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LEGAL ALERT

COURT OF APPEAL STRIKES A BLOW FOR
GENDER EQUALITY IN LANDMARK DECISION
CONCERNING THE TWO-THIRDS GENDER
RULE





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In the case of Adrian Kamotho Njenga v The Judicial Service Commission & 9 Others - Civil Appeal No 234 of 2017, the Court of Appeal sitting in Nairobi vide a Judgment dated 2nd December 2022, declared that there cannot be more than four (4) members of the same gender out of the seven (7) Judges of the Supreme Court of Kenya (“the Supreme Court”).

The history of this Judgment can be traced back to June 2016, when three (3) vacancies in the Supreme Court arose for the positions of Chief Justice, Deputy Chief Justice, and Judge of the Supreme Court. The Judicial Service Commission (“the JSC”) then nominated for appointment His Lordship, the now Retired Chief Justice David Maraga, Her Ladyship, the Deputy Chief Justice Philomena Mwilu and His Lordship, the Hon. Mr. Justice Isaac Lenaola. Due to this nomination for appointment by the JSC, the composition of Supreme Court in 2017 ended up comprising five (5) male Judges and two (2) female Judges.

Due to the said composition, Mr. Adrian Kamotho Njenga (“the Appellant”), together with the National Gender and Equality Commission (“the NGEC”), filed Petitions in the High Court which were eventually consolidated (“the consolidated Petitions”). The issues that arose for determination in the consolidated Petitions inter alia was whether the Supreme Court was constitutionally constituted in terms of the two-thirds gender rule enshrined in Article 27 (6) and (8) of the Constitution as it only had two (2) female Judges; and whether the JSC had disregarded the advice by the

NGEC to consider the said rule while nominating Judges for appointment to the Supreme.

The Courts’ Determination

At the High Court, being the Court of first instance, it was held that the gender composition of the Supreme Court was not unconstitutional, and that the advice by the NGEC was not binding to JSC.

The Appellant, being aggrieved by the decision of the High Court, appealed to the Court of Appeal and was partially successful. In its determination, the Court of Appeal held that the interpretation of Article 27 (6) and (8) of the Constitution was that there could be no more than four (4) members of one gender in the Supreme Court, and that the JSC was mandated to take progressive steps to ensure the effective implementation of the two-thirds gender rule as advised in The Supreme Court Advisory Opinion No 2 of 2012. The Appellate Court also held that the advice of the NGEC did not bind JSC. The Court of Appeal held that given the time that has passed since the promulgation of the Constitution i.e., twelve (12) years, there was an obligation on the part of JSC to ensure that the two-thirds gender rule was complied with during the recruitment of Judges to all Courts in Kenya.

Mathematical Interpretation

The mathematical interpretation of male to female Judges arising from Article 27 (6) and (8) of the Constitution has been a recurring issue, particularly regarding the composition of the Supreme Court.



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In *Federation of Women Lawyers of Kenya (FIDA-K) v the Attorney General & Another* (2011) eKLR, the High Court was faced with the same issue and in its holding, found that the two-thirds gender rule could only be progressively realised after giving the State time to implement measures for the attainment of the gender principle as enshrined in the Constitution.

Six (6) years later, whilst determining the consolidated Petitions, the High Court held that the then composition of Supreme Court was constitutional notwithstanding that it comprised five (5) male judges and two (2) female judges. In mathematical terms, the High Court held that $\frac{2}{3}$ of 7 judges would give 71.42% or 4.667 judges while $\frac{1}{3}$ of 7 would give 28.57% or 2.33 judges. The High Court then reasoned that since human beings cannot be counted in decimals, the decimals would be rounded off to the nearest whole number, such that 4.667 Judges would be rounded off to 5 and 2.33 Judges to 2 making the then composition of Supreme Court then, constitutionally sound.

At the Court of Appeal however, it was held that there could be no more than four (4) members of one gender among the Judges of Supreme Court, essentially overturning the decision of the High Court, which held that appointing five (5) judges of the same gender to the Supreme Court as constitutionally sound. The Court of Appeal held that when five (5) members of the Supreme Court are of one gender, then no matter the mathematical manoeuvring, whether expressed in

decimals or fractions, the same would still result in more than two-thirds of the members of the Supreme Court comprising one gender, which would be in violation of a fundamental constitutional provision.

