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# An Inquiry into the efficacy of the Kenyan ethical regime on the conduct of judges.

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# Declaration and Approval

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the dissertation itself.



Obondi Victor

June 2024

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# ABSTRACT

In November 2010 Kenyans enacted and gave to themselves a new Constitution. The new Constitution fundamentally transformed the administration of the Judiciary, it obliges probity and accountability in the recruitment of judges, and the administration of justice in exercise of donated judicial authority. The new Constitution also obliged the enactment of a code to govern the conduct of judicial officers.

The new Constitution has by its specific provisions reformed the justice system. However, regardless of the prevailing solid laws governing ethical conduct of judges, to wit: the Constitution; the Judicial Service Act; and the Judicial Service (Code of Conduct and Ethics), Regulations, 2020, unethical conduct among the Judges is to date a matter of grave concern. There is a disconnect between the conduct of the judges and the expectations of the people of Kenya. The situation begs the question; Is there a need to make more laws or should the search for a solution be re-directed to focus beyond laws?

I considered proposals away from the rule-based ethical regime. I concluded that rule-based ethical regime is not sufficient for the betterment of the ethical conduct of Kenyan judges. That virtue ethics should be included in the judges training and supervision to having judges who are and can be said to be ethically flourishing in fact and in deed. This should be able to deliver responsiveness to the ethical conduct expected of judges by the people of Kenya as expressly and impliedly put in the enactments. I argue for the introduction of virtue ethics in the judges' ethical regime not as a substitute to rule-based ethics but as a complement though taking primacy and remaining true to its valid dream that in the fullness of time it will render the latter redundant.

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## List of Abbreviations

| | |
|---|---|
| CJC | Canadian Judicial Council |
| EPJ | Ethical Principles for Judges |
| IBA | International Bar Association |
| JAC | Judicial Appointment Committee |
| JMVB | Judges and Magistrates Vetting Board |
| JSC | Judicial Service Commission |
| KJA. | Kenya Judiciary Academy |
| KMJA | Kenya Magistrates and Judges Association |
| KNCHR | Kenya National Commission of Human Rights |
| LC | Lord Chancellor |
| LCJ | Lord Chief Justice |
| LSK | Law Society of Kenya |
| OJC | Office of Judicial Complaints |
| SCJJ | Judges of the Supreme Court |
| SEE | Social Ethics Education |
| SOJAR | State of the Judiciary and Administration of Justice Annual Report |
| UK | United Kingdom |

# LIST OF DEFINITIONS OF KEY TERMS

The following are the key concepts and theories for the study:

Judge – (for purposes of Kenya) a Judicial officer presiding in the superior courts of Kenya, that is the Employment and Labour Relations Court, Environment and Land Court, High Court, Court of Appeal, and the Supreme Court established under Article 162 of the Constitution of Kenya.

Common-law jurisdictions – Sovereign Nations that adopted English common-law (customary law based on judicial precedents as opposed to enactments).

Ethical regime – body of enactments (Constitution and legislation) governing the moral conduct of judges.

Integrity – the quality of honesty and moral character of an individual. The High Court of Kenya has pronounced itself on the meaning of integrity 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 behavior, attribute or conduct in question has to rise to the threshold of criminality.

Justice - The definition of justice that has stood the test of time is that by the Roman jurist Ulpian (Domitius Ulpianus), he defined justice as "giving to each his due" Olsthoorn, (2016). John Stuart Mill emphasizes the primacy of moral principles in the meaning of justice, he defines justice as a name for certain classes of moral rules, which concern the essentials of human well-being more clearly, and are therefore of more absolute obligations than any other rules for the guidance of life, Kamenka & Alice E.-S. Tay, (1986). This definition underscores the indispensability of moral principles in the business of 'giving to each his due' and the superiority of virtue-ethics to rule-based ethics in the exercise and practice of justice.

Deontological ethics – a theory of ethics founded by Immanuel Kant that grounds ethics on duty as formulated by the categorical imperative, Wood, (1999).

The theory determines the ethics of an act on the premises of a universal law, so that what is not prohibited by law is ethical.

Utilitarian ethics – a theory of ethics founded by Jeremy Bentham and grounded by John Stuart Mill. It holds that right and wrong actions and moral principles should be judged and/or evaluated on the basis of their production of happiness and deprivation of unhappiness for the greatest number of people, West, (2004). An action is judged by its end, therefore ethical if it produces pleasure and lack of pain, and unethical is it produces pain and privation of pleasure, J. S Mill, (1895).

Virtue ethics – a theory of ethics founded by Aristotle. Etymologically virtue derive from Latin 'virtus'meaning excellence Hooft, (2006). Hooft, (2006) defines virtue as referring to "a disposition or a pattern in someone's character or personality that leads them to act morally". Swanton, (2003) on her part define virtue thus "A virtue is a good quality ofcharacter, more specifically a disposition to respond to, or acknowledge, items withinits field or fields in an excellent or good enough way". Athanassoulis, (2013) takes thedefinition that, "Virtue is a purposive disposition, lying in a mean that is relative to us and determined by a rational principle, and by that which the prudent man would use to determine it". Annas, (2007) similarly adopts the 'a persons' disposition' definitionand explains that "A virtue is a disposition to act, not an entity built up within me andproductive of behaviours; it is my disposition to act in a certain way and not others". The common ground in the thread of definition is the disposition of a person, the person is therefore central to virtue ethics, the study consequently offers a short description of virtue ethics as ethics based on virtues of the person.

Natural Law School of Thought - hold that law is founded in human nature that govern how human beings ought to conduct their affairs to conform their existence to nature Wolfe, (2003). In this sense principles of true morality and justice informs law and are inherently discoverable by human reason, man - made/enacted (positive) law that contradicts these principles are invalid, Hart, (1972), laws therefore necessarily have moral values (Bennett, 2011).

Positive Law School of Thought - assert that, laws are posited, conformity to moral values is not necessary but contingent Raz, (2002). The moral value of law

therefore depends on the specific law's content and the relevant conditions of the people to which the law actually governs Raz, (2002). The positivists' compliance with the law also follows the same trajectory of thought, in this sense, only enacted law is to be complied with and only so because it is enacted law and non-compliance thereof attract sanctions.




**List of Statutes**

The Constitution of Kenya, 2010.

The Judicial Service Act, 2011.

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

UK's Guide to Judicial Conduct, 2020.

Canadian Ethical Principles for Judges, 2004.

Indian Restatement of Values of Judicial Life, 1999.

South African Code of Judicial Conduct, 2012.

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# DEDICATION

I dedicate this work to my beloved mother Lucia Omullo, who instilled virtue ethics in me in my formative years. Her efforts have not gone to waste.

# EPIGRAPH

“Ethics secured by law alone is a hyena in a sheep skin. Trust it not with your flock.”

Obondi Victor.

# CHAPTER ONE: INTRODUCTION

## 1.1 Introduction

This chapter introduces the dissertation. It provides; a background to the study, the problem statement, the general objective and specific objectives, the research questions, the scope, and limitation of the study, and finally it lays the significance of the study.

## 1.2 Background to the study

For the readers to appreciate the choice of judicial officers in question, it is important to draw a distinction between judges and magistrates, their stations, and jurisdictions. In this regard, this paper makes a brief insight into the Kenyan system of courts. There are two categories of courts in Kenya namely, the Superior courts and the Subordinate courts. The Superior courts are, the Supreme Court, the Court of appeal, the High Court, the Employment and Labour Relations Court and the Environment and Land Court (vide Article 162, 1, 2 of the Constitution). The Subordinate Courts are, the Magistrate courts, the Kadhis' courts, the Courts Martial and any other court or local tribunals as may be established by an Act of Parliament (vide Article 169, 1 of the Constitution).

The Supreme Court is the apex court, otherwise referred to as the court of last resort, in the sense that no appeal lies on its decision. It consists of the Chief Justice as the president of the court, the Deputy Chief Justice as the vice-president of the court, and five other judges (vide Article 163, 1 of the Constitution). The quorum of the court is five judges (vide Article 163, 2 of the Constitution).

The jurisdiction of the Supreme court is thus: exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President; appellate jurisdictions to hear and determine appeals from the court of appeal and any other court or tribunal as prescribed by national legislation, provided that other than on matters involving interpretation or application of the Constitution, an appeal from the Court of Appeal only lies to the Supreme Court on certification by the Court of Appeal or Supreme Court as involving a matter of general public importance, such certification if made by the Court of Appeal is subject to review by the Supreme Court;

advisory opinion at the request of the national government, any state organ, or any county government on matters concerning county government (vide generally Article 163 of the Constitution). The decisions of the Supreme Court bind all courts other than the Supreme Court (vide Article 163, 7).

