> Art 166(3) (c), CoK 2010, laws of Kenya.

a judge of the Supreme Court, they must have worked as a judge of the court of superior record for at least fifteen years. This means that, when the first recruitment of judges of the Supreme Court of Kenya was undertaken in July 2011, those appointed for those positions must have worked as judges of the High Court and Court of Appeal as from 1996. Yet, data from the Judiciary clearly indicates that in the year 1996 and before the judicial reforms on the appointment judges that kicked in after the promulgation of the CoK, there was no woman as a judge of the Court of Appeal. In addition, out of the 45 judges of the High Court 18 were women.<sup>238</sup> In total the Superior Court judges were 56 and only 18 were women.<sup>239</sup> There were very few women in the Superior Courts at that time and if the JSC was limited to selecting judges of the Supreme Court only from the pool of judges, very few women would have the opportunity to compete for the said positions.

Men applicants are likely to have an upper hand when it comes to the fifteen year experience as a judge of the Superior Court. However, as the number of women representation continues to increase in the superior courts, there is hope that more women are going to meet the fifteen year experience requirement in the near future. Women as a disadvantaged group during the previous regime, means that it will take them sometime to gain the fifteen years of experience. In Rwanda, for a person to be appointed as a judge of the Supreme Court they must have at least eight years of experience in the legal profession.<sup>240</sup> However, the pool from which judges of the SCOK are selected is wide enough to accommodate women who have worked in other legal professions such as the civil society. It is upon the relevant stakeholders such as the JSC and the KWJA to lobby qualified women to apply for the positions of judges of SCOK.

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<sup>238</sup> Government of Kenya, 'Final Report of the Taskforce on Judicial Reforms (Government Printer 2010)106-107. <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf> accessed 26 February 2018.

<sup>239</sup> Ibid Page 106.

<sup>240</sup>Ibid.



Unlike the 1963 Independence Constitution that limited the pool of judges for the selection of judges of the High Court and Court of Appeal to advocates of the High Court of Kenya, the CoK has expanded the pool for candidates who can qualify to be appointed as judges of the Supreme Court of Kenya. In accordance with Article 166(3) (b) of the CoK, the CJ, DCJ and judges of the Supreme Court of Kenya, can be appointed from distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field. In 2011, the CJ who was appointed had worked in the civil society and not on the bench. In the recent past we have seen the positions of judicial officers attract members of the legal profession not working in court. Women must be encouraged to apply for these positions in order to grant the selection panel the opportunity to enhance gender equality.

One trend that has been noted in the two appointments of judges of the Supreme Court of Kenya is that despite widening the pool of applicants, very few women have tendered their applications for the position of the CJ. In 2011, out of the thirteen applicants for the CJ position, only two were women (Lady Justice Mary Angawa and Kalpana Rawal). These two were High Court judges then. In 2016, when the CJ resigned, only two women applied for the CJ position, (Lady Justice Roselyne Nambuye who is a judge of the Superior Court (Court of Appeal) while Ms. Lucy Wanja Julius was a legal practitioner with more than twenty years' experience.<sup>241</sup> This is a clear indication that women from other legal professions rather than judicial officers are yet to embrace the fact that they can literally apply for the SCOK as a judge because the pool is now widened.

Another trend is that in the previous SCOK's recruitment, most women applied for the DCJ position. This invokes the question why most women preferred to apply for the DCJ position and

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<sup>241</sup> The Standard, ' List of Applicants for CJ, Deputy CJ and Supreme Court Judges' <<https://www.standardmedia.co.ke/article/2000207975/list-of-applicants-for-cj-deputy-cj-and-supreme-court-judges>> accessed 15 March 2018.

not the CJ position. In response to this question Kenny notes that, ‘the reason why most women may have not applied for the CJ position could have been because of the kind of dirt/malice that tend to be brought up if they tendered their interest and how badly the women candidates would feel about themselves at the end of the process’.<sup>242</sup> What Kenny was trying to put forward is that in a patriarchal society like Kenya and as a result of chauvinistic attitudes, women tend to believe that the top positions are a preserve for men. Women afraid of threatening the status quo are likely to go for the lesser position.

During the 2016 interviews for the position of the DCJ, the JSC asked one of the female judges whether there was a perception out there that the DCJ position was reserved for women: <sup>243</sup>

Prof Ojienda, ‘Why did you apply for the Deputy Chief Justice?’

Judge Fatuma, ‘you can only climb a tree from the bottom’

Prof Ojenda, is there a perception in the Judiciary, that the DCJ position is reserved for women?

Judge Fatuma Sichale, ‘I think there is a feeling out there that this commission is male dominated?’<sup>244</sup>

The question as posited by Professor Ojienda and the answers given by Judge Fatuma brings out the picture that the female applicants for the DCJ position felt safe applying for the said position other than the CJ position.<sup>245</sup> Kenny has noted that indeed if we are to increase women

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<sup>242</sup> Judiciary, ‘Breaking the Glass Ceiling’ (Report on the KWJA Session with Professor S Kenney, 8th August 2016) <<http://kwja.org/document/breaking-the-glass-ceiling-report-on-the-kwja-session-with-prof-s-kenney/>> accessed 9 April 2018

<sup>243</sup> Citizen TV, ‘Judges Fatuma Sichale, Hannah Okwengu interviewed by JSC’ <<https://www.youtube.com/watch?v=RFC794NrQM0>> accessed 9 May 2018.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

representation in the Kenyan Supreme Court, then there is need to prepare and coach the female candidates.<sup>246</sup> This will place them at a higher standard and compete with the male candidates. Women applying for the Supreme Court judges' position need to understand that they must show that they are bringing their experience on board and will discharge their duties objectively. They are as competent as their male counterparts and the selection panel will have no option but to select them.

In 2016, one of the female applicants for the CJ position, when asked which experience she would bring on board if appointed, she argued that she was chosen one, a David that would kill Goliath.<sup>247</sup> She even made a comment that if appointed she would bar the media from following court proceedings in contravention with the right to public participation.<sup>248</sup> To make matters worse, her application was incomplete and she admitted not meeting the minimum requirements.<sup>249</sup> This is one of the interviews that attracted public ridicule as her answers did not portray a serious candidate for the CJ position. This is one of the case scenarios that women seeking to be appointed for judicial positions must draw lessons from. Women need to be prepared.

### **3.5 Role of JSC in Promoting Gender Equality in the Supreme Court of Kenya**

The JSC is obligated to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. It is the one obligated to recommend to the President persons for appointment as judges including judges of the SCOK. In the performance of its functions, the JSC is legally mandated to adhere to the salient constitutional principles of competitiveness and transparent processes and the promotion of gender equality in

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<sup>246</sup> Judiciary n(43).

<sup>247</sup>KTN, 'KTN Prime 13th September 2016: Lucy Wanja appears before CJ interview panel' <https://www.youtube.com/watch?v=b1hEtQTIKr4> accessed 8 May 2017.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

the judiciary including the Supreme Court of Kenya.<sup>250</sup> In implementation of these constitutional provisions, the JSA is the enabling statute with elaborate provisions on the working of JSC and it stipulates that its objective and purpose is to ensure that JSC facilitate the promotion of gender equity in the Judiciary.<sup>251</sup>

The JSC is tasked when selecting and recommending the judges to the Supreme Court, to ensure that there is compliance with the two thirds gender rule as envisaged in article 27 (8) of the CoK. Failure of the realisation of the two thirds gender representation in the Supreme Court as per the constitutional stipulations can be partly attributed to the JSC. JSC should ensure that there is no prejudice in the selection and shortlisting process of the Supreme Court judges. For instance, some of the information sought in the interview may negatively impact on the number of women willing to apply for those positions. In particular, indebt grilling of the reasons behind divorce in case of divorced women may expose them to public ridicule for instance in the scenario of Nancy Baraza thus partly discouraging others from tendering application when such vacancies arise. In any case there is no solid link between divorce and competence in serving as the judge of the Supreme Court.

Besides, JSC in conjunction with other relevant bodies in realisation of gender equality such as NGEN is supposed to initiate programmes to deconstruct gender stereotypes that have portrayed the senior judiciary positions as masculine due to the enormous pressure appurtenant thereto. These programmes should also educate women on the importance of application and serving as judges in the Supreme Court. The lower number of applications made may be as a result of the little knowledge and misconceptions that has been perpetuated over time. The notions that women

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<sup>250</sup> Art 172, CoK 2010, laws of Kenya

<sup>251</sup> Sec 3 (j), JSA No. 1 of 2011, laws of Kenya.

should only be led and that women cannot be leaders since they cannot make rational decisions has partly contributed into the low number of applications to the positions of the CJ. Thus, it is high time JSC initiates sensitisations that will deconstruct this inferiority syndrome. These are among few positive steps that JSC is supposed to take in ensuring that both women and men are accorded equal opportunities to the apex court in Kenya.

