



Recruitment of Judges in Kenya: The Intricacies of Gauging a Candidate's Integrity

MERCY MWARAH DECHE 

ACADEMIC
ARTICLE



ABSTRACT

When Kenya was at the verge of an implosion due to the 2007 Post election violence, there was general consensus that one of the contributing factors was the low confidence level the Kenyan public had in the judiciary. Rebuilding public confidence in the judiciary has been a key focus of post 2010 constitutional dispensation in Kenya. It is therefore not by accident that integrity is a key criterion in the recruitment of Judges. This paper discusses the historical underpinnings of integrity in the Kenyan Judiciary then lays out the current legal and normative framework of gauging integrity in the post 2010 dispensation. Despite having in place an unassailable constitutional and statutory legal framework on gauging integrity of candidates, the process is not free from challenges. The existing framework is neither fool proof nor has it yielded the desired results. There is therefore need to inject into the framework political will and more innovative approaches.

CORRESPONDING AUTHOR:

Mercy Mwarah Deche

University of Nairobi, KE

mercy@mercyconsultants.com

KEYWORDS:

Integrity; Judiciary; Judges; Commission; Constitution

TO CITE THIS ARTICLE:

Mercy Mwarah Deche,
'Recruitment of Judges
in Kenya: The Intricacies
of Gauging a Candidate's
Integrity' (2023) 14(1)
*International Journal for
Court Administration* 4. DOI:
[https://doi.org/10.36745/
ijca.475](https://doi.org/10.36745/ijca.475)

Increasing the integrity of the public sector by cleaning up the political and governance structures in Kenya remains a yet to be realized objective. This is evident from the country's dismal placement in the global ranking of corruption perception index.¹ The agenda of increasing integrity has therefore been a front burner priority since 2010 when the current Constitution was promulgated. As one of the three arms of government, the judiciary is a critical cog in the governance wheel of any constitutional democracy as it is the defender of justice, democratic values and the rule of law. The sanctity of the office of a judge has been described as follows:

A judge occupies an enviable position in society. He is enveloped by an aura of dignity. He is always on a pedestal. That position has to be jealously guarded. Where corruption occurs in the Judiciary, it is the worst form of abuse of public trust since honesty, integrity and fairness are the features that entice citizens to such recourse in the courts, only to be ambushed.²

Public confidence in the institution of the judiciary and in the moral authority and integrity of its servants is of utmost importance to the stability of a country.³ Kenyans learnt this the hard way with the infamous violence after the 2007 Elections. The violence was partially attributed to the low levels of confidence the Kenyan public had in the judiciary.⁴ The mandate to promote this confidence in Kenya is primarily vested in the Judicial Service Commission (the Commission).⁵ It achieves this through, not only receiving and considering complaints against judges, but also ensuring that persons of questionable integrity are kept away from joining the hallowed institution as judges. It is no wonder that integrity is a key criterion in the recruitment of Judges.

This paper interrogates the process of the recruitment of judges with a special focus on the criterion of integrity. This is done by critiquing the existing substantive and procedural legal framework and highlighting the hurdles encountered by the Commission in inquiring into candidates' integrity. The paper is divided into five parts. Part one contextualizes the discourse by discussing the concept of integrity. This is followed by part two, which discusses the historical underpinnings of integrity in the Kenyan Judiciary. Part three interrogates the international, constitutional, statutory and jurisprudential framework that underpins the concept. Part four, discusses the praxis of integrity inquiry as required of the Commission by statute, followed by part five which highlights the challenges encountered by the Commission in gauging integrity. The paper concludes with a call for more interventions beyond the legal framework.

1 Transparency International, Corruption Perception Index Available at: https://www.transparency.org/en/cpi/2021?gclid=CjwKCAjwsMGYBhAEEiwAGUXJabR-3zbFx4ZCOE5or0DRudO0VklItvZQdXgSMicTOuU-qyM3i581tBoCoK0QAvD_BwE accessed 29 August 2022.

2 Constitution of Kenya Review Commission, Report Of The Advisory Panel Of Eminent Commonwealth Judicial Experts Available at: <http://www.commonlii.org/ke/other/KECKRC/2002/8.html> accessed 28 August 2022.

3 UN Bangalore Principles of Judicial Conduct (2002) available at https://www.un.org/ruleoflaw/files/Bangalore_principles.pdf accessed 29 June 2021.

4 Independent Review Commission, Report on the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 ('Kriegler Commission Report').

5 The Constitution Article 2010 (KEN) Article 172.

2. DEFINING INTEGRITY

The Kenyan Constitution and all the relevant enabling statutes discussed in the part below do not expressly define integrity. Black's Law Dictionary defines it as 'soundness of moral principle and character as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity," "honesty," and "uprightness"'.⁶ This definition was expounded by the Constitutional Court in Kenya as follows:

A person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality.⁷

Deborah Rhodes, a renowned scholar on legal ethics, describes persons of integrity as 'individuals whose practices are consistent with their principles, even in the face of strong countervailing pressures'.⁸ From the definitions above, integrity is clearly much more than moral character or compliance with a canon of dos and do nots. Abstaining from criminal behaviour or an absence of a criminal record does not necessarily endow one with integrity. Integrity speaks to an attitude and lifestyle of consistently, tenaciously and with steadfastness, resisting the allure of breaching set judgment boundaries even in borderline dilemma situations that may not result in immediate harm to anyone in particular. This resonates with the statement paraphrased from the quote of Charles Marshall that 'integrity is doing the right thing when you don't have to; when no one else is looking or will ever know; when there will be no congratulations or recognition for having done so'.⁹