The court of Appeal ranks second and consists of a number of judges as may be prescribed by an Act of Parliament being not less than twelve – section 7 (1) of the Judicature Act currently sets the number at not more than 30 judges, the judges of the Court of Appeal elect one of them to be the President of the court, the Court of Appeal has jurisdiction to hear and determine appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament (vide Article 164 of the Constitution).

The High Court ranks third and consists of several judges prescribed by an Act of Parliament and who shall elect from among themselves a Principal Judge of the court (vide Article 165, 1 & 2 of the Constitution). The jurisdiction of the High Court is thus: unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened; jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed for removal of the President; jurisdiction to hear any question respecting the interpretation of this Constitution and any other jurisdiction, original or appellate, conferred on it by legislation (vide Article 165, 3 of the Constitution); supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function other than a superior court (vide Article 165, 6 of the Constitution).

The jurisdiction of the Subordinate Courts is conferred by legislation (vide Article 169, 2 of the Constitution). The main pieces of legislation on Subordinate Courts are the Magistrates' Courts Act, 2015 respecting the Magistrates Courts and the Kadhis' Courts Act respecting the Kadhis' Courts, the Courts Martial is established under Part VIII of the Armed Forces Act, Cap 199 Laws of Kenya. There are numerous tribunals that cannot and need not find space in this study. This study is however concerned only with judicial officers of the Superior Courts. The qualifications, appointment and removal of judges will be discussed later in this study.

Globally Judges hold a privileged position in the society, they resolve disputes between citizens and between citizens and the state, try criminal suspects and order the punishment of those found to have departed from the common good and protect the rights of the citizens from the excesses of the state. Theoretically and de jure in any limited government, they are the most powerful wielders of donated authority, by their pronouncements (in many jurisdictions, including Kenya) even one's life can be taken away by way of a death penalty.

The office of a Judge is held in high esteem. Judges are deemed as the custodians of justice. Their primary objective in the discharge of their functions is to deliver justice, this role demands of them to be of high morality and integrity, just, trustworthy, beyond reproach and of good standing with the public such as to command public confidence. Accordingly, they should be like Caesar's wife, that is, beyond suspicion of unethical conduct.

However, it was realized that Judges were not necessarily living up to this expectation. As a means of ensuring that judges adhere to this high calling, resort was had to enactment of laws to govern the conduct of judges. At the international stage the "Bangalore Principles of Judicial Conduct, 2002" were formulated and adopted in April 2003 by the Commission on Human Rights in its 59$^{th}$ session, UNODC, (2007).

In Kenya for a long time, the relationship between judges and the public has been less than satisfactory, judges are viewed with a lot of suspicion and mistrust. The courts of justice are perceived to be courts of injustice, Maya, (2016). The public doesn't trust the judges to be what they ought to be, custodians of justice. Justice appears to be for sale and only available to the highest bidder, Mutua, (2001). The phrase "why hire a lawyer when you can buy a judge" was coined in response to the sad state of affairs in the pre-2010 Constitution judiciary characterized by unmitigated ethical challenges and want of probity among the judges, Maya Gainer, (2016).

In November 2010, Kenya promulgated a new Constitution that heralded a paradigm shift in the management of the Judiciary, ordering probity and accountability in the recruitment of judges and exercise of judicial authority and demanding that judges be persons of high moral character, integrity, and impartiality. The Constitution provides binding national values and principles of governance to include inter alia, rule of law, social justice, equality, integrity, transparency, and accountability. The constitution

further obliged the enactment of a judicial code of conduct, and which code Judicial Service (Code of Conduct and Ethics), Regulations, 2020 is in force. Other applicable laws dealing with ethics includes Anti-Corruption & Economic Crimes Act, 2003, Ethics & Anti-Corruption Commission Act, No. 22 of 2011, Public Officers Ethics Act, Bribery Act, 2016, and Leadership and Integrity Act, 2016.

The new dispensation has ameliorated the justice system. However, despite the new dispensation coupled with a multiplicity of laws governing ethical conduct of judges, the want of ethics among the judges remains a real concern in Kenya today. There is a disconnect between the conduct of the judges and the principles of justice they purport to administer. This begs the question on efficacy of the laws in dealing with ethical challenges among the judges. Central to this disconnect is the relationship between law (properly so called) and morality. It is therefore necessary to interrogate the efficacy of the prevailing ethical regime, with a view of proposing solutions to its limitations from a virtue ethics perspective. Virtue ethics requires knowledge and practice, so that it is only complete when a person necessarily knows the virtues and then conduct their affairs in accordance with the virtues.

### 1.3 Problem Statement

The people of Kenya rely on judges to resolve their disputes and decide their cases justly. To this end they expect the men and women upon whom they have donated and entrusted the power and authority to judge to do so justly and to be ethically beyond reproach. The Constitution, the Judicial Service Act, 2011 the Judicial Service (Code of Conduct and Ethics), Regulations, 2020 require high ethical standards of judges and set up processes designed to avail this standard. However, despite the laws, ethics remains a challenge among the Kenyan judges. The disconnect between the peoples' expectations as codified in laws and the praxis is quite disappointing and has left the people exposed to maladministration of justice. It is a situation that may find a perfect description in the now famous Kenyan slang that "kwa ground vitu ni different" – reality run counter to expectations.

This study addresses itself to the problem statement, that is: an inquiry into the efficacy of the Kenyan ethical regime in securing ethical conduct of Judges.

### 1.4 General Objective

This study aspired to attain considered proposals away from the rule-based ethical regime, for the betterment of the ethical conduct of Kenyan judges towards having judges who are and can be seen to be ethically flourishing. These proposals should be responsive to the ethical conduct expected of judges by the people of Kenya as expressly and impliedly put in the Constitution, the Judicial Service Act, 2011 and the Judicial Service (Code of Conduct and Ethics), Regulations, 2020. This study sought to find out the lacuna in the Kenyan ethical regime regarding judges, with a view of coming up with a virtue ethics-based solution.

### 1.5 Specific Objectives

The objectives of this study are:

(i) To appraise the efficacy of the Kenyan ethical regime on the conduct of judges to the ethical challenges among the judges.

(ii) To do a comparative study of the ethical regimes on the conduct of judges in other five common-law jurisdictions.

(iii) To find out whether the learning and practice of virtue ethics is the missing therapy to the ethical challenges among Kenya judges.

### 1.6 Research Questions

This study sought to find answers to the following questions:

(i) Is the Kenyan ethical regime on the conduct of judges efficacious to the ethical challenges among the Kenyan judges?

(ii) How does the ethical regimes on the conduct of judges in other five common-law jurisdictions compare?

(iii) Is the learning and practice of virtue ethics the missing therapy to the ethical challenges among Kenyan judges?

## 1.7 Scope of the Study

This study is limited to a critical evaluation of the ethical expectations of the people of Kenya respecting Judges as provided expressly or impliedly in the Constitution, the Judicial Service Act, 2011 and the Judicial Service (Code of Conduct and Ethics), Regulations, 2020 as contrasted with the apparent ethical challenges among the Kenyan Judges. Due to the impracticability of interviewing a fair representation of Kenyans, their expectations were gleaned from the Constitution that they enacted and gave to themselves and their future generations, and the relevant laws enacted pursuant thereto by their authorised representatives.

The extent of ethical challenges among the Kenyan judges was gleaned from complaints lodged with the Judicial Service Commission (JSC), Reports of Tribunals appointed by the President to investigate complaints referred to the President by the JSC, Reports of other Tribunals appointed to generally investigate the conduct of judges, Report of the Judges and Magistrates Vetting Board (JMVB) as it were, SOJARs, Case laws, Studies and Journal Articles.

Whereas judging is a function of the judiciary that comprises of judges, magistrates, Kadhis, and members of Tribunals and Courts martial, it is beyond this study to consider the entirety of the judiciary. Judges are at the apex of the ranking and can inspire their juniors into ethical conduct and to right their wrongs by way of the appeal mechanism, thus the choice of judges for this study. This study sought to determine whether a paradigm shift in the approach of securing judges' ethical conduct, from a purely rule-based one to a primarily virtue-based one, with secondary rules can cure the ethical challenges among Kenyan judges.