However, it is a clear fact that the minimum qualifications for the candidates willing to apply to the positions of the judges in the Supreme Court are common to all genders. By JSC taking the aforementioned steps to ensure women representation in the Supreme Court does not mean that JSC lowers these minimum qualifications for the women. Furthermore, one may argue that the application process is voluntary and JSC cannot force women to apply for the position of the judges of the Supreme Court. However, despite of all these critiques these steps are simply meant to ensure equal opportunities to both men and women in the positions of judges of the Supreme Court. Thus, JSC should partner with other relevant institutions in realisations of gender equality to initiate programmes and mechanisms geared towards enhancement of the gender equality in the Supreme Court.

### **3.6 Conclusion**

In conclusion, gender representation in the Supreme Court has not yet fully adhered to the constitutional principle of gender equality as envisaged in article 27 (8) of the CoK. The Supreme Court consists of seven judges and thus to conform to the two thirds gender rule, at least three judges out of seven should be of different gender. However, since its inception the number of women has been two despite efforts of pushing it to at least three. Thus, JSC and the President

should reconsider their selection and appointment criteria in ensuring that not more than four judges of the Supreme Court judges are of the same gender.

## CHAPTER FOUR

### 4.0 GENDER QUOTAS AND WOMEN REPRESENTATION IN THE HIGHEST COURTS: A CASE OF THE SUPREME COURT OF KENYA

#### 4.1 Introduction

Generally the number of women representation in the Kenyan judiciary has increased after the promulgation of the CoK and cumulatively the judiciary has to a large extent abided by two-thirds gender principle.<sup>252</sup> At the court levels apart from the Supreme Court of Kenya (SCOK), women representation has surpassed the 30% mark.<sup>253</sup> Arithmetically women representation in the SCOK stands at 29% (two women) while 71% (five men) of the judges are male. The appointment of the judges of the SCOK raised concerns regarding whether the JSC in recommending the judges of the SCOK failed to comply with the two-third gender principle in recruiting judges of the SCOK. Raising the question whether the gender quota system should be adopted in enhancing women representation in the SCOK. This chapter therefore interrogates and analyses in detail the debate for and against the use of gender quotas in enhancing gender equality in the highest courts by critically analyzing the SCOK decisions in the *FIDA* and *NGEC Cases*.

#### 4.2 Women Representation in the Highest Courts

If the Kenyan JSC in the selection and recruitment of the magistrates and judges of the Courts has complied with the two-third gender principle in all courts, then why is it difficult for the same to be applied in the SCOK? Is the SCOK peculiar in any way from the other superior courts of record and the magistrates' courts? These questions raise weighty issues that this study seeks to

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<sup>252</sup> Government of Kenya, *Annual Report and Financial Statements: 2015-2016* (Judicial Service Commission 2017)13.

<sup>253</sup> *Ibid*.

interrogate. At the gist of the *FIDA Case* and the *NGEC Case*, the petitioners argued that indeed the JSC in recommending the judges of the SCOK in both scenarios had failed to comply with the two-third gender principle. The petitioners called for the need to adopt the gender quota system as a measure of increasing women representation in the SCOK. In both cases the court was asked to interrogate whether gender quotas should be applied in the recruitment of the judges of the SCOK by the JSC.

Before delving into the Court's decision in the *FIDA* and *NGEC* cases on the compliance of the two-third gender principle in the recruitment of judges of the SCOK, it should be noted that women representation in the highest courts has raised a number of concerns not only in developing countries but in developed nations as well.<sup>254</sup> It is not a Kenyan problem alone. It is a global concern.<sup>255</sup> As women increasingly enter the professional world, they tend to be more concentrated at the lower levels. As William and Thames note that the 'lower-prestige offices see greater representation of women, because the lower level of prestige makes the office easier to attain and less appealing to men'.<sup>256</sup> In Kenya while the JSC advertised for the positions in the SCOK, evidence shows that the CJ position was more attractive to the men, while the DCJ was appealing to the women. This made it look like the DCJ position was purely created and reserved for women and not men. One of the women interviewees of the DCJ position aptly put it that she applied for the DCJ position because it is easier to climb a tree from down.<sup>257</sup> The CJ position in Kenya is the most prestigious as the qualified person becomes the president of the judiciary.

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<sup>254</sup> Tonja Jacob and Dylan Schweers, 'Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments' (2017)103 Virginia Law Review 1379.

<sup>255</sup> Diana Z O'Brien and Johanna Rickne, 'Gender Quotas and Women's Political Leadership' (2016) 110(1) American Political Science Review 112.

<sup>256</sup> Margaret S Williams and Frank C Thames, 'Women's Representation on High Courts in Advanced Industrialized Countries' (2008) 4 Journal of Politics and Gender 451.

<sup>257</sup> Citizen TV, 'Judges Fatuma Sichale, Hannah Okwengu interviewed by JSC' <<https://www.youtube.com/watch?v=RFC794NrQM0>> accessed 9 July 2018.



It is no doubt that the highest courts of the land are not only prestigious but they play a great role in constitutionalism, rule of law, democracy, good governance and access to justice. These courts are considered as the most prestigious and appointment of judges is competitive.<sup>258</sup> Appointment of judges of the highest courts require vast legal experience and integrity.<sup>259</sup> In recruiting the judges of the highest courts, it is reasonable that the recruiting body takes into consideration not only the competitiveness and effectiveness of the court, but all the merit of those appointed. It is not a position for everybody. The reason why this is so is because the highest courts adjudicate on important issues that have a significant impact on the country, rule of law and justice. For instance, in Kenya, the SCOK has exclusive jurisdiction to hear disputes relating to presidential elections. The recruitment of the judges of the highest courts is very vital as it can either build or destroy public confidence and its legitimacy. Therefore, the recruitment process must be independent from personal interests and politics of the day.

Data indicates that while women have been able to break the glass ceiling in the judiciary, women representation in the highest courts is still low.<sup>260</sup> In Kenya, out of the seven judges of the SCOK, two are women. Three out of the nine judges of the Supreme Court of the United States and Canada are women representing one third of the court.<sup>261</sup> In India, out of the 25 Supreme Court judges, only one is a woman.<sup>262</sup> Yet the Indian Supreme Court was established in 1950 and for almost four decades of existence, only six women judges have been appointed. In New Zealand, two out of the

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<sup>258</sup> Laura Langer, Jody McMullen, Nicholas P Ray and Daniel D. Stratton, 'Recruitment of Chief Justices on State Supreme Courts: A Choice between Institutional and Personal Goals' (2003) 65(3) *The Journal of Politics* 655.

<sup>259</sup> Hunter (n 11).

<sup>260</sup> UK Judiciary, *Increasing Judicial Diversity* (A Report by JUSTICE Chair of the Working Party Nathalie Lieven QC 2017).

<sup>261</sup> National Women's Law Centre, 'Women in the Federal Judiciary: Still Long Way to Go?' <https://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf> accessed 11 July 2018.

<sup>262</sup> Ghosh and Others (n 5).

seven judges of the Supreme Court are women.<sup>263</sup> In the United Kingdom out of the five judges of the Supreme Court only one is a woman and is the president of the Supreme Court.<sup>264</sup> In Uruguay, its highest court is exclusively composed of men.<sup>265</sup> This means that women still have a long way to go in reaching gender parity in the highest courts.

Some countries have made strides in increasing women representation in their highest courts. In the California Supreme Court it is headed by a female justice and majority of the judges are women as four out of the seven judges are women.<sup>266</sup> In Trinidad and Tobago, women are the majority in their highest courts standing at 74%.<sup>267</sup> We have also seen in countries such as the United Kingdom, Lesotho, Ghana, Benin, Nigeria and Rwanda women take up the positions of CJ or presidents of their highest courts.<sup>268</sup> The position of the president of the highest court which is the court of the last resort is not an ordinary position. For one to qualify as the president of the judiciary they must possess exemplary qualifications. Between 1990 and 2014, ‘eighteen women in fourteen African countries’ had served as either chief justice or presidents of the highest courts in their land.<sup>269</sup> It is, therefore, clear that as women penetrate the legal profession, they are making great strides taking up leadership positions in the highest courts. This is a clear indication that women representation in the highest courts is practicable and as countries continue to enhance gender

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<sup>263</sup> Ruth McColl, ‘Celebrating Women In The Judiciary 2014’ (Address to New South Wales Women Lawyers, The Honourable Justice Ruth McColl AO Court of Appeal Supreme Court of New South Wales Union, University and Schools Club 27 February 2014 ).

<sup>264</sup> B Dickson, ‘Activism and Restraint within the UK Supreme Court’ (2015) 21 European Journal of Current Legal Issues 1.

<sup>265</sup> Council of Europe, *European Judicial Systems: Efficiency and Quality of Justice* (CEPEJ Studies No 23 Council of Europe 2016).

<sup>266</sup> The Judiciary of California, ‘Supreme Court Justices’ <<http://www.courts.ca.gov/supremecourt.htm/www.weownthedream.org/3014.htm>> accessed 11 July 2018.

<sup>267</sup> Michelle Toxopeus, ‘Women in the Judiciary’ <[https://hsf.org.za/publications/hsf-briefs/women-in-the-judiciary#\\_ftn3](https://hsf.org.za/publications/hsf-briefs/women-in-the-judiciary#_ftn3)> accessed 12 July 2018.

<sup>268</sup> Cowan (n 11).