The question that often arises is whether integrity is a virtue that is caught early in childhood on a mother's knee and through interaction with families, relatives, schools, peers, and culture or a value that can be taught at any stage in life.¹⁰ Is an adult deficient in integrity a lost cause; being too old to learn better ways? Deborah Rhodes is of the persuasion that it is possible to instil professional integrity through teaching a person to develop their own capacity for moral reasoning, to assist them with identifying legal and ethical boundaries, and how to cope more effectively with the pressure to cross them.¹¹

⁶ Garner, Bryan A., and Henry Campbell Black. Black's Law Dictionary. 1999.

⁷ *Trusted Society v Mumo Matemu* Nairobi High Court Petition No 229 of 2012 [2012] eKLR.

⁸ Deborah L. Rhode, If Integrity Is the Answer, What Is the Question, 72 Fordham L. Rev. 333 (2003). 335 Available at: <https://ir.lawnet.fordham.edu/flr/vol72/iss2/6> accessed 20 August 2021.

⁹ Charles Marshall, *Shattering the Glass Slipper: Destroying the Myth Before it Destroys You* (Prominent Publishing, 2003).

¹⁰ Deborah Rhodes (n 8) 342.

¹¹ Ibid.

3. HISTORICAL AND PHILOSOPHICAL UNDERPINNING OF THE CRITERIA OF INTEGRITY

There is general consensus that the pre 2010 Judiciary in Kenya was characterized by impunity, emasculation by the executive, and endemic corruption that had resulted in total loss of faith in the institution by the Kenyan public.¹² This was to be expected as executive high handedness controlled the appointment of judges in a recruitment process that was as opaque as the judges it produced.¹³ A story is often told, along the court corridors, of a certain lawyer in the 1980s who had numerous complaints of embezzlement of clients' funds pending against him. He was in hiding in his rural home when he saw uniformed police officers approach his gate. He thought they were there to arrest him and ran to a tea plantation with the officers in pursuit. As they wrestled him to calm him down, they explained to him that they had orders to take him to State House for swearing in as a judge. Though the truth of the account cannot be verified, this mode of operation was a probability before the promulgation of the current Constitution. It was not uncommon for the president to appoint persons with skeletons as judges as they were certain to be malleable to the executive's bidding.¹⁴

Many have painted the grim picture of the pre 2010 Judiciary. The Committee on Constitutional Review Commission which compiled public feedback that informed the content of the 2010 Constitution recorded the following:

'Serious allegations were made against the Judiciary, including inefficiency, incompetence and corruption. Besides, it was fairly evident that the people had lost faith in the Judiciary's ability to dispense justice fairly, impartially and without fear. Similar sentiments had been expressed by a committee established by the Judiciary itself – the Kwach Report and a Report by Commonwealth Judicial panel of experts.'¹⁵

Earlier, an advisory panel from the commonwealth had noted that the Kenyan judicial system was in need of fundamental structural reform as it suffered from a serious lack of public confidence.¹⁶ The most vivid picture was however painted by the first post 2010 Chief Justice who made the following remarks after 100 days in office;

"We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a Judiciary that was designed to fail."¹⁷

¹² L Franchesci & PLO Lumumba, *The Constitution of Kenya: A Commentary* (Strathmore University Press 2019) 509.

¹³ Ibid 541.

¹⁴ Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001), 23 Hum. Rts. Q. 96, 105.

¹⁵ The Final Report on the Constitution Review Commission <http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf> accessed 28th June 2022 page 210.

¹⁶ Report Of The Advisory Panel Of Eminent Commonwealth Judicial Experts, 2002 available at <http://www.commonlii.org/ke/other/KECKRC/2002/8.html> accessed 28th June 2022.

¹⁷ S Kang'ara et al (eds), *Beacons of Judiciary Transformation, Selected Speeches, Writings and Judicial Opinions of Chief Justice Mutunga* (Sheria Publishing House, 2021) 14.

The post 2010 prioritization of integrity in the recruitment process was therefore informed by a history of unaccountable predecessors known for their inefficiency, corruption, and bias. It is therefore an intentional attempt to move towards ‘a future very different from the past in its values and practices’.¹⁸ In fact, soon after the promulgation of the Constitution of Kenya 2010, there was an exercise of vetting judges and magistrates which was aimed at ‘re-inventing integrity and restoring public confidence’ in the judiciary.¹⁹

4. LEGAL FRAMEWORK

Integrity is closely related to accountability which features prominently in the Constitution. There is an evident tilting of the scales in the Constitution of Kenya 2010, in favour of the governed with the obligation for accountability on the part of state officers being reiterated throughout the constitution. To begin with, the list of National Values and Principles of Governance in Article 10 includes integrity, transparency and accountability.²⁰ These are the values that bind all state and public officers in the interpretation of the constitution, laws and policy. This is further reinforced by another list of values and principles of public service in Article 232 (1) (a) which includes high standards of professional ethics as one of the enumerated values.²¹ The most conspicuous indicator of the significance assigned to integrity by Kenya’s current constitutional architecture is the inclusion of an entire chapter on leadership and integrity.²² The chapter requires that State officials be selected on the basis of personal integrity, competence, and suitability.²³ Once in office, their public and private conduct is equally required to be of the caliber that avoids demeaning the office they hold.²⁴ This chapter has been operationalized by several statutes, the principal of which is the Leadership and Integrity Act.²⁵ The statute not only sets out a general Leadership and Integrity code for state officers, it also requires public entities to prescribe specific codes for their officers.²⁶ In addition, the Public Officer Ethics Act reinforces the place of ethics in public service by providing a general code of conduct and reiterating the need for the establishment of codes of conduct and ethics for specific officers.²⁷