## 1.8 Limitations of the Study

This study is a time bound research that needed to be completed within six months, the amount of data collected and analysed is accordingly not exhaustive. Due to the expensive nature of foreign travel, the researcher could not afford to travel to the five countries subject of a comparative study in this research, accordingly the study relied entirely on published data available within Kenya and online. Most of the complaints against judges remain confidential and unpublished, JSC only publish in their Annual

Reports (SOJAR) statistics in terms of numbers of complaints received and determined, accordingly this research is limited to published complaints.

### 1.9 Significance of the study

The function of Judges is necessary to ensure that everyone is given their due. In performing this duty judges are called to ensure a balance in distribution of the available and scarce resources among the people of Kenya, protect the rights of the meek and downtrodden from the mighty of the society and thus ensure social equity and justice. A society where there is no justice cannot prosper, is characterised by high rates of crime and uprisings and often disintegrates at the altar of injustice, Kameri-Mbote & Akech, (2011) and James Thuo Gathii, (2016) for instance attribute post-election violence to want of trust by the people of Kenya in the judiciary. Justice cannot be found in Kenya if the Kenyan judges persist in unethical conduct. That the ethical conduct of Judges should be a matter of great concern therefore goes without saying.

The significance of this study can be seen considering the expectations of the people of Kenya as enacted in the Constitution and the other relevant laws legislated therefrom, and the prevailing ethical challenges among judges that has and continue to fail the said expectations as enacted. The prevailing state of ethical challenges among judges is detrimental to the delivery of justice. It is therefore necessary that a remedy be sought.

This research benefits judges in appreciating the value of and need for learning and practicing virtue ethics. This will impact positively in their ethical conduct and productivity in the discharge of their judicial function. Judges will learn from this paper the ethical values that are violated by the acts categorized as constituting gross misconduct under the Rule-based ethical regime, hence improve on their ethical conduct. Even though this paper is concerned with the conduct of Judges, the benefit extends to all judicial officers including Magistrates in the same vein.

The Kenya Judiciary Academy should find useful insights in this paper on how to improve its training modules as concerns Judges ethics. Law, Ethics and Governance students, and practitioners should find useful material in this paper that enriches their studies and practice respectively.

This study proposes development an approach that will better the ethical conduct among Kenyan judges with a trickle-down inspiration to the entire judicial system and consequently ensuring that justice is served in the land. This should be of manifest benefit to the individual judges who should be attaining excellence and becoming better persons, the litigants and court users, the entire people of Kenya and philosophically to humanity.

### 1.10 Conclusion

The background to the study has provided a brief insight into the Kenyan judicial architecture, drawing a distinction between the superior courts presided over by Judges and subordinate courts presided over by magistrates. The offices of judges are found to be privileged and powerful, underscoring the importance of the need for the judges to be ethical in their conduct. There is a historical ethical challenge among Kenyan judges that has subsisted the post 2010 constitutional era and defied the present ethical regime.

# CHAPTER TWO: LITERATURE REVIEW

## 2.1 Introduction

This chapter contains two parts. Part one provides the theoretical framework of the study. It inquiries into the three schools of ethics namely deontology, utilitarian, and virtue-ethics, making a strong case for virtue ethics. Part two provides the empirical review which deals with the analysis of existing body of literature as relates to the research questions. The research gap is then pointed out.

## 2.2 Theoretical Framework

### 2.2.1 Introduction

The ethical challenges facing Kenyan judges is evidenced in the character of accusations and complaints levelled against them, the complaints as shown later, are grounded on conducts alleged to be unethical hence the need for an antidote founded on ethics. To find this antidote, this study will examine the three schools of ethics to wit: deontological ethics; utilitarian ethics; and virtue ethics. This paper takes virtue ethics as the ideal, it is therefore important to discuss deontological and utilitarian ethics to demonstrate the choice of virtue ethics as the blueprint in evaluation of the judge's ethical conduct.

### 2.2.2 Deontological Ethics

The brainchild of Immanuel Kant. Deontology grounds ethics on duty as formulated by the 'categorical imperative', Wood, (1999). The categorical imperative is explained by Kant as "a law that either commands or prohibits", the ethics of acting or not acting in a particular way is therefore depends on the existence of a law permitting or prohibiting it, he posits "An action neither permitted nor prohibited is called morally indifferent" Kant, (2017 6.223). The content of law is merely defined by the universal lawfulness of actions in general, "I ought never to act except in such a way that I could will that my maxim should be a universal law", Wood, (1999). Kant writes thus:

> The categorical imperative, which as such only affirms what obligations is, is: act upon a maxim that can also hold as a universal law … You must therefore first consider your actions in terms of their subjective principles; but you can know whether this principle also holds

> objectively only in this way, that when your reason subject it to the test of conceiving yourself as also giving universal law through it, it qualifies for such a giving of a universal law, Kant (2017 6.225).

Deontological ethics can be reduced to simply, a comply with the law directive, it doesn't matter what your constitutive motive for doing or not doing a particular act. The moral value of an act is in its compliance with the law. Accordingly, it will merely demand of Judges, that in their conduct they should be as ethical as the law require of them. It is a positivist approach to ethics, which has so far failed to remedy the ethical challenges among the Kenyan Judges.

### 2.2.3 Utilitarian Ethics

Founded by Jeremy Bentham and grounded by John Stuart Mill. It holds that right and wrong actions and moral principles should be judged and/or evaluated on the standard of their production of happiness and deprivation or unhappiness for the greatest number of people, West (2004). John Stuart Mill writes:

The creed which accepts as the foundation of morals, utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce reverse of happiness …. "By happiness is intended pleasure, and the absence of pain; by unhappiness pain and the privation of pleasure …. Pleasure and freedom from pain are the only desirable as ends." J. S Mill, (1895).

Utilitarian ethics is therefore concerned with the consequences of an action, and not the process employed by the agent and the motive of the agent in doing the action. It propagates the, the end justifies the means kind of ethics. The moral value of an act is evaluated on the standards of its consequence, in this sense the killing of a suspected thief through mob justice will consequentially bear moral value insofar as it resulted to pleasure for the majority who were baying for the suspect's blood.

Pleasure and freedom from pain are not ends in themselves, in strict sense they can only be means to an end, that is flourishing properly understood. Miller (2010) criticises Mill's propositions' thus "…. The idea that we all desire the same experience for their own sakes might appear to be just not false but absurd …. Different people want different experiences". One single act may be of several distinct pleasures and can at the same time bear both pain and pleasure, Miller, (2010), for instance writing

a just judgement can be pleasurable and yet still painful in the sense of the amount of work that goes into it.

The utility of the result of a judgment robs off an act of any moral value and elevates or rather debase an act beyond moral evaluation standard. Judges employing utilitarian ethics will simply seek to find whether their conduct results into happiness, in this sense when faced with the challenge of convicting or acquitting a corrupt politician who is very popular, utility will be found in an acquittal insofar as this will promote happiness among the politician's supporters. This study therefore finds that utilitarian ethics is incapable of securing ethical conduct among the Kenyan Judges.

### 2.2.4 Virtue Ethics

Virtue ethics is attributed to Aristotle. Etymologically virtue derive from Latin 'virtus' meaning excellence Hooft, (2006). Hooft, (2006) defines virtue as referring to "a disposition or a pattern in someone's character or personality that leads them to act morally". Swanton, (2003) on her part define virtue thus "A virtue is a good quality of character, more specifically a disposition to respond to, or acknowledge, items within its field or fields in an excellent or good enough way". Athanassoulis, (2013) takes the definition that, "Virtue is a purposive disposition, lying in a mean that is relative to us and determined by a rational principle, and by that which the prudent man would use to determine it". Annas, (2007) similarly adopts the 'a persons' disposition' definition and explains that "A virtue is a disposition to act, not an entity built up within me and productive of behaviours; it is my disposition to act in a certain way and not others".