<sup>269</sup> Cowan and Kang (n 10) 49.

equality, women need to be encouraged to apply for the positions in the highest courts if they qualify.<sup>270</sup>

### **4.3 Should Gender Quotas be adopted in Enhancing Women Representation in the Highest Courts?**

The call for gender diversity in increasing women representation and participation in all spheres of life continues to increasingly gain momentum at both the international level and domestic level.<sup>271</sup> Countries are adopting various policy measures that seek to enhance women leadership and representation in political and leadership positions.<sup>272</sup> However, it is now recognized that due to social attitudes against women in patriarchal society, the pace at which women representation will be achieved is slow.<sup>273</sup> In order to enhance women representation in social, economic and political lives including the judiciary, countries are increasingly adopting gender quotas in response to the changing attitudes about women.<sup>274</sup> The use of gender quotas in appointment of highest courts judges has triggered the question whether gender quotas are effective in increasing women representation in the highest courts.<sup>275</sup>

Gender quotas refer to the requirement to have individuals appointed or recruited according to certain proportions. Gender quotas aim at ensuring that a certain number of the unrepresented gender are recruited into the political, economic and social life. There are three types of gender

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<sup>270</sup> Valdini and Shortell (n 2)..

<sup>271</sup> Anne Philips, *The Politics of Presence* (Oxford University Press 1998).

<sup>272</sup> Iris Bohnet, *What Works: Gender Equality by Design* (Harvard University Press 2016).

<sup>273</sup> Ronald Inglehart and Pippa Norris, *Rising Tide: Gender Equality & Cultural Change around the World* (Harvard University 2003); Naila Kabeer, 'Gender Equality and Women's Empowerment: A Critical Analysis of the Third Millennium Development Goal 1' (2005) 13(1) *Journal of Gender and Development* 13.

<sup>274</sup> Susan Franceschet and Mona Lena Krook, *The Impact of Gender Quotas* (1st edn, Oxford University Press 2012); Rohini Pande and Deanna Ford, 'Gender Quotas and Female Leadership: A Review' (Background Paper for the World Development Report on Gender, April 7 2011) <[http://scholar.harvard.edu/files/rpande/files/gender\\_quotas\\_-\\_april\\_2011.pdf](http://scholar.harvard.edu/files/rpande/files/gender_quotas_-_april_2011.pdf)> accessed 5 July 2018.

<sup>275</sup> Somani (n 24).

quotas: reserved seats; legal candidates' quotas; and voluntary political party quotas which is voluntary.<sup>276</sup> Gender quotas can be legally mandated by the Constitution or Statute; or on a voluntary basis. In Kenya,<sup>277</sup> Rwanda,<sup>278</sup> Uganda,<sup>279</sup> the use of gender quotas in appointive and elective bodies is constitutionally mandated. The 1995 Constitution of Uganda has further constitutionalized the rights of women and requires that Ugandan women be accorded full and equal dignity of the person as men.<sup>280</sup> Laws, cultures, customs or tradition that are against the right, dignity and welfare of women which undermine their status are prohibited.<sup>281</sup> In South Africa, provisions relating to gender equality are embedded in its Constitution and Women's Charter for Effective Equality. However, it is only in the Local Government – Municipal Structures Act that the use of gender quotas in political parties is entrenched.<sup>282</sup>

Whereas gender quotas can aim at increasing the representation of either gender in neutral terms of male and female, the main idea of gender quotas in most countries is to increase women representation.<sup>283</sup> As countries increasingly adopt gender quotas, the debate for and against the use of gender quotas in increasing women representation in leadership positions has centered on the tension between selection by gender and selection by merit.<sup>284</sup> Supporters of gender quotas view them as a temporary measure in increasing women representation until when a level playing

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<sup>276</sup> Dudley (n 4).

<sup>277</sup> CoK 2010, Article 27(8).

<sup>278</sup> Constitution of Rwanda, Article 82, 126

<sup>279</sup> UNDP, *Gender Equality and Women's Empowerment in Public Administration: Uganda Case Study* (United Nations Development Programme 2012).

<sup>280</sup> Constitution of Uganda, Article 33.

<sup>281</sup> Ibid.

<sup>282</sup> Inter-Parliamentary Union, 'Women in National Parliaments' Inter-Parliamentary Union (July 1, 2017), >[www.ipu.org/wmn-e/classif.htm](http://www.ipu.org/wmn-e/classif.htm)> accessed 18 July 2018.

<sup>283</sup> Kombo and Others (n 19).

<sup>284</sup> Philips (n 20) 60.

ground between women and men is reached.<sup>285</sup> Gender quotas play short-cutting a process that can naturally take generations'.<sup>286</sup>

In a strong patriarchal society where the attitudes against women are still prevalent, the use of gender quotas can be the only way for women to get into appointive and elective positions.<sup>287</sup> The use of gender quotas as a policy measure in enhancing women representation is a step towards sending a message to the populace that indeed the government recognizes that women and men should be treated equally.<sup>288</sup> Further gender quotas send a symbolic policy that indeed the demand for gender equality is prevalent. Society as a whole is kept alert that there is a change in governance and women's role in governance is now entrenched. Appointive and elective bodies must then in any decision making ensure that gender equality is adhered and reflected in its decisions. Supporters of gender quotas therefore encourage that where underrepresentation of women exists, gender quotas is the best alternative. Those who favour gender quotas argue that they are guaranteed to work.<sup>289</sup>

Critics of gender quotas present a wide range of theoretical and practical considerations. One of the greatest criticism against the use of gender quotas is that they undermine merit and in some cases leave organizations at disadvantage.<sup>290</sup> This is referred to as the merit principle. In the US the merit principle requires that 'recruitment should be from qualified individuals from appropriate

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<sup>285</sup> John Hendra , 'Women in Politics Map 2014' ( Statement by UN Women Deputy Executive Director Policy and Programme John Hendra, New York, 11 March 2014)< <http://www.unwomen.org/en/news/stories/2014/3/women-in-politics-map-2014>> accessed 7 July 2018.

<sup>286</sup> *ibid.*

<sup>287</sup> Hanane Darhour and Drude Dahlerup, Sustainable Representation of Women Through Gender Quotas: A Decade's Experience in Morocco' [2013] Women's Studies International Forum 1.

<sup>288</sup> Li-Ju Chen, 'Do Gender Quotas Influence Women's Representation and Policies?' (2010) 7(1) The European Journal of Comparative Economics 13.

<sup>289</sup> Kate Malleon, 'The Case for Gender Quotas for Appointments to the Supreme Court' <http://ukscblog.com/case-gender-quotas-appointments-supreme-court/> accessed 7 July 2018.

<sup>290</sup> Mona Lena Krook, 'Contesting Gender Quotas: Dynamics of Resistance' (2016) 4(2) Journal of Politics, Groups and Identities 268.

sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge and skills, after fair and open competition which assures that all receive equal opportunity'.<sup>291</sup> Critics of gender quotas and any affirmative action insists on the dangers of abandoning the meritocratic principles and argue that:

Quotas are patronizing and self-defeating. Appointing or selecting women on grounds other than ability will rebound, not just on those individuals but on women generally. To say it is merely wiping out a disadvantage is disingenuous. Women will be making progress by denying men an equal chance to compete.<sup>292</sup>

The use of gender quotas is seen as a token to women by virtue of their sex without taking into consideration their merit and experience.<sup>293</sup> Even if gender quotas were to work, Mona has argued that they only focus on quantitative physical ration rather than the qualitative barriers which must be addressed.<sup>294</sup> The 2013 United Nations Millennium Development Goals Report while recognizing that gender quotas has been key in increasing women representation, indicated that indeed gender quotas in itself is insufficient.<sup>295</sup> In order to ensure gender quotas are effective, 'political commitment to gender equality and ambitious measures to achieve it must be accompanied by sanctions for non-compliance'.<sup>296</sup> Whereas gender quotas have been argued to be effective, it has been averred that experience from Kenya and Australia show that they are

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<sup>291</sup> US Merit Systems Protection Board, 'Merit System Principles' <<https://www.mspb.gov/meritsystemsprinciples.htm>> accessed 7 July 2018.

<sup>292</sup> M. Phillips, 'Hello to the Gender Gerrymander', *Observer* (3 October 1993).

<sup>293</sup> Carol Bacchi, 'Arguing for and against quotas: Theoretical issues' in Drude Dahlerup (ed), *Women, Quotas and Politics* (Taylor & Francis 2006)33.

<sup>294</sup> Mona Lena Krook, 'Contesting Gender Quotas: Dynamics of Resistance' (2016) 4(2) *Journal of Politics, Groups and Identities* 268.

<sup>295</sup> UN, *The Millennium Development Goals Report 2013* (UNGA 2013) 22.