Though Judges are state officers, the constitution underscores their call to integrity separately by requiring that they be appointed from among persons of high moral character, integrity and impartiality.²⁸ The threshold of integrity for judges is further

¹⁸ S Kang’ara et al (n 17) 231.

¹⁹ Committee of Experts, on Constitutional Review, 2010 Final Report of the Committee of Experts on Constitutional Review https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf accessed 28th June 2022).

²⁰ The Constitution 2010 (KEN) Article 10.

²¹ Ibid Article 232 (1).

²² Ibid Chapter 6 articles 73 to 80.

²³ Article 73.

²⁴ Article 75.

²⁵ Leadership and Integrity Act 2012 (KEN).

²⁶ Ibid section 6 to 36 and section 37.

²⁷ Public Officer Ethics Act 2003 (KEN) section 5 and sections 7 to 25.

²⁸ Article 166 (2) (c).

articulated in the Judicial Service Code of Conduct²⁹ and the Bangalore Principles of Judicial Code of Conduct. The latter are international non-binding soft laws that set standards that judges are expected to adhere to.³⁰ Inquiry into a person's integrity has the potential to affect the legal rights and interests of the subject of inquiry. It is therefore an administrative action as per the Fair Administrative Action Act.³¹ Right to a fair administrative action is enshrined in the bill of rights in the Constitution.³² The process of gauging one's integrity is therefore not insulated from the standards set in the Fair Administrative Action Act and the Constitution. These include ensuring the process is fair, and that the person is given a hearing including an opportunity to cross examine any person with adverse information against them. Other standards are the right to access documents, materials and evidence to be relied upon in making the administrative decision and the right to be furnished with reasons for the decision eventually made.³³

5. THE PRAXIS OF APPRAISING A CANDIDATE'S INTEGRITY

The gamut of procedural and substantive edicts on recruiting Judges is set out in mandatory terms in the Third Schedule to the Judicial Service Commission Act.³⁴ The schedule is very prescriptive as it not only spells out the activities to be carried out; it also sets the timelines. This distinguishes the exercise of recruiting Judges as one of the most, if not the most, rigorous, open, and participatory recruitment carried out by a state agency. The participatory nature of the process is in congruence with the constitutional pronouncement that judicial authority emanates from the people.³⁵ Each stage is informed by the need to infuse a sense of integrity in the process as well as attract candidates of unquestionable integrity. The prioritization of the candidates' integrity is therefore evident throughout the entire process.

The recruitment process commences with a declaration of vacancy by the Chief Justice of the Republic of Kenya. The declaration is made in the government's official publication, known as the Kenya Gazette.³⁶ Having the vacancy declared in a government publication by the head of an arm of government, are both reflective of the significance of the process and a preface to its transparency and participatory nature. Apart from the Gazette Notice, similar notices are published on the Judiciary website, print media, and also circulated to the main Bar associations like the Law Society of Kenya, the International Commission of Jurists (ICJ) and Federation of Women Lawyers (Fida- Kenya). The substratum of the notices is a buildup of awareness of an impending recruitment within the prospective pool of potential applicants and the general public. This is with a view to attracting maximum participation both in terms of the number of applicants and feedback during the participatory vetting process.

29 Judicial Service (Code of Conduct and Ethics) Regulations 2020.

30 The Bangalore Principles of Judicial Conduct (2002).

31 Fair Administrative Action Act section 2.

32 Article 47.

33 Fair Administrative Act (n 31) section 4 (3).

34 Judicial Service Act (2011) KEN.

35 The Constitution Article 159 (1).

36 section 3 of the First Schedule to the JS Act.

The declaration is followed by an advertisement in the media which, among other specifications, spells out the Constitutional threshold on integrity by restating that the applicants should be persons of high moral character, integrity and impartiality.³⁷ Pursuant to this standard, the applicants are required to obtain and attach to their applications clearances from various state and non-state agencies.³⁸ These include a clearance certificate from the Credit Reference Bureau (CRB) and a Tax Compliance Certificate from the Kenya Revenue Authority (KRA), both of which are supposed to assist in evaluating an applicant's fidelity to management of their financial obligations. A Certificate of Good Conduct, issued by the Directorate of Criminal Investigation is meant to confirm that the applicant has no criminal record, while a Certificate of Good Standing from the Law Society of Kenya is supposed to speak to the applicant's professional history. In their totality, these documents are meant to assist in determining the applicant's integrity by demonstrating a consistent history of honesty and high moral character in diverse spheres of life.

