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Kenya: Judicial Service Commission demands recusal of Supreme Court justices

By Carmel Rickard

IN an extraordinary move, Kenya's judicial service commission has tried to persuade virtually all of that country's top judges, from the chief justice down, to recuse themselves from hearing a matter involving the JSC. The commission argued that as this would disqualify the supreme court from hearing the matter, the decision of the lower court should stand as the final word.

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THIS is the latest episode in a long-running dispute between [Gladys Shollei](#) [2] and [Kenya's Judicial Service Commission](#) [3]. However, what might have started as a straightforward appeal became something quite different with an application by the JSC that virtually all the supreme court judges recuse themselves from considering the matter.

Shollei held the position of chief registrar of the judiciary. In 2013 the JSC drew up a list of 87 allegations against her, involving irregularities, illegalities and other misbehavior, and she was dismissed. She then claimed she was the victim of a witch-hunt and began a determined and sustained challenge to her dismissal.

First, [the industrial court upheld her claim](#) [4], saying the JSC violated her fundamental rights by unlawfully removing her from office. The [court of appeal later reversed that decision](#) [5]. Shollei then brought an appeal to the supreme court where five judges were due to hear the matter.

Before that matter could be argued, however, the JSC applied to the supreme court for, among others, an order that four of the court's seven judges should recuse themselves from hearing Shollei's appeal. A fifth judge had already done so, even before the application was heard. This left just two supreme court judges untouched by the recusal application.

Explaining its recusal application, the JSC said that the chief justice and a second member of the supreme court were involved with the JSC's discussions at which it was decided to bring the application. This meant they were "conflicted and should not sit on the bench to determine this appeal". Two other members of the supreme court were also "conflicted", and there was "a real likelihood of bias" because they were both involved in litigation or disciplinary proceedings related to the JSC.

In addition, a fifth member of the court had already decided to recuse himself from the appeal as he was a member of the JSC when Shollei's case was considered by that commission.

According to the JSC's argument, all these judges should stand down. As the supreme court would then have become "an inappropriate forum" to deal with the Shollei matter and effectively disqualified from considering the dispute, the court of appeal's decision should be final.

In response to this application, all five judges of the supreme court hearing the matter disagreed. They said their court had a special constitutional mandate which could not be delegated to any other forum. They did not regard the case as one "calling for the recusal of any judge of the supreme court".

Two members of the court added their own separate decisions, concurring with this general view but spelling out additional reasons:

Justice Mohammed Ibrahim said the constitution, which was the voice of the people of Kenya, established that the supreme court should have seven members and that two of these judges should be members of the JSC.

As a result, the supreme court would always have members who are or were also members of the JSC. If they refused to hear a case solely on the grounds that they were also JSC members it would be a mockery of the will of the people who had willed that the two institutions "carry out their various functions simultaneously".

Judges also had a "duty to sit" and recusal "should not be used to cripple a judge from sitting to hear a matter".

His colleague, Justice Njoki Susanna Ndungu, said the right to a fair trial was non-derogable. Thus, when someone approached the supreme court to assert their rights, the court "will be hard-pressed to turn them away on the basis of claims of bias by a respondent state organ".

She said she did not understand what prejudice the JSC would suffer if its application was turned down and the court were to go ahead and hear the appeal. Shollei herself had not raised the problem of bias or any prejudice on the part of the judges. “It is my considered opinion that the (JSC) cannot claim prejudice or bias when an individual citizen is seeking to exercise their constitutional right to be heard.”

With [the five members of the bench unanimously agreed that the JSC’s recusal application should be refused](#) [6], the court said that Shollei’s appeal was to be fixed for hearing on a “priority basis”.

The following Kenyan judgments are discussed above:

1. [Gladys Boss Shollei v Judicial Service Commission & another \[2018\] eKLR](#) [6] (Supreme Court decision)
 2. [Judicial Service Commission v Gladys Boss Shollei & another \[2014\] eKLR](#) [5] (Appeal decision)
 3. [Gladys Boss Shollei v Judicial Service Commission & another \[2014\] eKLR](#) [4] (Industrial Court decision)
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**This is the second of three Jifa articles in the 6 July 2018 edition of the newsletter, focusing on challenges to the powers of regional chief justices over the last week.*

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[2] <http://info.mzalendo.com/person/gladys-jepkosgei-boss-shollei/>

[3] <https://www.judiciary.go.ke/leadership/judicial-service-commission/>

[4] <http://kenyalaw.org/caselaw/cases/view/95296/>

[5] <http://kenyalaw.org/caselaw/cases/view/102246/>

[6] <http://kenyalaw.org/caselaw/cases/view/155119/>

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