<sup>296</sup> *Ibid.*

constrained by focus on quantitative outcomes rather than the qualitative benefits that women bring on board.<sup>297</sup> In order to enhance equality for opportunities, women must compete for the said positions just like their male counterparts. Critics on the other hand posit that the use of gender quotas ‘emphasize the potential threat to meritocratic selection’ and lead crowding out of other unrepresented and marginalized groups.<sup>298</sup>

Even if critics see gender quotas as a token to women who should compete with men for the available positions, gender quotas allow women to get to position they would not have in the absence of gender quotas. Gender quotas also send a strong message that the government is committed to granting everyone despite their sex opportunities to participate in the social, political and economic spheres of life. Gender equality in institutions grants it legitimacy and the use of gender quotas in itself portrays the institution’s strides to bring everyone on board. An institution which treats everyone equal without discriminating them on the ground of gender enhances justice. Everyone is treated equally. Gender quotas have received international recognition as a viable tool in enhancing affirmative action.<sup>299</sup> If gender quotas are to be effective, Dahlerup argues that it will depend on two dimensions.<sup>300</sup> The first dimension is who has mandated the quota system and second, what part of the selection and nomination process that the quota targets.<sup>301</sup>

The debate for and against gender quotas brings us back to the core question in this study on whether gender quotas can be effective in enhancing women representation in the highest courts. It is in no doubt that, as the quest for judicial gender diversity across the globe deepens, this has

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<sup>297</sup>Claire Bennett, A Gender Agenda: The Effectiveness of Quota Systems in Increasing Women’s Meaningful Participation in Politics’ (Australian Institute of International Affairs 2014).

<sup>298</sup> Timothy Besley, Olle Folke, Torsten Persson, and Johanna Rickne, ‘Gender Quotas and the Crisis of the Mediocre Man: Theory and Evidence from Sweden’ (2017) American Economic Review.

<sup>299</sup> Bennet (n 46).

<sup>300</sup> Drude Dahlerup, *Women, Quotas and Politics* (Taylor & Francis 2006)19-21.

<sup>301</sup> Ibid

been realized in many countries at the lower levels of the judiciary. In a number of countries such as Rwanda, Angola, Canada, Australia, Slovenia and Serbia, gender parity or nearly gender parity has been reached in their highest courts.<sup>302</sup> In Solvania and Latvia women have broken the gender ceiling in the highest courts and more than 50% of judges of the highest courts are women.<sup>303</sup> In Ghana and Nigeria despite the countries not having specific gender quotas in the Constitutions, women representation in their highest courts has been enhanced. Dawuni and Kanga,<sup>304</sup> note that indeed gender quotas in themselves are not the sure way of increasing women representation in the highest courts because in most of the countries which have more women judges in their highest courts, they don't have a constitutional gender quota in place. Section 174 of the South African Constitution requires that any appropriately qualified woman and man who is fit and proper can be appointed as judicial officer. It further requires that in making such appointments the judiciary must take into consideration gender and racial composition. Critics of the gender equality in the appointment of judges in South Africa have argued that the JSC puts more weight on racial consideration than gender. That is why women representation in the South African Court remains low.<sup>305</sup>

Whereas the use of gender quotas has been effective and adopted at the lower levels of the courts, its use in highest courts of the land has been controversial.<sup>306</sup> It is not surprising that the question of increasing women representation in the SCOK was adjudicated in the Kenyan Courts. Ecuador sought to increase women representation in its Supreme Court through the gender quota system.<sup>307</sup>

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<sup>302</sup> Arrington and Others (n 81).

<sup>303</sup> Valdini and Shortell (n 2).

<sup>304</sup> Dawuni and Kang (n 10).

<sup>305</sup> Ibid.

<sup>306</sup> Valdini and Shortell (n 2) 57.

<sup>307</sup> Valerie Hoekstra, 'Increasing the Gender Diversity of High Courts: A Comparative View' (2010) 6(3) Politics and Gender 474.



Unfortunately it was not successful.<sup>308</sup> It is at the highest courts that the question of gender equality in the appointment of judges is acute and most controversial. Should gender quotas be used when appointing judges of the highest courts?

Critics of adopting gender quota in the appointment of judges of the Supreme Court have argued that such appointments should solely be on merit taking into considerations any other factors such as gender, racial, ethnic and social diversity.<sup>309</sup> Any person applying for the position in a higher court must possess all the qualifications as required by the law before the appointive body takes into consideration their gender. The highest court of the land cannot be treated as an ordinary court and a lot are stake.<sup>310</sup> It is not for everybody. However, it can be argued that if merit was solely the consideration then it would take long before marginalised groups ever get an opportunity to be appointed as judges of the highest courts. Then it would be difficult to break the glass ceiling and the status quo would remain the same for a long period of time. While the qualifications is an important aspect in the recruitment process, diversity is as important as well. In a scenario where all applicants are merited then it would be reasonable for the recruiting body to also take into consideration the gender, social and ethnic factors.

Critics of gender quotas on the ground of merit literally focus on the role of the highest courts and the hierarchy. The court is required to develop jurisprudence and law. As a court of last resort, the merit of judges is fundamental. Critics of gender quotas in the appointment of women judges in the highest court therefore posit that instead of using gender quotas, emphasis should be put on the selection and recruitment process and more qualified women encouraged to apply for the

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<sup>308</sup> Jennifer M Piscopo, 'States as Gender Equality Activists: The Evolution of Quota Laws in Latin America' (2015) 15(7) Latin American Politics and Society 27.

<sup>309</sup> Somani (n 24).

<sup>310</sup> Valdini and Shortell (n 2).

positions.<sup>311</sup> This may literally take long if the obstacles that hinder women entry into the judiciary are not dealt with. The obstacles to women entry into the legal profession should be removed and this will allow more women compete effectively for the said positions.

Further critics posit that, gender quotas are not naturally effective.<sup>312</sup> In countries such as Ghana which do not have a quota system, women have been able to be appointed to the highest positions of the Court. Yet in a country such as Kenya where gender quotas are constitutionally mandated only two of the seven judges of the SCOK are women. Whether quotas exist or not is not automatic that indeed the number of women judges in the highest court will increase if the barriers and social attitude towards women is not dealt with. This assumption is not true, because in the UK in the absence of gender quotas, women representation in its Supreme Court is very low. The number of women judges in the highest courts will vary from one country to another. According to Cowan and Kang the selection process and the commitment of the gatekeepers towards gender equality will ultimately affect women representation whether in the presence or absence of the gender quota system.<sup>313</sup>

Supporters of gender quotas in the highest courts argue that due to the patriarchal nature of the society it will take long for women judges to be appointed in the highest courts.<sup>314</sup> Non-appointment of women judges in the highest courts on the basis of merit is in itself ill defined as a diverse judiciary in itself is merit.<sup>315</sup> Due to cultural exclusivity, gender quotas must be implemented immediately to increase women representation in the judiciary. Supporters of gender

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<sup>311</sup> Ibid.

<sup>312</sup> Johnson (n 75).

<sup>313</sup> The authors argues that if the JSC, Judicial Councils and the legislature involved in the appointments of judges are gender sensitive then they will play a great role in enhancing gender equality in the judiciary.

<sup>314</sup> Dahlerup (n 69).

<sup>315</sup> Bindman and Karon (n 3).

quotas agree that as a result of the vast experience required in the appointment of the judges of the highest courts, this may not favour women. In order to increase women representation then, there is need to have in place diversity in the pool of candidates for selection, enhance training and mentoring to improve opportunities for qualified people from diverse. The arguments for and against the use of gender quotas in the highest courts can well be understood by analysing the Kenyan experience.

#### **4.4 Kenya Experience in the Adoption of the Gender Quota System in the Selection Process of the Supreme Court Judges**

As the question whether gender quotas should be used in enhancing women representation in the highest courts gains momentum, in Kenya, the SCOK interrogated this question in the *FIDA* and *NGEC cases*. In Kenya the gender quota system is constitutionally mandated. This in itself is an indication that the Kenyan people recognize that gender equality is an important principle in governance. Therefore the principle of gender equality must be taken into consideration in the appointive and elective positions. The JSC is not an exception and in recruiting and recommending judges to the SCOK it has an obligation to ensure that it enhances gender equality. To interrogate gender quotas in the highest courts, this study analyses the courts decisions in the *FIDA* and the *NGEC Cases*. These cases raised the question whether in recruiting judges of the SCOK, the JSC had failed to take into consideration the two-third gender principle and as a result of that failure the SCOK as constituted was unconstitutional. In both cases, the Petitioners argued that in order to meet the two-third gender principle, out of the seven judges of the SCOK, three should have been women and not two as it was.

Before delving into the *FIDA* and *NGEC cases* which sought to interrogate the use of gender quotas in increasing women representation in the SCOK, the AG sought an advisory opinion in

the SCOK on whether the gender rule in the new constitutional dispensation was to be immediately or progressively realized. In *In The Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion No.2 of 2012)*,<sup>316</sup> the SCOK categorically provided that the implementation of the gender quota provisions was to be progressively realized. It held that:

*We take judicial notice that women's current disadvantage as regards membership of elective and appointive bodies, is accounted for by much more than lack of political will. It arises from deep-rooted historical, social, cultural and economic-power relations in the society. It thus, must take much more than the prescription of gender quotas in law, to achieve effective inclusion of women in the elective and appointive public offices. For the female gender to come to occupy an equitable status in civil and political rights, the State has to introduce a wide range of measures, and affirmative-action programmes.*<sup>317</sup>

The gender rule could not be immediately realized as the CoK requires the State to take legislative and other measures including affirmative action to ensure its realization.<sup>318</sup> According to the SCOK, the two-third gender principle does not amount to a substantive right until when the State takes steps to actualize it depending on the availability of resources. In order to progressively realize the gender-rule, the SCOK called upon Parliament to take upon legislative steps and held that:

*Bearing in mind the terms of Article 100 [on promotion of representation of marginalized groups] and of the Fifth Schedule [prescribing time-frames for the enactment of required legislation], we are of the majority opinion that legislative measures for giving effect to*

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<sup>316</sup> Advisory Opinion No.2 of 2012, In the Supreme Court of Kenya [2012] eKLR.