Once the applications are received, the first task of the Commission is to shortlist from a long list of applicants. Ordinarily, the position of a judge attracts many applicants. For instance, in the 2019 recruitment, the Commission received 113 applicants for the Court of Appeal, 230 for Environment and Land Court and 161 for Employment and Labour Relations Court, for 11, 20 and 10 vacancies respectively.³⁹ At this stage, the Commission is barred from interrogating a candidate's integrity. This was clarified by the Constitutional Court in *Trusted Society of Human Rights & Others v JSC & Others* where it held that failure to attach a Tax Clearance Certificate to the application is not sufficient basis of exclusion from the shortlist.⁴⁰ From this decision, it is clear that the interrogation of integrity commences after shortlisting meaning that one cannot be disqualified from the shortlist by reason of a query around their integrity, however overt.⁴¹

Shortlisted candidates are taken through a rigorous pre-interview vetting stage which takes a trinal approach. First and foremost, at the time of the publication of the names of the shortlisted candidates the Commission invites members of the public to avail, in writing, any information of interest in relation to any of the applicants. Secondly, as the information from the public is received, the Commission simultaneously carries out a verification of all the information and documentation provided by the applicant. This includes contacting the applicant's references and their former employers.⁴² Lastly, the Commission consults all relevant professional bodies and government agencies including those from which the applicants have sought clearance. From these agencies, the Commission calls for the applicants' professional and personal background information that may affect the proper functioning of the courts should the applicant be appointed. The entities that the Commission ordinarily consults include the National Intelligence Service; The Kenya National Commission on Human Rights; Higher Education Loans Board; Law Society of Kenya, International Commission of

³⁷ Article 166 (2) (c).

³⁸ Available at <<http://kenyalaw.org/kl/fileadmin/pdfdownloads/HIGHCOURTADVERT.pdf>> accessed 20 March 2023.

³⁹ Kenya Law, http://kenyalaw.org/kl/fileadmin/pdfdownloads/shortlisted_candidates_for_the_position_of_judges.pdf accessed 20 August 2021.

⁴⁰ *Trusted Society of Human Rights & Others v JSC & Others* Petition no 314 of 2016 as consolidated with JR No 306 Of 2016 [2016] eKLR.

⁴¹ Ibid.

⁴² Section 7.

Jurists (Kenya Chapter), Federation of Women Lawyers (FIDA-Kenya), Kenya Revenue Authority, Credit Reference Bureau, Advocates Complaints Commission, Commission on Administration of Justice, Ethics and Anti-Corruption Commission, and relevant SACCOs.⁴³ Any adverse information received from these sources is passed on to the candidates who are given an opportunity to respond. The candidate is also given time to defend themselves against any allegation raised during the oral interview.

At the interview stage, the Commission is obligated to publicize the date, time and venue of the said interviews as well as hold them in public.⁴⁴ Members of the public are therefore allowed access into the interview room as observers. The interviews are also streamed live on social and mainstream media. The public nature of the interviews is peculiar to the recruitment of Judges. The openness is designed to ensure that the candidates' character remains subject of public scrutiny throughout the recruitment process. In fact, the candidates are open to vetting even after the interviews as the Commission is under an obligation to continue receiving feedback on the candidates' character until nomination of the successful candidates for appointment by the President.⁴⁵

Ultimately, the basis of evaluation of a candidate's integrity is the information provided by the candidates in their applications, references from former employers, and feedback garnered from the public and various state and non-state entities. In addition, where the candidate is a serving judicial officer or a judge, the Commission calls for their internal records from the Directorate in charge of performance, the Office of the Judiciary Ombudsman, and the Commission's Complaints records.⁴⁶ All this information is interrogated during the oral engagement at the oral public interview. The candidate is also asked theoretical questions on the concept and legal framework of integrity to gauge their understanding. The value added by the theoretical questions to gauging a candidate's integrity is doubtful as a person with integrity issues can still have accurate answers to all theoretical questions.

There are times when the Commission may receive adverse information against a candidate that has the potential of unduly embarrassing them, or where the integrity question involves vulnerable third parties like children as is often the case in family related matters. In such instances, the Commission retreats to camera proceedings with the candidate. The aim is to have each candidate's integrity interrogated while leaving their dignity intact whether or not their candidacy is successful. At the end of the interview, each Commissioner scores the candidate on various criteria including integrity. The final score is the average mark awarded by the individual Commissioners. The scoring process is not insulated from the effect of outlier scores. This is where some commissioners award particular candidates inordinately high or low marks based on their personal biases or interests. It cannot also be said to be totally free from biases of individual Commissioners.

6. CHALLENGES

The process described above is not fool proof. It is replete with gaps, barriers and landmines. Whereas the substantive laws on integrity are ascertainable and known,

⁴³ *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* Nairobi High Court Petitioner Number 369 of 2019 [2020] eKLR para 42.

⁴⁴ Section 9 and 10.

⁴⁵ Section 8 (2).

⁴⁶ *Adrian Kamotho Case* (n 43).

the same cannot be said of the procedural rules and regulations. Commissioners are therefore well equipped with a good grasp of the ‘what’ integrity entails but blunted when it comes to the ‘how’ to gauge the same in an individual candidate. This gap and the quandary it present may be attributed to several reasons including scant jurisprudence, capacity limitation, absence of peer review mechanisms, over reliance on state agencies for information, weaponization of integrity, executive interference and absence of political will.