The common ground in the thread of definition is the disposition of a person, the person is therefore central to virtue ethics, the study consequently offers a short description of virtue ethics as ethics based on virtues of the person. The person must be understood as the human person, that is a rational being. The necessity of rationality for virtue translates to the necessity of practical reason, on this score Annas draws a distinction between virtue and habit thus "A virtue, unlike a mere habit, is a disposition to act for reasons, and so a disposition that is exercised through the agent's practical reasoning; it is built up by making choices and exercised in the making of further choices", Annas, (2007). Practical reasoning is central to the building and exercise of virtue, and for this reason critics have assigned an intellectualist tag to virtue ethics. Annas, (2007) dismisses this intellectualist tag and argues that practical reasoning is

available to everyone and cannot therefore be elitist, virtue ethics attempts to better the reasoning which is common to all as opposed to substituting it for another. Hooft, (2006) agrees that moral action carries practical necessity that we ought to deal in a particular manner regardless of contrary persuasions.

The field of ethics was predominantly dominated by deontologist and utilitarian approaches, however the contemporary approach has revisited virtue ethics. Axtell & Olson, (2012) observes that, the renewed vibrancy of virtue ethics may surprise many who had antecedental been sold to the proposition that it was conceptually unable to serve practical moral guidance. Virtue ethics according to Hursthouse, (1999) is a term of art which is both a new and old approach to ethics, the former because it has been revived into the contemporary ethics and the latter because it dates back to Aristotle. Aristotle, (2000 1095a14) wrote on The Highest of all goods "…. both the general run of men and people of superior refinement say that it is happiness…". Aristotelean happiness is not the utilitarian happiness, it is happiness in the sense of flourishing (eudemonia) and includes honour, suffering and misfortunes. Annas, (2007) had occasion to speak to this, thus "...modern philosophical notion of happiness has been influenced by utilitarian ideas, leading easily to the trivialising thought that happiness is pleasure".

As opposed to other theories of ethics, virtue ethics has virtue as the evaluating standard of the moral value of a person, and the appreciation of what living a flourishing life is. Actions do not provide the bases upon which a justification of one's moral worth can be made though they are a manifestation of one's character Athanassoulis, (2013). In this sense it is not enough to do the right act, Athanassoulis, (2013) explains that "..being virtuous is not merely instrumentally good but constitutive of what it means to live a good life qua human being". Virtue does not demand merely the doing of the right thing, but that the right thing be done and done for the right reason, in this sense virtue calls for both the effective (wholeheartedly and without internal opposition) and the intellectual (knowledge) Annas, (2007).

The central question in virtue ethics is, what kind of person ought I to be? According to Kupperman, (2009) "Virtue ethics also treat choices as typically embedded in a pattern or path of life rather than presenting them atomistically". Virtue is therefore holist, concerns goodness and its manifestations. Crisp, (2010) agrees that the

fundamental question that virtue ethics answers is that of Socrates, How should one live?, he however adds that the question that raises further questions including "What kind of person should I be? and How should I act?", to which virtue ethics answers thus: "You should live the life of virtue as a virtuous person, acting virtuously". The justification for acting virtuously is found in the virtues themselves. Crisp, (2010) buttresses the holism that virtue ethics demands, "Acting virtuously requires that the agent (a) act with knowledge, (b) act from rational choice of the actions for their own sake, and (c) act from a firm and unshakable character". In this sense an act of virtue done merely in compliance with the law (duty) or as a maxim in a universalist principle does not find space in virtue ethics. The end of a virtuous act is in virtue, judges therefore ought to possess knowledge in virtue, conduct themselves virtuously not because the code of conduct obliges them to such conduct but because it is virtuous hence good in itself, and unapologetically without any internal opposition.

To the question, why need the agent be committed to acting virtuously? Crisp, (2010) answers that, the commitment is itself praiseworthy, such that a praise for a virtuous act is also a praise for the agent for possessing and exercising such virtue. Virtue ethics maintains a command in moral theory and fulfils the task of moral theory than the other theories, Hooft, (2006).

## 2.3 Empirical Review

### 2.3.1 Research Question 1. Is the Kenyan Ethical regime on the conduct of Judges responsive to the ethical challenges among the Judges?

Most of the literature on this question draws from a past, that is the period of pre-2010 Constitution. It is worthwhile therefore to briefly look into what was said about that period, to have a proper appreciation of the present thinking. According to Mutua, (2001), the judges were at the service of the ruling political class, and were enthusiastic to be employed by the government for the unjust exercise of judicial authority. It was therefore futile to seek redress in courts against the ruling political class and their associates. Ang'awa, (2009) had occasion to give her views on the status of the judiciary, she noted that, the lack of confidence in the Kenyan judiciary was because the judiciary had been compromised by corruption and State capture.

The Committee of Eminent Commonwealth Judicial Experts expressed shock and dismay at the widespread allegations of bribery of judges and concluded that "...as presently constituted, the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform". International Commission of Jurists, Kenyan Section, (2002).

The Ouko Task Force found a wanting situation in the law governing matters concerning judges. On appointment of judges, it noted that "..one of the causes of loss of public confidence in the judiciary has been the use of non-transparent procedures in the appointment of judges", Republic of Kenya, (2010). It noted inadequacies in the procedures of disciplining and removal of judges. It concluded that the low public confidence in the judicial process and its institutional decline was majorly due to corruption among the judges, and the measures attempted at curbing the vice were at best suboptimal. It found the Judicial Code of Conduct and Ethics, 2003 weak and outdated hence ineffective.

Subsequent to the enactment of the 2010 Constitution, there is a change in opinion as the literature largely acknowledges the sufficiency of the ethical regime at least in theory. Former Chief Justice Willy Mutunga noted that, the 2010 Constitution provided a near tabula rasa beginning for the judiciary, it weeded out bad judges and made the judiciary attractive to judges of good character and integrity, Cottrell et al, (2016). Judiciary that is attractive to judges of good character and integrity is one that is necessarily ethically compliant. Maraga CJ, agrees with his predecessor thus "The promulgation of a new Constitution in 2010 gave impetus to the transformation journey of the Judiciary", he notes that, it grants authority to judges and demands accountability from them, The Judiciary of Kenya, (2020). According to Kenya National Commission of Human Rights (KNCHR) independence of the judiciary under Article 160 of the Constitution "gives the judiciary autonomy in conducting its affairs whilst safeguarding it from external interference" KNCHR, (2014). KNCHR credits the new Constitution with the increased transparency in recruitment and removal of judges, in the sense that JSC recommends the appointment and removal of judges, and for providing legislative and administrative measures that have "significantly enhanced the integrity, efficiency and transparency of the judiciary" KNCHR, (2014).

Anita Nyanjong and Ochiel J Dudley, (2016) argued for a shift of focus to the accountability of the independence and credits the 2010 Constitution for demanding honesty and accountability in Chapter Six as mechanisms for ensuring that judges are accountable in the exercise of their judicial authority. They observe that the Constitution, the Judicial Service Act and the Code of Conduct have ensured political, decisional and behaviour accountability of judges, further the Constitution has established a justification culture such that judges are expected to justify every exercise of their judicial authority, in this sense the actions must conform to the Constitution and the law, Anita Nyanjong and Ochiel J Dudley (2016). They conclude that the law is now adequate in ensuring that judges are independent and accountable thus, "The Constitution therefore signals an end to a past marked with inadequate judicial independence and accountability and heralds a new era where both values underpin the execution of the judicial mandate", Anita Nyanjong and Ochiel J Dudley (2016). By laying accountability mechanism for judges, the law demands that judges be ethical.

According to Jill Cottrel Ghai, (2016) the process of appointing judges is very open and transparent and the institutional independence of the judiciary is protected under *Article 160(1) of the Constitution.* She notes that even though integrity is not defined precisely, the Constitution insists on integrity of judges and subjects them to Chapter Six which demands among other values personal integrity and competence. Whereas she agrees that declaration of wealth is a good thing, she notes that the declaration is not done in public and in this sense does not satisfy the intended accountability measure. Her general assessment to the prevailing law is favourable, she opines thus, "Serious efforts have been made to change entrenched negative cultures. Accountability of the judiciary is taken seriously. And the judiciary of Kenya is close to being the judiciary for Kenyans", Jill Cottrel Ghai, (2016). The 'judiciary for Kenyans' must be the judiciary whose judges individually and collectively meet the ethical expectations of the people of Kenya.

Akech, (2011) while stressing the importance of accountability mechanisms especially in the judiciary in legitimizing it in the public perception and promoting acceptance and confidence conceded that the Constitution establishes principles and mechanisms that enhance accountability. He further notes that, "The new Constitution … introduces due process and certainty in the exercise of the power to dismiss judges

…likely to enhance independence of judges". Elisha Ongoya also expresses himself positively on the constitutional architecture respecting the judiciary thus "The power of the judiciary is itself highly guarded through the setting out the guiding principles of exercise of judicial power and principles of judicial independence" Odero et al., (2014).