<sup>317</sup> Ibid Para 67.

<sup>318</sup> CoK 2010, Art 27(6).

*the one third- to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015.*<sup>319</sup>

However despite this judgment, effort to have a legislation on the implementation of the two-third gender principle has been futile. The Advisory Opinion No.2 of 2012, focused generally on the implementation of the gender quota in relation to women representation in the legislature following the 2013 General elections. The legislature is an elective body while the SCOK is an appointive body and therefore the recruitment process of women will vary. In an elective body, the voters' social attitude towards women leadership will to a large extent determine the extent to which women are elected. In an appointive body such as the SCOK, then the criteria for appointive and the recruitments body attitude will ultimately affect the number of women appointed.

***4.41 Federation of Women Lawyers of Kenya (FIDA) & Others v. Attorney General & Another (FIDA Case).***<sup>320</sup>

This was the first case interrogating the use of gender quotas in enhancing women representation in the SCOK following the first appointments of the judges of the SCOK. It sought to interrogate the import, interpretation and tenure of Article 27(8) of the Constitution. This case further sought to interrogate the process used to nominate and recommend the five judges of the SCOK by the JSC and the compliance of the gender quota system at the recruitment stage. This case arose after the JSC on 15th June 2011 recommended five persons as judges of the Supreme Court of Kenya to the President for appointment on 16th June.<sup>321</sup> Of the five recommended, only one was a woman. FIDA, the Petitioner contended that in recommending one woman and four men as judges of the

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<sup>319</sup> Advisory Opinion No.2 of 2012, Para 81.

<sup>320</sup> Petition 102 of 2011, High Court at Nairobi [2011] eKLR.

<sup>321</sup> CoK 2010, Article 172.

SCOK, the JSC had violated the human rights and fundamental freedoms of women as it had failed to take into consideration ‘the correct arithmetic/mathematics of the Constitutional requirements on gender equity’.<sup>322</sup> These recommendations fell below the mandatory maximum and minimum threshold of gender equality which requires that not more than two thirds of the members of elective and appointive positions should be of the same gender.

Using quantitative analysis, it was in the Petitioner’s view that in order to comply with Article 27(8) of the CoK, the JSC was under an obligation to ensure that ‘in the final analysis of its recommendation no gender fell below 33.3% and no gender exceeded 66.7%’.<sup>323</sup> In reaching this calculation, the Petitioner’s averred that mathematically,  $1/3$  of 7 is 2.3 and  $2/3$  of 7 is 4.7. If the JSC was to comply with the two-thirds gender rule, then ‘2.3 ought to have been rounded off to 3 and 4.7 ought to have been rounded of to 4 which would have resulted in a constitutionally compliant ratio’.<sup>324</sup> This would have resulted into three women and four men in the SCOK. It is apparent that the Petitioners focused on the quantitative representation of women judges in the SCOK. Mona warns that even if the use of gender quotas was to work, they focus more on the quantitative physical ration rather the qualitative barriers that hinder women from penetrating into the leadership position.<sup>325</sup>

This judgment is peculiar as it was the first decision to interrogate the use of gender quotas in the SCOK. Second, the SCOK interrogated the role of the JSC as a gatekeeper in enhancing gender equality in the selection process. The implementation of the gender quotas had already been adjudicated by the SCOK in the Advisory Opinion No.2 of 2012 which affirmed that it would be

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<sup>322</sup> FIDA CASE page 3.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Mona Lena Krook, ‘Contesting Gender Quotas: Dynamics of Resistance’ (2016) 4(2) Journal of Politics, Groups and Identities 268.

progressively realised. In its introduction while the SCOK appreciated that the new CoK has brought with it a new realm in governance and invoked high expectations in people who require that the government must live to their expectations the Court made this remarks on equality:

*The main impediment to the implementation and protection of Individual Rights is the prevailing social attitude. As they say, you can legislate equality all you want, but you cannot make people think it and live it particularly if they had been conditioned through inherited traditions and their own life experiences to the concept of inequality. Indeed, the first step, we believe, is to appreciate the common humanity of men and women. We are human beings first and foremost and only secondarily male and female.*<sup>326</sup>

This remarks by the SCOK in a paramount decision as this already reflects that the SCOK recognizes the deep rooted social and cultural attitudes that ultimately will determine whether women are represented in leadership positions or not. Although well embedded in our CoK, the Supreme Court decision clearly indicates that indeed while it is fundamental to legislate equality, it does not make any difference if the concept of inequality has been conditioned in traditions and people's own life and experiences. That from the onset, we are first recognized as human beings, then as male and female. However, as we accept that indeed there exists social attitudes towards women, this in itself is not a limitation to recognizing the role of the women and to change the said attitudes through policy formulation such as the adoption of gender quotas and legislating the same.

Gender equality in Kenya is constitutionally mandated and whether social attitudes towards women exist or not, it is apparent that the people of Kenya have recognized that men and women

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<sup>326</sup> FIDA Case Page 3 (Emphasis Added).

have a right to equal opportunity. In order to give life to the CoK, the State and State organs must abide by the gender quota system. The SCOK recognizing the place of gender equality in Kenyan governance, democracy and constitutionalism set out the threshold that an applicant claiming that his right to equal treatment under Article 27 must meet.<sup>327</sup> First a claimant must establish that because of the ‘distinction drawn between the claimant and others, the claimant has been denied equal protection or equal benefit of the law’.<sup>328</sup> So the claimant has to compare themselves with other people and show that it is solely because of the distinction they possess, that their right to be treated equally with others was violated.

Secondly, the SCOK sought to define what would constitute such a distinction. It provided that, ‘the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds in Article 27’.<sup>329</sup> These grounds include race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth’.<sup>330</sup> The CoK does not leave space for the Court to consider any other grounds not stipulated under Article 27(4). A person claiming that their right to equality and freedom from discrimination has been violated has to stick within the specified grounds.

If a woman judge has to raise the issue of gender discrimination in the appointment of judges, according to the decision in the FIDA case, they must show that it is as a result of sex that they were not selected. This implies that despite the woman judge meeting all the criteria for appointment as set out in the CoK and JSC Act, they were denied an equal opportunity to

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<sup>327</sup> Ibid page 10.

<sup>328</sup> Ibid (Emphasis Added).

<sup>329</sup> Ibid (Emphasis Added).

<sup>330</sup> CoK 2010, Article 27(4).



employment based on their gender. On this issue the SCOK argued that if indeed this would have been proved in the FIDA case it would grab the JSC by the neck as it stated that:

*Had we been supplied with the evidential disability suffered or inflicted by the JSC upon the female gender we would have crossed the river and grabbed JSC by the neck with the words that “you should never tamper with the rights of our mothers, daughters, sisters, aunts and nieces”.<sup>331</sup>*

On the question whether the JSC failed to comply with the two third gender principle in the recruitment of the SCOK judges, the SCOK affirmed that indeed the implementation of the two-third gender principle was to be progressively realized. This decision did not depart from the Advisory Opinion No.2 of 2012. It is upon the State to take legislative action, and other measures including affirmative action to ensure its realization in accordance with Article 27(3) of the CoK. Article 27(8) is merely inspirational in nature and it only creates legitimate expectation on people that indeed the government in good faith will put in place legislative and policy measures to implement it.<sup>332</sup> The SCOK averred that Article 27(8) did not create a specific and substantive right upon which Kenyan women could base a claim. Instead what it does is to create a duty directed to the State as an entity in international law to take specific steps to ensure that it has materialized. This duty specifically falls on the State. It was in the SCOK view that Article 27(8) of the SCOK did not place any duty or a right directed to the JSC to perform its functions in a particular manner.<sup>333</sup> The JSC has administrative discretion to recruit judges and all they need to show is that they followed the law. The SCOK was very cautious because the temperatures on the

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<sup>331</sup> FIDA Case Page 38.

<sup>332</sup> Government of the Republic of South Africa & Others vs Grootboom & Others Case No.11 of 2000 LRC 2001 Vol 3

<sup>333</sup> FIDA case, Page 33 para 1.

implementation of the two-third gender rule was very high at that time. It is not surprising that the SCOK did not to a large extent depart from the decision in the Advisory Opinion No.2 of 2012.