The advancement of the frontiers of jurisprudence on integrity is the function of the courts. Unfortunately, they have been reluctant to entertain litigation questioning the integrity of persons aspiring to high office whether elective or appointive and hence failed to sufficiently give the much-needed guidance on integrity.⁴⁷ They have instead adopted the *Pontious Pilate* approach of ‘washing their hands’ and pushing the issue to another forum.⁴⁸ Jurisprudence and pronouncements emerging from the courts can best be described as embryonic, inconsistent, and lacking in courage to authoritatively lay thresholds. This has left the country with a very elastic integrity threshold. It is almost impossible to describe how ‘the man of integrity’ looks like in Kenya.

The other challenge in gauging a candidate’s integrity lies in the human limitation in distinguishing true character from a facade. As observed by Tom Donaldson, integrity is not a vaccine that comes with a certificate to show whether one has it or not, or the date they got it.⁴⁹ Not even the Certificate of Good Conduct issued by the Department of Criminal Investigation is sufficient proof of integrity as it merely proves that one has no criminal record. It is not uncommon for a person to tick all the relevant boxes as demanded by the standards set by the substantive law on integrity, only for time to unveil them as irredeemably dishonourable or with unresolved probity. The discovery is usually made long after the candidate has been recruited. This is evident from the fact that since 2010, some judges have had their integrity impugned and declared unfit to continue serving as judges by Presidential Tribunals following due process.⁵⁰

The challenge of human limitation is exacerbated by the composition of the commission. Out of the eleven commissioners, eight are lawyers.⁵¹ There is no requirement for the other three to have human resource expertise. This impacts on the capacity of commission to effectively conduct integrity inquiries, with optimum Human Resource skills.

The other related challenge is the lack of a reliable repository from which the history of a candidate’s conduct and character can be cross referenced. In some jurisdictions like the Washington State in the United States of America, Bar Associations actively

⁴⁷ *Okoti & 15 others v Attorney General & 7 others; Commission on Administrative Justice & 15 others (Interested Parties) (Constitutional Petition E090,E168,E221,E230,E234,E249, E017,E109 & E010 of 2022 (Consolidated))* [2022] KEHC 3209 (KLR) Available at <http://kenyalaw.org/caselaw/caselawreport/?id=234357> accessed 20 March 2023.

⁴⁸ *Ibid.*

⁴⁹ Deborah L. Rhode (n 8) 341.

⁵⁰ Ben Sihanya, ‘Judicial Power, Structure and Independent Accountability in Kenya and Africa: Interests, Process and Outcome’ Part 1, Chapter 8A, in Ben Sihanya (2020) *Constitutional Democracy, Regulatory and Administrative in Kenya and Africa Vol. 1: Presidency, Premier, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya. Available at <https://innovativelawyering.com/attachments/36230.pdf> accessed 20 August 2021.

⁵¹ Constitution (2010) KEN Article 171.

provide a useful repository for the appointing authority's reference during the appointment of non-elected Judges.⁵² The repository is compiled with the assistance of Judicial Rating Committees which evaluate and rate candidates interested in serving in the judiciary. The process is voluntary but all candidates submit themselves to it as it is comprehensive and is trusted as fair and objective. The rated candidates are then ranked in order of their suitability to hold the office of a judge. It is this ranking that is used as a reliable repository by the appointing authority.⁵³

Unfortunately, the Law Society of Kenya lacks a comparable mechanism. In fact, there exists no known mechanisms for determining compliance with Chapter Six of the Constitution, not just for those seeking recruitment as judges, but for individuals seeking any appointive or elective position in State and public offices. It is for this reason that the High Court has observed that the chapter six laws are 'more observed in breach than compliance' as a consequence of their weak enforcement structure.⁵⁴ As stated above, the process is more tractable where the candidate in question is a serving judge or judicial officer as their demonstrable consistent history of honesty and moral character is easily discernible from their records within the institution. These include records held by the Directorate of Performance, the Judiciary Ombudsman, the Commission's Complaints' records, and feedback from the Court Users Committees. The Commission however receives applications from persons from all walks of life outside the judiciary. Such applicants lack a common repository against which their alleged character history may be gauged. This poses a challenge to the Commission. Therefore, the assessment of these candidates' integrity is left to the subjective biases of individual Commissioners.

The above state of affairs leads to the next challenge which is the Commission's overreliance on state agencies to establish a candidate's integrity status. As stated above, the Commission ordinarily consults other state agencies in evaluating the candidates' integrity which has opened up a new frontier of challenges. First and foremost, the assumption that that all government agencies share a common agenda in as far as evaluating candidates for integrity is concerned, is not entirely accurate. The truth is that the interests of some of these agencies, which are mere appendages of the executive, hardly coincide with those of the Commission. Candidates have in particular accused the Kenya Revenue Authority of misusing their role in the recruitment exercise to widen their net and impose unreasonable penalties on them in return for tax clearance.⁵⁵ The role of these agencies was also subject of focus in *G.B.M. Kariuki v Director of Criminal Investigations & 3 Others*.⁵⁶ The Petitioner, then a Judge of the Court of Appeal, complained about delay by the Director of Criminal Investigation to issue him with a Certificate of Good Conduct to enable him apply for an advertised position for Chief Justice and Supreme Court Judge.

⁵² King County Bar, Information about the KCBA Judicial Candidate Evaluation Ratings Process <https://www.kcba.org/For-Lawyers/Judicial-Resources/Judicial-Candidate-Evaluation-Ratings> accessed 1 august 2021.