According to Orina, (2016) the recruitment of judges by the JSC as opposed to the executive ensures independence and accountability. Walter Khobe Ochieng, (2016) also credits the 2010 Constitution for transforming JSC from the executive dominated club to an empowered democratic institution. According to Khobe the recruitment process for members of JSC is designed to protect it from executive interference. While finding merit in the requirement for the JSC to submit reports to Parliament, Khobe finds fault in the want of obligation on Parliament to debate and act on such reports hence whitling the intended accountability. Kameri-Mbote & Akech, (2011) equally hail the judges' recruitment process noting that the Constitution provides a revamped JSC with greater autonomy enhancing decisional independence. They conclude that the measures introduced by the 2010 Constitution are comprehensive and necessary in restoring public trust in the judiciary collectively and judges individually.

Prof. Yash Pal Ghai on his part sets out the ethical principles of financial probity, integrity, transparency and accountability as the dominant governance restructuring principles of the 2010 Constitution, Murunga et al., (2014). In this sense Yash Ghai is saying that with these principles enshrined in the Constitution, ethical governance is assured in so far as the law is concerned accordingly the law sufficiently provides for matters to do with judges' conduct. He concludes that the Constitution is designed to serve the people. According to Mbondenyi & Ambani, (2013) in all important matters the new Constitutional order has erected a framework that attempts a representative and responsive government that has given judicial independence a literal constitutional meaning. They conclude that "The 2010 Constitution has adequate provisions and safeguards for judicial independence", and in this sense success of judicial transformation should be a guarantee unless vices are permitted to thrive.

James Thuo Gathii, (2016) finds merit in the protection of the Constitutional provisions relating to judicial independence from whimsical amendments by requiring

a referendum approval for any amendments touching on judicial independence. He concludes that the accountability demanded by the Constitution is compatible with judicial independence. On the question of independence and accountability of the judiciary Patricia Kameri-Mbote and Muriuki Muriungi, (2016) are of the considered view that there is no insufficiency of rules governing the conduct of Judges, they express themselves thus:

> Having reviewed the internal mechanisms of ensuring independence and accountability in the Kenyan judiciary, we conclude that adequate normative, procedural, and institutional mechanisms exist; are anchored in the Constitution and laws of Kenya; and are aligned to international best practice.

Okiri et al., (2019) also noted that the ethical challenge is beyond the rule-based regime. They opine that there are adequate laws governing the conduct of judges in Kenya, and that the persistent misconduct among judges cannot be blamed on want of laws.

Luis G Franceschi, (2016) takes the most philosophically enlightening appraisal of the extant rule-based regime. He opines that the Constitutional requirement that judges be persons of high moral character (vide Article 166, 2, c) can properly be deemed Aristotelian. He argues that by making 'high moral character' an essential Constitutional requirement for judges is a pointer to classical approach to personal independence of judges, "where Aristotelian virtue ethics is at the very core of the philosophical foundations of judicial independence". According to Franceschi the judiciary's institutional independence is secured by the "well defined steps" adopted by the Constitution which includes, power of the JSC to recruit judges; security of tenure of judges; and establishment of judicial fund. He puts much premium and rightly so on the Constitutional demand that judges be persons of high moral character, a provision the making of which he observes that the Constitution "went unusually further" and "gave the judiciary of Kenya an Aristotelian virtue approach" Luis G Franceschi, (2016). He explains that the importance of the responsibility to uphold the principles of integrity, independence and efficiency for judges compared to other judicial officers is found in the weighty duty that judges have based on their jurisprudential power. Franceschi attributes the enactment of the Judicial Code of

Conduct and Ethics to the virtue approach adopted by the Constitution in judges' personal independence, Luis G Franceschi, (2016). His assessment of the ethical command of the Code is positive thus:

> This code fosters the independent work of the judge and prevents, in theory, any possible conflict of interest that could tarnish, disfigure, or ruin judicial independence and jeopardise the pursuit of justice in the exercise of the judicial function. This code reinforces the institutional independence of the judiciary by limiting and directing the judge's personal and social behaviour in the attainment of a high moral character.

He credits the Code for demanding that judges be scrupulously impartial and fair, and above reproach not only in their judicial functions but also in their public and private lives. Franceschi notes that the Code promotes the values of prudence, justice, equity, and integrity in judges hence benefiting the people of Kenya. He observes that the Code in its intention to drive a behaviour change among the judges adopted the main Aristotelian virtues of justice, courage, prudence, and self-control. Franceschi inveighs the lack of particularised penalties for violation of the Code, a situation that renders the Code's progressive provisions sterile, and mostly ineffective. His overall evaluation of the Code however remains that, the ethical issues of impartiality, independence, equality and non-discrimination, professionalism, integrity, propriety, accountability, prohibition against sexual harassment and prohibition against corrupt practices concerning judges are extensively addressed by the Code and in this sense the Code is progressive at least in its provisions. Franceschi concludes that, the 2010 Constitution enshrines "a financially, politically and structurally independent justice system. The spirit of this new dispensation sought to help the judiciary to regain its lost public confidence.." Luis G Franceschi, (2016).

Peter Kwenjera Mwangi, (2016) opines that the 2010 Constitution secured independence and integrity of the judiciary thus, "…the new Constitution contains provisions which not only configure the judiciary institutionally but also demand a certain calibre of judges in terms of professionalism, education, experience, character and integrity". He notes that the Constitution has protected the recruitment of judges from executive interference and established a revamped JSC with members drawn from the wider justice stratum. He credits the Constitution for demanding high

qualifications for appointment of judges and which are comparatively better than other jurisdictions.

Peter Kwenjera Mwangi, (2016) like Franceschi reads virtue ethics in the Constitutional provision on integrity and morality. He however takes issue with the vagueness with which the Constitutional and legal provisions on integrity and morality are formulated, he opines that despite emphasizing moral character, integrity, and impartiality the extant ethical regime suffers want of clarity in standard and criteria for determining ethical probity of judges in their recruitment, discipline, and removal. His overall assessment of the prevailing legal regime is commendatory thus, "It can be confidently stated that the law establishes a framework of the criteria and the mechanisms needed to implement the requirement of moral character" Peter Kwenjera Mwangi, (2016). But how about the praxis? The following section is instructive.

#### 2.3.1.1 Pre-Constitution 2010 Complaints Concerning Judicial Ethics

The Judges and Magistrates Vetting Board (JMVB) relied on the Constitution 2010 provisions as the yardstick for determining the suitability of judges who were in office pre-2010 Constitution. It is therefore worthy to briefly look into the pre-2010 complaints on the conduct of Judges. This will also form a basis for appreciation of changes (if any) between the pre and post 2010 Constitution ethical regime.

In its determination respecting the suitability of the judges in office at the time of promulgation of the 2010 Constitution, the JMVB noted several complaints made against the judges. For Justice Riaga Omolo as he then was, allegations of bias, corruption, lack of independence and impartiality were made, Kenya Judges and Magistrates Vetting Board, (2012a). JMVB found him to have been partial in favour of the government, and to have used his judicial authority to promote impunity, Kenya. Judges and Magistrates Vetting Board (2012a). Allegations of lack of independence and impartiality were made against Justice Samuel Bosire as he then was, Kenya. Judges and Magistrates Vetting Board, (2012a). Justice Emmanuel O'kubasu as he then was, was found to have sat in a matter presented by the proprietor of a butchery where he was a customer, and actually granted orders in favour of the said proprietor and later accepted accommodation at a hotel belonging to the said proprietor's brother in London, Kenya. Judges and Magistrates Vetting Board, (2012a). Justice Joseph Nyamu as he then was faced allegations of lack of independence and impartiality, he

was found to have been a gate-keeper for the executive, Kenya. Judges and Magistrates Vetting Board, (2012a). Justice Mohammed Ibrahim faced the allegation of inordinate delay in delivery of judgments and rulings, with some spanning up to 9 years, JMVB found that "the delays, so extensive and so massive in impact", Kenya Judges and Magistrates Vetting Board, (2012c). Justice Roselyn Nambuye also was found culpable of inordinate delay in delivery of judgments and rulings undermining justice and public confidence in the judiciary, Kenya Judges and Magistrates Vetting Board, (2012c).