Recognizing that indeed a State should meet its minimum core obligations, the SCOK argued this will be dependent ‘on the benefits to be accorded and on the basis of genuine need of all the vulnerable groups within our society.’<sup>334</sup> Article 27(8) of the CoK specifically provides that at least two-thirds of those in appointive and elective bodies should not be of the same gender resulting into the minimum requirements. The government must demonstrate that indeed it took every effort to ensure that it met its minimum core obligations arising under Article 27(8). In the progressive realization of the gender quota what the government has to do is to ensure that the needs of the most vulnerable members of the society are met. According to the SCOK this would be difficult in the context of the two gender principle in the appointment of judges of the SCOK.<sup>335</sup> The CoK seeks to protect a number of vulnerable group and the gender is not the only consideration. In fact, the JSC is required to take into consideration regional balance, ethnic balance and other vulnerable groups such as marginalized communities and people with disabilities. Merit and fair competition is the basis for the appointment of members of public service.<sup>336</sup>

The SCOK faulted the use of affirmative action through the use of gender quotas.<sup>337</sup> Affirmative action seeks to compensate individuals or a group of persons of past injustice. Affirmative action in some cases will benefit the advantaged people in the society. The SCOK therefore brought in a new dimension in adopting the use of gender quotas. Even if vulnerable groups exists, their needs

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<sup>334</sup> page 36.

<sup>335</sup> FIDA Case page 34.

<sup>336</sup> CoK 2012, Art 232(g).

<sup>337</sup> FIDA Case Page 36.

and opportunities vary according to the different vulnerable groups and ‘such varieties must be holistically addressed’. In appointing judges of the SCOK and taking into consideration gender equality a woman from Central Kenya and a woman from the North-Eastern part of Kenya cannot be treated the same. Gender equality in itself leads to many inequalities’.<sup>338</sup> It is because of these complexities that the SCOK averred that indeed the ‘difficult questions relating to the definition of minimum in context of a right of two thirds in particular whether the minimum core obligation should be defined generally or with regard to the specific group of people’.<sup>339</sup> One can say that indeed this analysis by the SCOK brings to the fore the issue whether a woman from rich background and who had an opportunity to attend good schools be selected in favour of a man who was raised in a poor and marginalized community should be denied the opportunity based on gender. This is indeed difficult and it will vary from one society to another.

On the question regarding the use of gender quotas in the appointment of the SCOK judges, the SCOK averred that this position is not for everyone and there exists a criteria upon which every applicant must meet. The criteria to be appointed as a judge of the SCOK is well enumerated under Article 166 of the CoK and Part V of First Schedule to the Judicial Service Act 2011 and held that:

*When all is said and done, affirmative action is not meant to secure special people for any group within our society. We are saying so because the central issue in this dispute is the appointment of Judges to the Supreme Court. Without doubt persons to be appointed to any judicial office can be decreed to be learned persons who have gone through vigorous learning and experience. Judicial appointment cannot and is not meant for every Dick and Harry. It is only meant for people who have gone through Law school and who have*

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<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

*attained a certain foundation of experience in their legal training and experience. Affirmative action is meant to incorporate every sector of our society and to bring up the less and disadvantaged members of our society.*<sup>340</sup>

Whereas affirmative action is well enumerated in the CoK, these should be read together with the provisions relating to the criteria of appointment of the SCOK judges under the CoK and Regulation 13 of the First Schedule of the JSA. Regulation 13 of the First Schedule of the JSA requires that in determining the qualification of the individual applicants the JSC shall be guided by the following criteria; professional competence; written and oral communications skills; integrity; fairness; good judgment; legal and life experience; and demonstrable commitment to public and community service. The JSC shall then select and nominate the most qualified candidates taking into consideration gender, regional, ethnic and other diversities of the people of Kenya.<sup>341</sup>

What the JSC need to do as a priority is to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. Judicial appointments should be based on the concept of equal opportunity between men and women. Women and men seeking judicial appointments have to possess the attributes of good judges and the experience required. In making the appointments the criteria established in law comes first and anyone who meets the criteria has a legitimate expectations that they will be selected.<sup>342</sup> All applicants must be subjected to the criteria set out and it was in the SCOK's view that it would be unfair if gender came first then criteria. For, no one 'has a right to be considered according to any particular set of criteria in the first place which was not subjected to other

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<sup>340</sup> Ibid Page 24.

<sup>341</sup> Regulation 14

<sup>342</sup> *FIDA Case*, page 29.

candidates'.<sup>343</sup> It is clear that in appointing judges of the SCOK, the merit principle will in most cases be a priority. However, the SCOK reminds that a court that lacks diversity in itself will lose legitimacy and public confidence and called upon the judiciary to comply with the provisions of Article 27 and 172 of the CoK.

In conclusion, the SCOK in the FIDA case affirmed the decision in the advisory opinion No. 2 of 2012 on the two-thirds gender rule that it was not to be immediately realized but rather it was upon the government to take steps to progressively realize the same. It asked the Petitioners to wait until the government has taken legislative steps to actualize the two-third gender principle.

#### ***4.42 National Gender & Equality Commission & Another v Judicial Service Commission & 2 Others (NGEC Case),<sup>344</sup>***

In 2016, three vacancies arose in the SCOK following the retirements of the CJ, DCJ, and a judge of the Supreme Court. The JSC embarked on the process of recruiting qualified and experienced applicants for the said position. This triggered court applications by the Petitioners on the ground that the recommendation of a male judge to the SCOK was in contravention with the two third gender principle. The Petitioners argued that in an appointive position like that one, the JSC did not require a legislation. Further, the SCOK as constituted then was unconstitutional and it was in the best interests of the SCOK's legitimacy to lead by example by complying with the two-third gender principle.<sup>345</sup>

The JSC averred that it had recommended the best among the women and the men who had applied for the position of the judge and none was discriminated on the grounds of gender. The

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<sup>343</sup> Ibid.

<sup>344</sup> Petition No 446 of 2016, High Court at Nairobi [2017].

<sup>345</sup> Ibid Para 12.

recommendations were based on the effectiveness and competitiveness taking into consideration gender equality. It further argued that in determining whether the judiciary had complied with the two-third gender principle, one should look at the judiciary as a whole and not at the Supreme Court. Yet in its annual reports, the judiciary gives information on each level of the court as to the extent upon which they have been able to comply with the two third gender principle.<sup>346</sup> It is therefore important that even in the SCOK, the JSC complies with its constitutional duty towards enhancing gender equality taking into consideration the constitutional requirements such as gender equality. It cannot be said that at the highest court, it is not important to show that gender equality has been achieved if the same has been achieved generally in the judiciary.

Just as in the FIDA case, the SCOK in the NGEC case reiterated that indeed appointment of judges in the SCOK is not for everyone. Only those qualified as stipulated in law can apply and be appointed as judges of the SCOK. In determining whether the JSC had complied with the two-third gender principle, the SCOK held that in accordance with the Regulation 14 of the First Schedule of the JSA, the JSC is required to take into account competence first even if it has to consider gender.<sup>347</sup> It stated that:

*The impugned appointment related to judges of the Supreme Court. Article 166(3) of the Constitution provides for the appointment of the Chief Justice, Deputy Chief Justice and Judges of the Supreme Court and their qualifications. These are basic constitutional requirements which are augmented by the requirements provided for in the JSC Act. Even where the applicants meet basic constitutional requirements, the 1st respondent, in making*

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<sup>346</sup> Government of Kenya, *Annual Report and Financial Statements: 2015-2016* (Judicial Service Commission 2017)13.

<sup>347</sup> Ibid Para 25.

*recommendations for appointment of a judge, has to consider competence as the first criteria before considering the other criteria including gender.*<sup>348</sup>

In the NGEC case, just like the FIDA Case the Petitioners also focused on the numerical composition of the SCOK. They used percentages to show that indeed women representation in the SCOK fell below 33.3% rendering it unconstitutional. In analyzing the numerical representation the SCOK was of the view that indeed the SCOK had not fallen in short of the two-third gender principle:

*Taking the numbers as they are, two-thirds of seven would give 71.42 percent or 4.66 men, while one-third of seven would give 28.57 percent or 2.33 female. There is no decimal point in human beings, and taking the figures to the nearest whole numbers, 4.66 would round off to 5 men, while 2.33 would round off to 2 women. The Constitution does not use percentages but fractions, and for the petitioners to succeed, they were to show that there was indeed a direct and clear breach of the Constitution and statute with regard to the two-third gender principle while making the recommendation for appointment.*<sup>349</sup>

While in the FIDA Case, the SCOK called upon the Petitioners to wait until Parliament enacts a legislation to progressively realize the two-third gender principle, the SCOK in the NGEC Case agreeing with the Respondents, provided that indeed it is not through the legislation alone that the two third gender principle can be implemented.<sup>350</sup> Article 27(6) and 27(8) of the CoK contemplates that the State can take other measures including policy direction and affirmative programmes. It is easier in the appointive positions to achieve gender parity in the absence of a legislative action as

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<sup>348</sup> Ibid Para 26. Emphasis Added.

<sup>349</sup> Ibid Para 32.