⁵³ Ibid.

⁵⁴ *Mumo Matemu* case (n 7).

⁵⁵ Denis Mwangi, 'Ngatia Questioned on KRA Debt & High-End Car Collection' (2021) available at <https://www.kenyans.co.ke/news/64443-ngatia-questioned-kra-debt-high-end-car-collection> accessed 20 July 2021.

⁵⁶ *G.B.M. Kariuki v Director of Criminal Investigations & 3 others* Nairobi High Court Petition No 340 of 2016 [2016] eKLR.

Aside from unduly penalizing candidates, the use of agencies that have no express constitutional role in the recruitment of judges casts aspersions on the independence of the Commission. The Commission has been accused of placing the fate of the candidates at the whims of other agencies. This concern was noted by the constitutional court which warned that if caution is not exercised, the Commission runs the risk of recruiting persons whose qualifications are pre-determined by the said bodies as opposed to the Commission itself.⁵⁷

The other challenge arises from the perennial power struggle between the Commission and the executive on the scope of the mandate of each in the recruitment exercise. The Kenyan constitutional architecture vests the substantive mandate to recruit judges, up to the nomination stage, in the Judicial Service commission.⁵⁸ The constitution only bestows on the President the responsibility to appoint the nominated judges 'in accordance with the recommendation of the Judicial Service Commission'.⁵⁹ The court has repeatedly clarified the president's role in the recruitment exercise as ceremonial and limited to appointment, swearing in and gazettelement.⁶⁰ The court has further clarified that the constitutional delineation of the President's role precludes him from purporting to process, vet, approve or disapprove the nominees presented by the Commission.⁶¹ The President is therefore bound by the nomination list presented to him by the Commission. This constitutional and court sanctioned delineation of roles resonates with the Latimer House Principles.⁶² It has, however, not deterred the appointing authority from breaching and encroaching the set boundaries. The most common entry point of this encroachment has been the weaponization of the criterion of integrity to assault the character of candidates deemed as undesirable by the appointing authority. This was the gist in the *Adrian Kamotho* case discussed below.⁶³

Weaponization of integrity is principally waged through the National Intelligence Service, who deliberately cast aspersions on the candidates' integrity without giving details.⁶⁴ Once some of the candidates' integrity is put into question, the appointing authority declines to appoint as per the recommendation of the Commission. They cherry pick some and leave out the ones against whom unsubstantiated allegations of lack of integrity are levelled, effectively meddling in the entire recruitment process. This is the fate that befell the 2019 recruitment which animated the debate on the integrity of the affected nominees for over two years.

It all began after the Commission nominated a total of forty-one individuals for appointment as judges of the Court of Appeal, the Environment and Land Court, and the Employment and Labour Relations Court. The Commission had carried out the vetting process in compliance with the First Schedule to the Judicial Service Act

⁵⁷ *Trusted Society of Human Rights & Others v JSC & Others* (n 40).

⁵⁸ The Constitution Article 172 (1) (a).

⁵⁹ Article 166 (1) (b).

⁶⁰ *Law Society of Kenya v Attorney General & 2 others*, Petition No 313 of 2014 [2016] eKLR.

⁶¹ *Ibid.*

⁶² The Commonwealth, 'Latimer House Principles' available at <https://thecommonwealth.org/sites/default/files/news-items/documents/LatimerHousePrinciplesPH7Jul17.pdf> 20 August 2021.

⁶³ *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others* (Interested Parties) Nairobi High Court Petitioner Number 369 of 2019 [2020] eKLR 6.

⁶⁴ *Ibid.*

without any feedback on the impropriety of any of the candidates from the National Intelligence Service, despite calling for information from them. However, the NIS threw the spanner into the works after the oral interviews of the Court of Appeal Judges. In a single statement letter addressed to the Commission, the NIS claimed to be in possession of certain unsubstantiated adverse reports against some of the candidates.⁶⁵ When asked by the Commission to substantiate, they wrote another one-line letter stating that they had discharged their obligation in their first letter. The Commission proceeded to forward the names of the nominees to the President, including some in the NIS list of 'persons with adverse reports'. The President declined to appoint the 41 judges prompting the filing of a Constitutional Petition to compel him to do so. The court took issue with the NIS's refusal to give particulars of the 'adverse reports' and held that lack of integrity cannot be classified information touching on national security as had been alleged by the NIS.⁶⁶ The court called out the appointing authority for using opaque statements and allegations of lack of integrity, without disclosure of specific issues, to frustrate the appointment of certain persons as judges and declared the President's refusal to appoint unconstitutional.⁶⁷ The declaration by the court did not however move the appointing authority as they remained adamant for close to two years in the course of which one of the nominees unfortunately passed away in a tragic road accident.⁶⁸

Even when the appointment was eventually made after the two years hiatus, six of the judges were left out.⁶⁹ In a short speech made during the swearing in of the cherry-picked nominees, the President stated that he could not ignore reports he had received from other state organs. Notwithstanding the fact that the court had repeatedly declared that he was not at liberty to choose who becomes judge, he went ahead to declare: 'As long as I serve as President, I will choose the right over the convenient; the hard over the easy.'⁷⁰ Of significance, two of the rejected nominees were part of a five-judge bench that had, a few days earlier, nullified a constitutional amendment initiative spearheaded by the President after declaring the initiative irregular, illegal, unconstitutional, null and void.⁷¹ It is reasonable to conclude that the exclusion of the six had less to do with integrity and more of a penalty for their decisional independence especially in the face of state tyranny. It took the change of regime after a general election, for the six remaining judges to be appointed by the new President.⁷²

⁶⁵ *ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid* 15.