Place of merit/competence in the two-thirds gender rule

The JSC has argued that its mandate as enshrined in Articles 166, 171 and 172 of the Constitution, the procedure and considerations during recruitment of Judges as espoused in the Judicial Service Act, 2011, and the aspirations contained in section 10 of the Public Service (Values and Principles) Act 2015, do not obligate the JSC to prioritise gender over other factors when recruiting Judges. Indeed, this position was affirmed by the High Court in the consolidated Petitions, whereby the Court of first instance held that the foremost consideration relating to the appointment of Judges to Superior Courts is the question of competency, with gender being a secondary consideration. According to the High Court, discrimination would only arise when it can be shown that the female applicants performed better than the male applicants at the interview, but were not recruited.

The Court of Appeal has clarified this position and held that no factor or consideration should be more important than the other. The Appellate Court held that JSC must collectively consider all factors listed in Article 172 of the Constitution, competence and gender, during the recruitment of Judges to the Superior Court. The question of gender is thus as



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important as the one of competency with neither ranking superior to the other.

The “Progressive Approach” to implementation of the two-thirds gender rule

Since 2010, there have been a number of cases in which the JSC and other government recruiting bodies have cited the progressive approach in the implementation of the two-thirds gender rule, as a means of justifying gender imbalance. Cases such as Advisory Opinion No 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (2012) eKLR*, *Federation of Women Lawyers of Kenya (FIDA-K) v the Attorney General & Another (2011) eKLR* and *John Ouru Nyagah & 3 Others v County Government of Nyamira & 2 Others (2015) eKLR* provide plenty of fodder to remind the State of its responsibility in ensuring that historical injustices and systematic discrimination based on gender are cured progressively.

However, one realistic question sparked by the Court of Appeal Judgment is the timeframe for realising progressive implementation. What period is set to achieve the progressive realisation of Article 27 of the Constitution? Should we continue dancing to the tune of progressive realisation in the appointive positions twelve (12) years since the Constitution was enacted and promulgated?

In answering the concerns above, the Court of Appeal held that “at this juncture, 12 years after promulgation

of the Constitution, there is a responsibility on the part of the JSC to ensure that in the exercise of its mandate of recruitment of Judges to all courts, the two-thirds gender principle is complied with.” In addition, in Advisory Opinion No 2 of 2012, the Supreme Court set a timeframe for the progressive implementation of the gender principle by holding that a full realisation of the gender quota was to have been reached by 27th August 2015.

Conclusion

The decision of the Court of Appeal is a bold move towards extinguishing arguments on “progressive realisation” of the two-thirds gender rule. With this decision, practical implementation of gender equality has effectively kicked-in. This is especially a win for women given the structural and historical patterns of discrimination and unequal power relationships across the gender divide.

The Judgment asserts with surety that there will no longer be more than four (4) members of the same gender at the bench of the Supreme Court unless Kenyans decide to divert from their aspirations espoused under Article 27 of the Constitution. Therefore, it is imperative that whenever JSC is conducting the recruitment of judges, it must ensure that it adheres to the two-thirds gender rule.



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Legal Alert

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This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact John Mbaluto, FCI Arb, Deputy Managing Partner, (john@oraro.co.ke), and Claire Mwangi, Senior Associate, (claire@oraro.co.ke) or your usual contact at our firm, for legal advice.



John Mbaluto, FCI Arb
Deputy Managing
Partner
E: john@oraro.co.ke



Claire Mwangi
Senior Associate
E: claire@oraro.co.ke



ORARO & COMPANY
ADVOCATES

An Affiliate Member of AB & DAVID AFRICA

ACK Garden Annex, 6th Floor, 1st Ngong Avenue
P.O. Box 51236-00200, Nairobi, Kenya
Dropping Zone: Room 8, Embassy House Basement

T: +254 709 250 000

E: legal@oraro.co.ke | www.oraro.co.ke



Oraro & Company Advocates

