



1st September 2016

STATEMENT ON THE DECISION BY JUSTICE G.V. ODUNGA, AND THE ONGOING RECRUITMENT PROCESS FOR THE CHIEF JUSTICE, DEPUTY CHIEF JUSTICE, AND JUDGE OF THE SUPREME COURT

Since the Judicial Service Commission (JSC) advertised the positions of Chief Justice (CJ), Deputy Chief Justice (DCJ) and Judge of the Supreme Court of the Republic of Kenya on June 16, 2016, we, the undersigned human rights organisations, have been following closely, and with great interest, the ongoing process of the recruitment. We now make this statement to register our observations on the process so far.

After applications closed on July 6, 2016, the JSC issued a statement in which it listed the persons who had applied for the positions of CJ, DCJ and a Judge of the Supreme Court. The July 8, 2016 statement listed fourteen (14) applicants for the position of CJ, fifteen (15) for DCJ and twenty-one (21) for the position of Judge of the Supreme Court.

Articles 10, 73 and 166 (3) of the Constitution set out criteria for appointment of persons to these positions, but it was clear that the JSC had arbitrarily set a raft of criteria, unknown to the provisions of the Constitution, which appeared to disqualify candidates who had apparently met the minimum requirements.

Trusted Society of Human Rights Alliance, Arnold Magina, Yash Pal Ghai (Katiba Institute) and Samwel Mohochi (ICJ Kenya) separately moved the Court seeking orders to compel the JSC to invalidate the shortlisting for having been carried out in an irrational and arbitrary way and to release information and/or reasons on why it had disqualified certain candidates.

Following the hearing and determination of Petition No. 314 of 2016 (Consolidated with Petition No. 324 Of 2016 and JR No. 306 of 2016), Justice George V. Odunga ruled that the Judicial Service Commission review all applications for completeness and conformity with minimum constitutional and statutory requirements and may reject those that do not meet the minimum criteria for shortlisting. He further ruled that the JSC is obliged to give Kenyan citizens information or where information is denied, to provide precise reasons for such denial.

The Judge found that the JSC's decision to shortlist some candidates for only some of the positions was irrational. He also found that the JSC's decision to summarily reject applications before the interview stage, for those who met the minimum constitutional requirements, was outside the law and procedurally irregular.

The Court compelled the JSC to reconsider afresh the names of the applicants who were rejected and communicate its decision, particularly where adverse, to affected parties. It further prohibited the JSC from recommending to the President names for appointment without adhering to the Court's orders.

Since then, we have continued to observe the ongoing recruitment process. We note with concern that the JSC, in its attempt to comply with Justice Odunga's judgment, has further proceeded in a manner that is not rational, to include for interviews persons that do not meet the minimum requirements provided for in Article 166(3) of the Constitution. This is an affront to the Constitution and a flagrant breach of the JSC's constitutional mandate, which requires it to promote constitutionalism.

We see this as a conscious attempt to bring into ridicule the decision of the Court, and this action runs the risk of trivialising an important national exercise by, for example, purporting to interview recently admitted advocates for the position of Chief Justice in clear violation of the Constitution, which requires at least 15 years experience.

Our observation of the ongoing interviews, which began on Monday, August 29, 2016, has found that they do not inspire public confidence. At times the interview questions appear pedestrian, thus eliciting illogical responses. Candidates have been given free rein to make seemingly impractical proposals without being challenged to justify them; while some candidates have promised to revisit and reverse legal processes without explaining the legal framework within which this would be possible. In other instances, candidates have promised to conclude corruption cases in court within six months without elaborating how this is possible. In yet other instances, interviewers have promised to reopen cases that have been concluded without elaborating under what legal framework. Worse, in some cases, candidates have been made to comment on the merits of cases that are under appeal.

We would like the interviews to expose Kenyans to the judicial ideology of candidates for all these positions on how to use the Constitution as an instrument for delivering social justice. Pronunciations from the Supreme Court impact on the lives of many Kenyans, yet so far, no question has been put to any of the candidates that help the country to understand their judicial philosophy and the contribution they would make in

advancing constitutionalism through jurisprudence. We would like to remind the JSC of Article 159 of the Constitution, which states that judicial authority derives from the people and should be exercised for their benefit.

We fear that, so far, it is not possible to discern who among the candidates has the courage to use their intellect to entrench the national values and principles espoused in Article 10 of the Constitution. The Constitution secures the independence of the Judiciary, and those appointed to high office within it must be both champions and defenders of that independence.

Kenyans deserve Judges who can espouse a vision that grows on the Judiciary Transformation Framework 2012-2016 and tackles the outstanding issues facing the institution such as corruption, inefficiency, ineffectiveness and lack of intellectual rigour and creativity, especially in the Supreme Court.

We are thus constrained to demand that;

The JSC raises its standards and remain guided by the Constitution, of which they are already in breach, to find independent, impartial, honest and competent persons to serve as Chief Justice, Deputy Chief Justice and Judge of the Supreme Court.

We Urge the JSC to uphold their individual oath of office and conduct the interviews with the seriousness they deserve avoiding subjecting senior judicial officers to public ridicule and embarrassment.

We demand that the JSC interviews all candidates while maintaining equity to all and that candidates previously excluded should be considered seriously on merit and not as a cosmetic exercise to comply with the Court Order

We shall continue to watch this process closely and will not hesitate to register our concerns through all available legal channels should the JSC continue to do less than what it is obligated to do by the Constitution and the law and to observe the principles of rule of law.

Kenyan Section of the International Commission of Jurists

Kenyans for Peace with Truth and Justice

Katiba Institute