⁶⁸ Everlyne Kwamboka, 'Unfortunate: Lawyer Dies Before Joining the Labour Court as a Judge' available at <https://www.standardmedia.co.ke/entertainment/news/2001390022/unfortunate-lawyer-dies-before-joining-the-labour-court-as-a-judge> accessed on 20 August 2021.

⁶⁹ Republic of Kenya, The Kenya Gazette, Vol.CXXIII-No.124 dated 3rd June 2021 Available at http://kenyalaw.org/kenya_gazette/gazette/volume/MjQwNA--/Vol.CXXIII-No.124/ accessed 20 March 2023.

⁷⁰ Sam Kiplagat, '34 Judges Appointed by Uhuru Kenyatta Take Oath of Office' Business Daily 4th June 2021 available at <https://www.businessdailyafrica.com/bd/economy/34-judges-appointed-by-uhuru-kenyatta-take-oath-of-office-3425996> accessed 20 August 2021.

⁷¹ *David Ndii & others v Attorney General & others* Nairobi High Court Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 & Petition 2 of 2021 (Consolidated) [2021] eKLR.

⁷² Republic of Kenya, The Kenya Gazette Vol.CXXIV-No.188 dated 13 September,2022 Available at http://www.kenyalaw.org/kenya_gazette/gazette/volume/MjY4Mg--/Vol.CXXIV-No.188/ accessed 20 March 2023.

Integrity has been weaponized by the executive and used as a sword to assault and undermine both decisional and institutional independence of the judiciary. The President's refusal to appoint nominated judges is tantamount to an extra-judicial abrogation of his role to the position of an omniscient custodian of integrity. With the extra judicial powers, he is able to declare 'X has integrity and Y does not have it' with the expectation that the declaration must be embraced as the gospel truth. This insidious interference by the executive has the dual effect of undermining both the role of the commission and the decisional independence of serving judges. The latter serve with the ominous knowledge that the bona fide decisions they make in the course of their work may one day be used against them under the guise of integrity. The High Court highlighted the danger of casting aspersions on one's integrity without due process as follows:

...We would be hesitant to do so in a manner that visits violence to the underlying fundamentals of due process, justice and fairness in our constitutional system. Should we do so, public opinion or popular rhetoric will not soften that violence. Principle, in the form of due process will. It is for that reason that the Constitution envisages the enactment of laws to provide a process for realizing the constitutional aspirations enshrined in Chapter 6 and embedded throughout the charter. The courts may have the highest intentions to hasten this process, but we must remember that the Constitution also protects us from our best intentions: by providing safeguards for due process, justice and fairness. That, extravagant as it appears, is the price of constitutional maintenance.⁷³

The public nature of the recruitment presents another frontier of challenges. The publicity commences from the declaration of vacancy, to the publication of the names of all applicants indicating, those who make it to the shortlist, and those who fail to do so. The date and place of the interview is also publicized to give notice to members of the public as the schedule requires that the oral interviews also be held in public. Whereas the public nature of the process fosters transparency, it presents additional challenges. Apart from leaving the public speculating on the reasons behind a candidate's omission from the shortlist, interrogating candidates in public on integrity issues leaves the Commission walking the tight rope of balancing between avoiding violation of individual privacy and public need for transparency. This dilemma was partially addressed by the court in *Andrew Omtatah Okoiti v Attorney General & 2 others* where the court warned that public disclosure of reasons for failure to shortlist a candidate may be prejudicial to that candidate's career advancement especially where the reason for disqualification relates to their integrity.⁷⁴ The issue of how much should be disclosed to the public about a candidate including matters to do with their integrity, remains unresolved and pending determination by court.⁷⁵

Finally, like most African communities, Kenya is a highly patriarchal society. The process of interrogation of integrity has therefore not escaped patriarchal related

⁷³ *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Nairobi Court of Appeal No 290 of 2012[2013] eKLR.

⁷⁴ *Andrew Omtatah Okoiti v Attorney General & 2 others*. High Court of Kenya at Nairobi, Constitutional Petition 92 of 2011 [2011] eKLR.

⁷⁵ Joseph Wangui, 'CJ interviews: Makau Mutua, Katiba Institute Want Results Publicized' available at <https://nation.africa/kenya/news/cj-interviews-makau-mutua-katiba-institute-want-results-publicised-3378740?view=htmlamp> accessed 20 August 2020.

gender nuances as gender stereotypes play a role in shaping perception as far as integrity is concerned. The women who apply for the position of Judge engage the recruitment process with a substantially long history as leaders, and high calibre legal professionals. This history is often scrutinized and judged differently from that of their male counterparts. This is because patriarchal expectations deem women as nurturing beings, at peace with the entire world and incapable of wrong.⁷⁶ This expectation often results in unequal judgments between men and women especially in borderline ethical questions. An act or omission may be deemed as inconsequential when committed by a man but magnified as a grave wrong when committed by their female counterparts.