<sup>350</sup> Ibid Para 38.

was held in the case of *Marilyn Muthoni Kamaru & 2 Others vs Attorney General & Another*.<sup>351</sup>

All that is required is for the said bodies to put in place affirmative action programmes, policies and good will. The SCOK firmly stated that:

*The constitution therefore leaves a leeway to achieve gender parity even in the absence of legislation both in legislative and appointive bodies. It is even easier to achieve the two-thirds gender equity in appointive positions since all that is required are policies and affirmative action based on good will.*<sup>352</sup>

In dismissing the above petition, the Court held that the JSC did not breach the provisions of the CoK or the JSC Act when recommending Hon. Mr. Justice Lenaola as the judge of the Supreme Court. The recruitment of judges of the SCOK is first based on merit then any other consideration such as gender. The SCOK therefore emphasized the merit principle in recruiting the judges of the highest courts. Neither did the JSC breach the two-thirds gender principle as contemplated by the CoK. The court held thus:

*...it is difficult to fault the 1<sup>st</sup> Respondent for recommending the interested party for appointment to the Supreme Court making the number of men 5. It would have been ideal to recommend a woman for appointment, but that is not to say an ideal situation is the same as a clear breach of the Constitution or the law on the two-thirds gender. Even if one applied a mathematical formula to the question at hand, the result would invariably have been the same, that two thirds is 5 while one-third is 2. The number of judges being uneven, the figure can only be approximate and not exact’.*<sup>353</sup>

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<sup>351</sup> [2016] eKLR

<sup>352</sup> NGEK Case Para 39. Emphasis added.

<sup>353</sup> Para 41.



## **4.5 Conclusion**

It is clear that when it comes to appointment of judges of the highest courts, the merit principle takes priority over the gender equality. For women to get to the highest courts, there is need to have the qualifications that will enable them discharge their mandate. The question that needs to be addressed in Kenya and other countries seeking to enhance gender equality in their highest courts is whether there exists women who have the requisite qualifications. If not what are the impediments? However, gender quotas though temporary is key in bringing to the fore that indeed women and men need to be treated equally. That is why when the JSC recommended the judges of the SCOK for appointments, it raised a public interest issue and gender equality was brought to limelight. The State is now required to take legislative and policy measures to ensure that gender equality is reached. The Kenyan woman's eyes are wide open knowing very well that they have a right to equal opportunity.

## CHAPTER FIVE

### 5.0 CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Conclusions

The principle of gender equality is now anchored and entrenched in the Kenyan Constitutional dispensation. The recognition of gender equality in the CoK not only gives it the legitimacy but symbolizes the value that Kenyans attach to gender equality. While the term ‘gender equality’ connotes equal treatment of men and women in a patriarchal society such as Kenya, it is women who have suffered most when it comes to gender equality. Kenyan women have a legitimate expectation that they will participate in the Kenyan governance system and no one will discriminate them based on their sex. State organs are legally required to abide by the principle of gender equality. However, we can legislate gender equality all we want. For gender equality to be effective and implemented it requires a change in the attitude of the people and society at all. That is why the CoK has put in place the use of gender quotas as a temporal measure to ensure that women are now considered in both appointive and elective positions in the elective, social and economic spheres of life.

As the need to enhance gender equality increasingly gains momentum, the judicial arm of the government has not been left behind. Gender diversity in the judiciary is now fundamentally recognized as an important aspect of good governance, rule of law and access justice. The inclusion of women in the judiciary helps in alleviating gender discrimination in the adjudication process. In a patriarchal society, women are subjected to men dominance. The legal system then reflects the norms, functions and aspects of societal norms at different levels of governance. The society is then tailored into following the said legal system even when it discriminates women who are

treated as of weaker sex. If this is reflected in the legal system, then a judge who is called upon to interpret the law, is likely to interpret it as it is. Further, where the court is made up of only men, it is very difficult for the male judges to deviate from the norms and have a dissenting judgment.

As a result of this culture and the male dominated legal system, having women judges in our courts brings a gendered perspective in decision making. Women in the judiciary in developing the law and refuting stereotypes against women in the legal system brings a gender perspective in the decision making. This does not mean that women become feminists on the bench and only represent the interests of women. Gender equality in the judiciary gives it the legitimacy and is effective in protecting women rights. Having women judges on the bench is very vital in enhancing the respect of human rights and granting everyone the right to an equal opportunity. It symbolizes equal opportunity to all the gender and encourages the young women to seek and aspire to become legal practitioners.

The argument by critics of gender equality that appointment of women in the judiciary is a token is ill placed in the modern society. This emanates from the assumption that women are not qualified for these positions. Women are as much qualified as men. All they need is to be granted the opportunity. More women are entering the legal profession. Even at the lower courts, we have seen women making ground breaking decisions and developing the jurisprudence and the law.

An increasing number of countries including Kenya have embarked on the judicial reforms that seek to enhance women representation in the judiciary. However, data indicates that indeed more women have been able to break the judicial ceiling in the lower courts. In the higher level of the Court system very few women are represented. It is based on this background that this study sought to critically analyse women representation in the highest court in Kenya, the SCOK.

The SCOK is the highest Court in Kenya. It is the final arbiter of disputes and it is the only court with exclusive jurisdiction to hear and determine presidential elections disputes. It a prestigious court. The recruitment of the judges of the SCOK attracts a lot of visibility. The JSC is the body mandated to recruit and select the judges of the SCOK and in addition to enhancing competitiveness it is required to take into consideration the gender, ethnic and social diversity. Since the promulgation of the COK, the JSC has undertaken two recruitments of the judges of the SCOK. This has led to legal contestations that the JSC did not take into consideration the two-third gender principle in its recruitment.

The SCOK as the highest court of the land is not an ordinary court and it has limited positions. Only seven judges can be appointed as members of the SCOK. The JSC has to take into account a number of considerations. It cannot satisfy anyone, but it has to show that it at least followed the law in place in appointing judges of the SCOK. The selection and evaluation criteria of the judges of the SCOK is well set out in Article 166 of the CoK and Section 14 of the JSA. For one to be appointed as a judge of the CoK, they must first meet the evaluation criteria. This involves legal expertise, experience and integrity. So whether the applicant is a woman or a man coming from a marginalized community or not, a person with disability or not, one must meet the statutory criteria. This is a fact that we cannot evade from it. The expectations of the people of Kenya in the SCOK are very high. Only the best of the best can be selected in then SCOK. The SCOK interrogates weighty issues such as the presidential elections that have a nationwide impact that can either build or destroy the country. That is why in selecting the judges of the SCOK the JSC must take into consideration the integrity of the applicants. In short this study concludes that indeed the merit of the SCOK of applications is fundamental.

Even though the JSC in selecting the judges of the SCOK must first abide by the selection and evaluation criteria, the law requires that the JSC must also take into consideration the gender, ethnic and social diversity. The JSC is also guided by the values and principles of public service under Article 232 of the CoK. Regional balance is one of the consideration. For a limited number of posts in the SCOK, the JSC has the burden of ensuring that it satisfies all the needs of all the interests. This can be practically impossible. However, this does not discharge the JSC the mandate to abide by the principles entrenched in the CoK or grant them a chance to openly discriminate any candidate on any grounds. Despite the fact that the highest courts are prestigious court, to achieve legitimacy they must seek to enhance judicial diversity including gender, ethnic and social diversity. Gender diversity is one of the considerations that should be considered when appointing judges of the highest courts. Women and men must be given an equal opportunity in all spheres of life and none should be discriminated on the ground of sex. What the JSC needs to show is that indeed by employing its discretionary power in the recruitment of judges, it took into consideration all the factors including the gender of the applicants.

The gender quota system is now firmly recognized in our CoK and it must guide every decision made. The SCOK has held in some of its decisions, the Advisory Opinion No.2 of 2012, FIDA Case and the NGEC Case that indeed the realization of the two-thirds gender rule is progressive. It will require the State to put in place legal, policy and affirmative programs to enable its realization. The legislation of the Gender Bill is still on going and currently we do not have a legal framework to provide the way forward. This does not mean that Article 27(8) of the CoK is suspended until when the law takes effective. As was held in the NGEC case, appointive positions do not need a legal framework only, the CoK further envisages the need to adopt other policies

and affirmative action. If a political will exists, then gender balance in appointive positions such as the judiciary will be realised.

Back to the question, can gender quotas be used to enhance women representation in the SCOK?

The main aim of gender quotas is to accelerate women representation in the leadership positions.

Yes, gender quotas can be used to enhance women representation in the judiciary where they have met the required qualifications. In Kenya, we have a good number of Kenyan women in the legal profession who meet the statutory qualifications for the appointment of the judges of the SCOK.

This can be evidenced by the high number of women who were shortlisted for the DCJ positions.

Further, the JSC has a wide pool from which to select judges. All that is required is to prepare and encourage women to apply for these positions.

While the appointment of judges of the SCOK is based on merit, this study concludes that Kenyan women are as merited as men. The qualifications for the appointment of the CJ and DCJ positions as stipulated under Article 166(3) of the CoK are similar. In Kenya, more women have applied for the DCJ positions and in 2016 the JSC shortlisted 13 women for the position of the DCJ. This is a clear indication that in Kenya women are as qualified as men for the top positions in the judiciary including judges of the SCOK. It should not be assumed that women in Kenya are not qualified for the SCOK positions. The overwhelming application for the DCJ position by women and the shortlisting of 13 women in 2016 is evidence enough that indeed many women in Kenya meet the qualifications of the SCOK judge.