The JMVB observed that the Constitution 2010 made provisions intended to establish "a judiciary that, by correcting and transcending the deficiencies of the past, would come to enjoy the confidence of the public ..", Kenya Judges and Magistrates Vetting Board, (2012a). The Board noted that despite the "widespread public perception of continuing corruption in the judiciary, relatively few complaints of bribe-taking were received", Kenya Judges and Magistrates Vetting Board, (2012a). According to JMVB, this was because the givers of the bribes were beneficiaries of the judgements and further knew reporting will amount to confessing to a crime.

#### 2.3.1.2 Post Constitution 2010 Complaints against Judges.

It is important to note that just like any other employer-employee disciplinary proceedings, the disciplinary proceedings of judges are confidential. The JSC therefore do not publish details of the proceedings. The ad-hoc Tribunals appointed by the President to investigate the conduct of Judges as petitioned by JSC equally conduct their proceedings in camera and the Reports are only published when the conduct of the judge which is the subject of the investigations occurred in public. The complaints discussed hereunder are therefore not exhaustive of the said period.

**Nancy Makokha Baraza DCJ**

Barely six months into her appointment as the first Deputy Chief Justice and Vice - President of the Supreme Court of Kenya, under the new Constitution, having undergone a rigorous vetting and interview process by JSC, Justice Nancy Makokha Barasa DCJ (as she then was) found herself facing allegations of gross misconduct and misbehaviour. She was accused of pinching the nose of a mall security guard and threatening to shoot her while brandishing a pistol at the village market on 31st

December 2011, Republic of Kenya, (2012). The incident was significantly reported by the press, and it generated a lot of public debate in all media platforms.

The JSC formed a sub-committee to investigate whether the DCJ had breached the judicial code of conduct, acted in a gross manner, or showed, exhibited a conduct that can be termed as a gross misconduct or misbehaviour under *Article 168 of the Constitution* [2012]eKLR. The Complainant Rebecca Kerubo testified before the JSC sub-committee that the DCJ was uncooperative, dismissive, and rude to her, the DCJ assaulted her and told her that "you should know people". The DCJ later came back and ordered her bodyguards to shoot Mrs Kerubo but they declined prompting the DCJ to go get a gun and point at Mrs Kerubo threatening to shoot her [2012]eKLR**.**

The JSC Sub-Committee found inter alia that: the DCJ's contact with Rebecca Kerubo was unwelcome, unconsented, intrusive and aggressive to the person of Rebecca Kerubo constituted gross misconduct under Article 168 (1) (e) of the Constitution; that her conduct portrayed her as a person who has utter contempt and flippant respect for the dignity and rights of ordinary Kenyans in Breach of Rule 3(5) and 12(1) of the Judicial Code of Conduct and was in violation of Chapter 6 of the Constitution and in particular Article 73 (1) and (2) and Article 75 (1) (c); that she was not candid and her evidence on all material facts was exaggerated and even contradicted by her own witnesses, was economical with the truth and came across as an unreliable person devoid of candour due to her constant shifting of positions and therefore her integrity and suitability to continue holding the position of DCJ was doubtful; that she came out as a person incapable of handling the prestige, power and standing of the office of DCJ to the extent of losing all sense of common rationality and was mesmerized and overwhelmed by the trappings of office, [2012]eKLR.

The JSC adopted the findings of the Sub-Committee and recommended to the President, suspension of the DCJ and appointment of a Tribunal to investigate her conduct, and which recommendation the President acted upon. The DCJ filed a Constitutional Petition challenging the JSC's recommendation to the President and the President's appointment of a Tribunal to investigate her conduct. The Petition was heard by a three-judge bench of the High Court and was dismissed paving way for the Tribunal to proceed.

The Tribunal investigated the matter and found that the DCJ had committed gross misconduct and misbehaviour and recommended her removal from office. Tribunal to Investigate the Conduct of the Deputy Chief Justice and Vice- President of the Supreme Court of the Republic of Kenya, (2012). She was removed from office. The Tribunal found the DCJ's evidence unimpressive and with discrepancies, and that after she was served with the list of witnesses she contacted two of the witnesses. Tribunal to Investigate the Conduct of the Deputy Chief Justice and Vice- President of the Supreme Court of the Republic of Kenya, (2012).

**Joseph Mbalu Mutava J**

The Judge was appointed to the office of Judge of the High Court of Kenya on 23rd August 2011. He successfully went through the rigorous interview process by the JSC guided by the provisions of the Constitution of Kenya 2010. Between March 2012 – 2023 complaints were lodged against him at the JSC. The judge was accused of inter alia irregularly, inappropriately, and knowingly in collusion with other parties causing Nairobi High Court Miscellaneous JR0 Application No.305 of 2012 R v The A.G & 3 Others, Ex Parte Kamlesh Mansukhal Damji Pattni to be allocated to himself and without the knowledge and consent of the Duty Judge and the Presiding Judge of the Judicial Review Division, *Joseph Mbalu Mutava v Tribunal appointed to Investigate the Conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya*, (2019)**.** The Judge then proceeded to write a judgment in respect of the matter at a time when the JSC was inquiring into allegations of misconduct against him regarding the same matter. The Judge was also accused of seeking to influence the Ruling in the case of Nairobi HCCC No. 705 of 2009, Sehit Investments Ltd v Josephine Akoth Onyango & 3 Others in favour of the plaintiff therein through oral and text messages from his cell phone to Hon. Leonard Njagi who was presiding over the hearing of the matter, *Joseph Mbalu Mutava v Tribunal appointed to Investigate the Conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya*, (2019).

The JSC constituted a Sub-Committee to investigate the allegation, and the Sub-Committee found that the complaints met the threshold for recommending formation of a Tribunal to investigate the conduct of the Judge, JSC adopted the findings of the Sub-Committee and petitioned the President to suspend the Judge and appoint a Tribunal to investigate his conduct, *Joseph Mbalu Mutava v Tribunal appointed to*

*Investigate the Conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya*, (2019). The tribunal found the Judge's conduct amounted to gross misconduct and recommended to the President that he be removed from office. The Judge challenged the Tribunals decision at the Supreme Court, the court upheld the Tribunal's decision and, in the process, noted at paragraph 135 of the Judgment that the Judge was untruthful.

**Martin Mati Muya J**

The complaint against the Judge was lodged by NIC Bank Ltd. The complaint as framed by JSC was that the judge acted contrary to Article 168 (1) of the Constitution by inordinately delaying the delivery of reasons for his ruling and ordering that status quo be maintained thereby occasioning grave financial loss to the defendants in Bomet High Court Civil Suit No. 4 of 2016 between Alfred Kipkorir Mutai & Kipsigis Ltd v NIC Bank Limited, *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya (Petition 4 of 2020) KESC 16*, (2022). JSC considered the complaint and recommended suspension of the judge and formation of a Tribunal to investigate his conduct. The Tribunal found that the Judge's delay in delivering reasons for his ruling amounted to gross misconduct and recommended that he be removed from the office of a Judge.

The Judge challenged the Tribunals decision at the Supreme Court and the Court held that, the five months delay was not inordinate and did not amount to gross misconduct, *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya (Petition 4 of 2020) KESC 16*, (2022). The Tribunals decision was set aside, and the Judge continues to serve as a Judge of the High Court of Kenya.

**Said Juma Chitembwe J**

The complaint against the judge was initiated by JSC on its own motion after the then impeached Nairobi Governor Mike Mbuvi Sonko published on social media Audio and Video recordings of the Judge. The Judge presided over a succession cause No. 97 of 2015 (Re Estate of the late Peter Werner) in which two (2) pieces of land, Known as Title Numbers Kwale/Galu/Kiondo/779 and Kwale/ Galu/Kinondo/1222 were the subject matters. He upheld the confirmation of grant to Ms. Jane Mutulu Kyango, and

dismissed application for revocation by Pacific Fronties Seas Ltd. While the matter was still pending before the Court, the Title No. 779 was transferred to Amana Saidi Jirani for Ksh 8 million, holding it as a proxy to the Judge, Tribunal Appointed to Inquire into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court of Kenya, (2023)

A company associated with Mike Mbuvi Sonko signed a Sale Agreement dated 7th Nov 2017 with Jane Mutulu Kyongo for the purchase of the two pieces of land a foretasted. The Judge held several meetings and phone conversations with Mike Sonko in a bid to procure the transfer of No.779. The Judge presided over a petition where Mike Mbuvi Sonko was a party without disclosing their relationship, Tribunal Appointed to Inquire into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court of Kenya, (2023).