The gender nuances were the basis of a protest letter to the Commission by the leading Women's Rights organization in Kenya, FIDA-Kenya.⁷⁷ FIDA protested what they termed as the prevalence of attempts to disparage women candidates based on unfounded allegations. FIDA's statement was triggered by a memorandum from the Law Society of Kenya which had raised integrity issues against three female candidates.⁷⁸ FIDA argued that this was a tactic designed to insulate male candidates from competing on merit, effectively whittling down the list of candidates by tarnishing the most qualified candidates. Whether real or imagined, their protest brings to the fore the fact that the process of gauging integrity during the recruitment of judges has not escaped the global concern of a double standard in the expectation of probity between men and women.⁷⁹ The perception that women are judged more harshly than men has the potential to instil fear in women and dissuade them from making themselves visible to public scrutiny for fear of being unduly exposed to public attacks on their character.

7. CONCLUSION

The existence of the challenges discussed above affirms the fact that having in place an unassailable constitutional and statutory legal framework on integrity, and operationalization of the same are two totally different milestones. This brings to the fore the question of the value added by the current mechanisms of gauging integrity during the recruitment process. The mitigating factor is that the mechanism is still in its infancy as the current framework is only ten years old. The reinforcement of integrity into the process is equally recent. The challenges should therefore be viewed as opportunities for growth. Further, as Deborah Rhodes argues, the greater value in the process of interrogating a candidate's integrity is in the message the exercise reinforces. It sends out the message that integrity matters, which is enough to keep away a good number of those with something to hide.⁸⁰

However, the gaps and challenges that weaken or discredit the integrity gauging process cannot be wished away. The same can be tackled by borrowing best

⁷⁶ Surapeepan Chatraporn, 'The Defiance of Patriarchy and the Creation of a Female Literary Tradition' (2006) *Journal of Humanities* (Special Issue No.1) 36.

⁷⁷ Kevin Cheruiyot, 'Chief Justice Position not Reserved for a Man, Fida Says', *The Star Newspaper* 31st March 2021 Available at <https://www.the-star.co.ke/news/2021-03-31-chief-justice-position-not-reserved-for-a-man-fida-says/> accessed 20 March 2023.

⁷⁸ N L Havi, 'Memorandum of the Law Society of Kenya on Shortlisted Candidates for Position of Chief Justice and Supreme Court Judge, 29 March 2021 (on file with author).

⁷⁹ Surapeepan (n 76).

⁸⁰ Page 339.

practices from other jurisdictions like in Washington State in the United States where the Bar Associations play an active role in peer reviewing potential candidates and maintaining a database of persons suitable to occupy the office of a judge. This will require local legal bodies like the Law Society of Kenya, International Commission of Jurists and FIDA-Kenya to play a more active role in the recruitment of Judges by continuously vetting members interested in joining the bench and maintaining a database of persons of high moral character. This database, if periodically audited, can be a credible repository for the Commission to refer to in their interrogation of a candidate's integrity.

The process of gauging integrity needs to be insulated from weaponization by those with the power to manipulate perceptions of integrity through a deliberate besmirching of a candidates' characters – especially those deemed to be independent. Unfortunately, the Commission has remained helpless in the wake of this phenomenon. Though the court has declared that the president lacks residual legal power to question the suitability of a candidate nominated by the commission, the unfortunate practice persists. It has often morphed into vigilantism and mob lynching of the targeted candidates especially on social media.⁸¹ This has the ultimate effect of undermining public confidence in the institution of the judiciary which does not bode well for the rule of law as the interplay between the rule of law, judicial independence cannot be overstated. Weaponization of integrity needs to be constantly called out and condemned.

From the foregoing discussion, it is clear that the process of gauging the integrity of candidates during recruitment of judges is still a work in progress. An ideal process would be one that is objective, and capable of balancing public participation with independence and accountability. That is a process that is all inclusive but not over reliant on state machinery. One that enables the Commission to arrive at conclusions on a candidate's integrity that are devoid of subjectivity and interference and manipulation by the executive arm of the government.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR AFFILIATION

Mercy Mwarah Deche  orcid.org/0009-0008-7403-5798
University of Nairobi, KE

⁸¹ Kevin Cheruiyot, 'Chief Justice position not reserved for a man, Fida Says' (Reported in The Star 31 March 2021) Available at <https://www.the-star.co.ke/news/2021-03-31-chief-justice-position-not-reserved-for-a-man-fida-says/> accessed 20 July 2021.

TO CITE THIS ARTICLE:

Mercy Mwarah Deche,
'Recruitment of Judges
in Kenya: The Intricacies
of Gauging a Candidate's
Integrity' (2023) 14(1)
*International Journal
for Court Administration*
4. DOI: [https://doi.
org/10.36745/ijca.475](https://doi.org/10.36745/ijca.475)

Published: 14 April 2023

COPYRIGHT:

© 2023 The Author(s).
This is an open-access
article distributed under
the terms of the Creative
Commons Attribution
4.0 International License
(CC-BY 4.0), which
permits unrestricted
use, distribution, and
reproduction in any
medium, provided the
original author and source
are credited. See [http://
creativecommons.org/
licenses/by/4.0/](http://creativecommons.org/licenses/by/4.0/).

*International Journal for
Court Administration* is
a peer-reviewed open
access journal published by
International Association
for Court Administration.