The application of the two-third gender principle in the CoK is not voluntary. It is mandatory and obligatory. The people of Kenya when entrenching the gender quota system in itself were aware of the social attitudes towards women leadership in Kenya. Now that it is well entrenched in the CoK, no one should evade it by agreeing that the same is not an immediate realization. Even if it

is to be progressively realized, steps should be seen to apply and enhance the same in all spheres of life. Men and women must enjoy equal opportunities. While gender quotas can be effective in enhancing women representation in the SCOK, this can only be effective if the social attitude towards women leadership is addressed.

### **5.3 Recommendations**

Based on the above conclusions, this study makes the following recommendations to the various stakeholders.

#### **A. Kenyan Women**

Kenyan women have come a long way in fighting for gender equality in all spheres of life. The legal recognition of gender equality and the use of the gender quota system in itself is just one step towards the realization of the rights of the Kenyan woman. The Kenyan woman must rise and demand that which belongs to her as a right. The women must spearhead the realization of the gender equality in the judiciary. This can be done by women who have had the opportunity to be in the elective and appointive position. Women in these positions should not play the role of flower girls making it look as if their appointment was a token by virtue of them being women. They must show that they indeed deserved these positions and are making a difference.

The current women judges in the judiciary and in specific in the SCOK will determine whether indeed we need more women in the judiciary. They will also encourage other women to apply for the said positions. As argued, women bring a gender perspective in the adjudication process. The women judges must take an active role in the adjudication process. They should not take a back seat. They are in the SCOK because they met the merit and this must be seen in the judgments they

make. If this is done, the public will not only appreciate the need to have more women in the SCOK but it will change the social attitude against women leadership. So it starts with the women.

Women should also be at the forefront in empowering other women and creating awareness. Many qualified women do not apply for the SCOK positions because of fear and lack of confidence. This is why many women went for the DCJ position assuming that it was less competitive than the CJ post – reserved for men. Qualified women must come out in large numbers and compete for the positions in the judiciary. Evidence that more women applied for the DCJ position is an indication that indeed women in Kenya are qualified for SCOK positions. Women should not shy away from applying for the CJ position. It is not written anywhere in the Kenyan law that the CJ position is a preserve of men and women should only scramble for the DCJ position. In case where discrimination is apparent based on sex, women should in one voice condemn the same and not condone in silence.

#### B. Judicial Service Commission

The JSC is the body that selects and recommends to the President appointment of judges of the SCOK. In making recommendation of the judges of the SCOK, the JSC is under an obligation to abide by the qualification criteria and competitiveness of the SCOK. The JSC as a gatekeeper to the courts can either enhance gender equality in the judiciary or not. As a discretionary body, the JSC has to abide by the law. This study recognizes that indeed the JSC may face a legal challenge in enhancing gender equality during the recruitment of the judges of the SCOK. This is because the positions are limited only to seven. Yet the positions attract a large number of applicants qualified from which the JSC must only select seven.



Further the study recognises that the law requires the JSC to take into consideration various factors in addition to merit. This include regional balance, ethnicity and social diversity. This means that JSC must at least enhance the rights of the minorities and vulnerable groups such as people with disabilities and marginalized groups. Gender is only one of the many considerations. Even when the judiciary takes into consideration all these factors, this must be done in accordance with the law. A judge should not be discriminated on the ground of sex and denied an opportunity. However, while merit is most important in recruiting judges of the SCOK, the JSC should not hide behind the principle of merit to deny qualified women the chance to be the judges of the SCOK.

In order for the JSC to discharge its functions effectively, it should call upon qualified women to apply for the positions just the same way the Rwandan JSC does. It approaches qualified women and encourages them to apply. While the merit principle is fundamental, it should not be assumed that we don't have qualified women.

The JSC in collaboration with other stakeholders such as the civil society should work towards putting in place policy mechanisms and affirmative action programmes. This will enhance understanding and even when the JSC appoints a male judge instead of a female judge, it can provide grounds as to why it made that decision. As the court held in the NGEK Case, that appointive positions do not necessarily require a legislative action, the JSC must have the political will to enhance gender equality in the SCOK.

### C. Legislature

The legislature is the body mandated to take legislative steps to enhance the two-thirds gender principle in appointive and elective positions. The enactment of a gender law to enhance the two third gender principle has remained far from been realised. The legislature as required by law

should spearhead the enactment of the gender law. The current climate regarding the enactment of the gender law only derails the implementation of the rights of the Kenyan women. The legislature which is currently male dominated must put aside the social attitudes against women and instead focus on enacting the law. This can be done through the collaboration and coordination with other key stakeholders in the implementation of the CoK. The legislative framework must provide in broad terms how gender equality, not only in elective positions but also in appointive positions can be realised and implemented.

#### D. Executive

The executive is the arm of the government that enacts and implements policies. The executive plays a great role in the realization of the gender equality and affirmative action. In so doing, the executive through the Ministry of Labour and Social Protection must put the implementation of gender equality as a priority. It should ensure participation of stakeholders such as the judiciary, private sector and civil society in the formulation of policies and affirmative action programmes. Affirmative action programmes include outreach programmes and empowerment programmes reaching qualified women. Further, such affirmative actions can be used to train women and empower them, preparing them for future roles.

#### E. Judiciary

When asked to adjudicate on the two-third gender principle in appointive and elective positions, the judiciary must be bold enough to make decisions that seek to enhance gender equality and not undermine the same. The SCOK is the highest court in the land. The CoK has empowered it to even develop its rules of engagement; and all courts are bound by this court's decisions. The SCOK therefore must set the pace. The quality of decisions this court pronounces are likely to break or

enhance the two-gender rule principle. The SCOK in its pronouncement in the NGEC case that appointive positions is not limited to a legislative framework but the appointive bodies must put in place other policy and affirmative actions, is a forward looking decisions. Appointive bodies will no longer rely on the lack of a legislative framework to deny women their right to equal opportunities. Rather, they should embrace the will to give women an equal chance. The judiciary when asked to adjudicate on gender equality issues, they should facilitate its enjoyment to the greatest extent possible. The judiciary further plays a critical role in making pronouncement on Kenya's compliance with the treaties and conventions ratified by Kenya. It should also develop jurisprudence and law regarding the enforcement of gender equality. The judiciary also plays a critical role in creating awareness through trainings and publications, a role mandated to the Kenya Law Report.

#### F. The National Gender and Equality Commission

The National Gender and Equality Commission is the body established to promote gender equality and reduce discrimination against women. So far it has played a great role in enhancing women representation is the SCOK through litigation. NGEC should continue enhancing awareness and empowering women in the judiciary. It should enhance and ensure that Kenya complies with all treaties and conventions it has ratified. NGEC should enhance education awareness at the grass root level and educate women on the need to take part in the developments. These opportunities are key in changing the social attitudes. Further, NGEC should conduct and coordinate research activities on gender equality by working with other institutions such as the KNCHR, Commission on Administrative Justice and the civil society.

#### G. Law Society of Kenya

The Law Society is a body established under section 3 of the Law Society of Kenya Act chapter 18 of the Laws of Kenya. Its objects include *inter alia*, to assist the government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya; to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise; to protect and assist the public in Kenya in all matters of law; and to do all such other things as are incidental or conducive to the attainment of all or any of the foregoing objects. All members of legal fraternity are members of the Law Society of Kenya. The Society, therefore, plays a great role in not only protecting its members, but enhancing practice of law in Kenya. It is for this reason that the Society should develop such extensive reforms in policy that support affirmative action which could also inform legislation on the implementation of the two-third gender rule. The Law Society should, therefore, work closely together with the JSC especially in providing policy guidelines and recommendations on the suitability and selection of candidates.

#### H. Civil Society

The civil society in Kenya has played and continues to play a major role especially in the administration of justice in Kenya. In most of the cases, it is the civil society which is loudest in pointing out procedural irregularities in recruitment of judges, when other bodies are silent. This body should design more awareness programmes on the two-gender rule principle; and mobilise its members to participate fully in these programmes right from the grassroots level, county and all through to the national level.

#### I. Academia and Higher Institutions of Learning

This is perhaps the most important part of the society. These bodies determine largely the values created in our society. The society counts on the institutions of higher learning to impact the correct

knowledge, correct attitudes, and appropriate values from which society goodwill is achieved. In achieving the two-gender rule principle, political goodwill is paramount. These bodies should, therefore, design learning programmes and outcomes that instill discipline and good societal values, political goodwill which informs good governance in the public sector.

#### J. Kenya Women Judges Association (KWJA)

The KWJA maintains a record of all its members including members' legal expertise, experience and integrity; its programmes – activities, events and training (both local and international). It is this body that is better placed to drum up support for its members for selection and recruitment. It is this body that should design strategies to support selection and evaluation criteria for appointment of judges in the SCOK as stipulated under Article 166 of the CoK and section 14 of the JSA. The Kenya Women Judges Association should keep reviewing its policy programmes especially those that support defined selection procedures. This will ensure that its members are not sidelined. Such strategies should be placed before the JSC for consideration during selection and recruitment of Judges in the apex court.

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