The allegations against the Judge were: Lack of impartiality – failure to disqualify self; Lack of Integrity – offering legal advice to Mike Mbuvi Sonko on the viability of an appeal against a matter where the Judge had presided; Lack of Accountability, Involvement in corrupt practices and Impropriety – the judge acquired a beneficial/proprietary interest in a property which formed the subject matter of a suit before him, he then advised the parties on how to settle an appeal against his judgment, and even undertook to influence the Court of Appeal Judges hearing the Appeal; Subversion of Justice. The Tribunal found the judge guilty of the allegations, that he had engaged in gross misconduct and recommended his removal from the office of Judge of the High Court. The Judge has challenged the Tribunal's decision, his appeal is pending before the Supreme Court, Tribunal Appointed to Inquire into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court of Kenya, (2023).

**Kalpana Rawal, Philip Tunoi, Mohammed Ibrahim, Jackton B Ojwang and Njoki Susanna Ndung'u SCJJ**

On 27th March 2014 JSC issued a memo stating that the retirement age of Judges is 70 years. Justices Kalpana Rawal and Tunoi filed constitutional petitions seeking interpretation of the retirement age for Judges appointed under the repealed constitution. The High Court in a decision by a five-Judge bench declared that the retirement age for Judges is 70 years. The decision of the High Court was affirmed by a 7 Judge bench of the Court of Appeal in a judgment delivered on 27th May 2016. On

the very day later in the afternoon Justice Susanna Njoki Ndungu of the Supreme Court stayed the Court of Appeal Judgment, which stay orders were later vacated by a 5 Judge bench of the same court. *Apollo Mboya v Judicial Service Commission & another;Justice Kalpana Rawal & 4 (Interested Parties)*, (2020).

During this period some supreme court judges engaged in actions touching on the issue of the retirement age of Judges. On 24th September 2015 Njoki Susanna Ndung'u, Mohammed Ibrahim and Jacktone B Ojwang SCJJ issued a memo protesting a directive by the JSC requiring Judges aged over 70 years to cease sitting and hearing any matter until a suit pending in court was heard and determined. The message in the memo was that "illegitimate interference with the work of the Court, or its seven members will necessitate moratorium on all its judicial operations with immediate effect", *Apollo Mboya v Judicial Service Commission & another;Justice Kalpana Rawal & 4 (Interested Parties)*, (2020). In the intervening period Kalpana Rawal, Philip Tunoi, Njoki Susanna Ndung'u, Mohammed Ibrahim and Jacktone B Ojwang SCJJ held in Nicholas Kiptoo Arap Salat v IEBC & Others [2015]eKLR that "the Judicial Service Commission lacks competence to direct or determine how or when a Judge in any of the Superior Courts may perform his or her judicial duty, or when he or she may or may not sit in Court." *Apollo Mboya v Judicial Service Commission & another;Justice Kalpana Rawal & 4 (Interested Parties)*, (2020)

Justices Jacktone Ojwang and Njoki Ndung'u made good their threat to down their tools, consequently the Supreme Court did not proceed with its regular sittings for about two weeks due to quorum hitch. A complaint was filed by the then immediate former LSK Chief Executive Officer Appollo Mboya against Five of the Supreme Court Judges. Justices Mohammed Ibrahim, Njoki Ndung'u and Jacktone Ojwang were accused of threatening to and participating in an illegal strike contrary to their oath of office and in violation of the Constitution and which conduct amounted to gross misconduct, while all the five judges were accused of gross misconduct in the Salat case where they in alleged conflict of interest pronounced themselves on the question of Judges retirement age which was pending in other courts, *Apollo Mboya v Judicial Service Commission & another;Justice Kalpana Rawal & 4 (Interested Parties)*, (2020). The JSC found the conduct of the judges to be unbecoming of a Judge of the Supreme Court and amounted to misconduct (as opposed to gross misconduct), and therefore admonished them.

Both the Complainant and the Judges challenged the decision of the JSC, with the complainant arguing that JSC having found that the judges misconducted themselves ought to have petitioned the President for appointment of a Tribunal, whereas the judges argued that JSC having found that there was no gross misconduct had no powers to admonish them. The High Court found that JSC had no powers to admonish a judge and consequently the Court quashed the JSC decision admonishing the Judges, *Apollo Mboya v Judicial Service Commission & another;Justice Kalpana Rawal & 4 (Interested Parties)*, (2020).

#### 2.3.1.3 Summary

The available literature is unanimous in the finding that the Kenyan Constitution2010 and the enactments thereunder has introduced a robust ethical regime on the conduct of judges. The literature is however concerned with the theory, it fails to consider the efficacy of the robust ethical regime in ensuring ethical conduct among the judges. This researcher finds that the nature of complaints made against the conduct of judges in the pre-2010 Constitutional dispensation is the same with those made in the post-2010 Constitutional dispensation. The complaints in a nutshell are corruption, impartiality, lack of independence and inordinate delay in delivery of judgments and/or rulings. The prevailing Kenyan ethical regime however robust has failed to ensure ethical conduct among the judges. This research set out to find a solution in the learning and practice of virtue ethics.

### 2.3.2 Research Question 2. How does the rule-based regime governing the ethical conduct of judges in other common-law jurisdictions compare?

The choice of common-law jurisdictions for this study is founded in the Kenyan Constitutional proviso that judges be appointed from persons who inter alia hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or *possess an equivalent qualification in a common-law jurisdiction* (vide Article 166, 2, a). In dealing with this question, the study will consider four jurisdictions: one European jurisdiction namely United Kingdom; one American jurisdiction namely Canada; one Asian jurisdiction namely India; and one African jurisdiction namely South Africa.

#### 2.3.2.1 United Kingdom (UK)

According to Mclaren, (2016) the Act of Settlement embodied judicial independence by prohibiting judges from political activity. He opines that "...separation of powers in British Constitutional practice was to insulate as well as discourage the judiciary from direct involvement in politics and political life". According to Nail Andrews, (2011) the Constitutional reform Act, 2005 enshrine respect for the independence of the judiciary in the UK, he express himself that judges "should neither know-tow to Parliament, nor to the Executive, nor to any Princess or other high or powerful persons. Judges must stand above party politics, governmental exigency, corporate greed and private interests".

English judges are appointed by the Judicial Appointments Committee (JAC) purely on the basis of merit from among Solicitors or Barristers who have gained extensive experience in practice. Nail Andrews, (2011). Those who are interested in becoming judges must apply for the positions when advertised, and in appointing Judges JAC is obliged to satisfy itself that the candidate is of *good character*, Nail Andrews, (2011). The English judges enjoys security of tenure and may only be removed from office if they are found to have involved themselves in a flagrantly unprofessional conduct, Nail Andrews, (2011). Nail notes that even though judicial independence is enshrined in law "the day-to-day vitality of judicial independence require each judge to display *courage and integrity*", they must resist external influence and fear of criticism but conduct themselves in accordance with sound judicial practice. Accordingly Nail opines that a judge "must not become a maverick; but he should not succumb blindly to internal pressures and so become a career functionary". Nail Andrews, (2011).

Kate Malleson, (2011) finds merit in the depoliticization of the appointment of judges but notes a 'democratic deficit' in the appointments insofar as the judges are not subjected to Parliamentary scrutiny. Kate observes that the composition of JAC is largely legally dominated, it consists of six lay people, five judges, one solicitor, one barrister, one magistrate and one tribunal member, Kate Malleson, (2011). The position of JAC chairperson is reserved for a lay member as a mitigating measure to the dominating legal membership which for good measure cannot include a member of Parliament, Kate Malleson, (2011). Kate salutes the fact that vacancies in positions

of judges are advertised and filled competitively but finds fault in the unavailability of the nitty gritty of the appointments to the public.

The Process of removal of judges is now provided for in law – the Constitutional Reform Act, 2005 (Reform Act), Kate Malleson, (2011). The Lord Chancellor (LC) and the Lord Chief Justice (LCJ) must in consultation form a tribunal to inquire into and consider the allegations made against a judge. Kate Malleson, (2011). A judge below the High Court may only be removed on the grounds of misbehaviour or inability to perform judicial functions, and only upon a recommendation by the tribunal consisting of two lay persons and two judicial office holders. Kate Malleson, (2011). During the investigations the LCJ may suspend a judge who is subject of such investigations. This process Kate observes led to the removal of a district judge in 2009 for inter alia inappropriate, rude, and petulant behaviour to solicitors appearing before her. For senior Judges – High Court and above however, they can only be removed by a motion passed by both houses of Parliament and only on the ground of a misbehaviour with a criminal character, Kate Malleson, (2011).

The Reform Act establishes an office that receives complaints against judges, that is the Office of Judicial Complaints (OJC) and which also supports and advices LC and LCJ in the disciplinary process, Kate Malleson, (2011). The LC with the concurrence of the LCJ may reprimand, issue a formal warning or a formal advice about a disciplinary matter, Kate Malleson, (2011). The Reform Act further establishes the Judicial Appointments and Conduct Ombudsman with powers to review decisions of the OJC and JAC on the grounds of procedural failure or maladministration, upon an application by candidates for judicial office or judges or complainants not satisfied with the handling of their complaints.

Kate observes that there is a new guide to judicial conduct which moves to establish "common and open standards of professional conduct against which the behaviour of individual judges can be measured". She concludes that the prevailing framework "appears both robust and appropriate, with the capacity to strike the right balance between judicial independence and accountability" at least in paper, Kate Malleson, (2011).

#### 2.3.2.2 Canada

The federal judges are formally appointed by the cabinet, a situation which according to Martin L. Friedland, (2011) poses danger of politicising the selection process. The prevailing Federal Guidelines, in as much they encourage interviews in recruitment of judges do not insist on interviews, Martin take exception at this and wonders, "In what sphere do we make such important decisions without having had at least an opportunity for some of those making the decision to meet the person to be selected?". Martin observes that "the present system gives the minister too much direction to bring in non-relevant political considerations" and recommends narrowing of the range of candidates from whom the government can choose by limiting the number of nominees present for consideration for appointment as judges. The situation was worsened when in 2006 the government added to each selection committee a police representative, therefore giving the government the power to control the committees having a dominating representation. Martin L. Friedland, (2011) describes this as a more than desirable politicising of the process.

The removal of a Superior Court judge is by the Governor-General on Address of the Senate and House of Commons, no such removal has happened though judges have resigned when faced with such a process, Martin L. Friedland, (2011). The removal of other judges other than Superior Court judges do not require a joint address of the Houses, a number of them have been removed Martin L. Friedland, (2011). Martin approves of the Canadian Judicial Council (CJC) disciplinary procedure, unless a matter is disposed of at the preliminary stages, a panel consisting of three to five judges is formed to consider whether there is need for a formal inquiry. A formal inquiry is conducted in public by an Inquiry Committee comprising of five to seven members, majority being members of CJC plus senior lawyers or judges, Martin L. Friedland, (2011). The report of the inquiry is sent to CJC which then make recommendation to the Minister of Justice. Martin notes that, the CJC procedures now recognize that it can prefer other disciplinary measures other than removal.

The Canadian Bar Association's Judicial Issues Committee and the Ethics and Professional Responsibility Committee in a letter responding to the CJC's draft revised Ethical Principles for Judges (EPJ) took issue with the non-binding nature of the EPJ stating that "it should be a code of conduct with clear, consistent directive

language to give meaningful guidance to judges and enhance public understanding and confidence in judicial ethics", The Canadian Bar Association, (2020). The aspirational language employed in the EPJ was equally a point of concern for the Committees thus, "Many principles in the EPJ reflect fundamental legal requirements for judicial conduct and should not be mistaken for aspirations or exemplary behaviour beyond the norm". The Canadian Bar Association, (2020). Addressing the issue of the non-binding nature of the EPJ, Amy Salyzyn & Richard Devlin, (2020) pronounced themselves thus:

> Public confidence in the judiciary requires that judges be subject to binding ethical rules …How can the public have confidence in the judiciary if there are no clearly articulated and enforceable standards by which to assess judicial behaviour? In a mature democracy in the twenty-first century, a binding code of conduct is a vital mechanism that provides public accountability and enhances the legitimacy of the judiciary as an independent and self-regulating institution.

#### 2.3.2.3 India

Jaising, (2014) criticises the process of appointing judges as lacking transparency and public participation, he recommends a process in which vacancies are advertised and eligible persons then make applications so that their antecedents can be evaluated in a transparent manner that guarantees equal opportunity. Bhushan, (2009) finds fault with the process of recruitment of judges to the higher judiciary for being arbitrary and lacking transparency thus:

There is not only no transparency in the process, there is, also no system or method followed for preparing shortlists or for choosing among eligible candidates. The whole process is totally arbitrary and ad hoc, which has led to political favouritism when appointments were in the hands of the executive and nepotism when appointments have been with the judiciary.

He recommends a full-time independent institution to undertake the appointment of the judges. On judges' discipline, Bhushan observes that, "the main problem is the absence of an independent credible institution, which could entertain complaints against judges, investigate them and take action against errant judges", Bhushan,

(2009). He recommends a full-time body independent of the executive and even the judiciary, "Institutionalising an in-house body of sitting judges as a judicial council to entertain complaints against judges …will not serve the purpose". He argues that, other than obvious conflict of interest, sitting judges cannot have requisite time to attend to disciplinary issues, Bhushan, (2009). He criticises the 'Veerswami' judgement that protects judges from criminal investigations unless permitted by the Chief Justice of India as limiting accountability of judges, also pointed out for derailing accountability is the definition of criminal contempt to include 'scandalous or lowering the authority of the court', this prevents public exposure of corrupt judges, Bhushan, (2009).

Sastry & Saibaba, (2013) notes that despite justice finding primacy in the Indian Constitution preambular statement, accountability of justice and judicial accountability suffers certain loopholes that diminishes the performance, image, and credibility of the judiciary in dispensing justice. They observe that, "..the Republic of India has been fortunate enough in having judges of a greater learning and impeccable integrity to man the highest judiciary", however the judicial system is still *plagued with ills of corruption, lack of transparency and accountability making it impossible to render justice judiciously,* Sastry & Saibaba, (2013). They make recommendations that includes that: Only those *persons who have high moral and ethical character with status of being impartial and fearless should be appointed to the judiciary, especially to the higher judiciary;* It is necessary to infuse ethical standards to those who pursue law right from their studies in law colleges, Sastry & Saibaba, (2013).

Banerjee, (2002) observes that the *judiciary continue to be plagued with want of propriety in the conduct of some senior judges.* According to Banarjee the expectation of laymen was that corrupt judges would not find place in the judiciary "since the apex court itself would have the final say in appointing judges on sheer professional merit without political pressures from the government", however the opposite is true, *there is lack of transparency, and allegations of Judges' relatives being promoted to higher courts is rife,* Banerjee, (2002). He criticises the judges for abusing the Contempt of Court Act to silence critics of judicial corruption and maladministration, Banerjee, (2002).

According to Chandrachud, (2010) the use of the Contempt of Court Act to suppress criticism of the judiciary has insulated the Indian Judiciary from vibrant checks and balances, and this threatens to "exacerbate the severe problem of judicial administration delay and corruption". Raju Z. Moray, (1998) opines that, judges cannot be trusted to self-regulate, "*The so-called Code of Conduct unanimously adopted by all the Supreme Court judges …has not prevented ...judges from breaching it with impunity",* he observes that "In Bombay High Court ...many senior judges are observed to be clearly violating the Codes' salutary provisions". He notes some of the violations to include; Judges' relatives practicing before them, judges failing to declare their close relatives assets and judges living with their relatives who are members of the bar, he call for penal consequences against breaches of the Code, Raju Z. Moray, (1998).

According to Balakrishnan, (2008) the Indian Judiciary has made two significant initiatives in the realm of judicial education and training, one is the setting up of the National Judicial Academy by the Supreme Court "offering regular courses of training designed to cater to the needs of superior court judges", the other is the setting up of judicial academies by each high court "to train judges newly inducted in the subordinate courts and to provide continuing education to judges in service".

**2.3.2.4 South Africa**

According to Hugh Corder, (2011) there has been substantial reform in the regime governing the appointment of, discipline and removal of judges *but with no visible practical outcomes.* The judges are appointed by the Judicial Service Commission (JSC) chaired by the Chief Justice and composed of a teacher of law, the Minister of Justice and Constitutional Affairs, representatives of the judiciary and of the professional bodies of advocates and attorneys, and strangely ten serving members of Parliament drawn from both Houses and four members designated by the President in consultation with leaders of opposition parties. Corder observes that "..of the twenty-three ordinary members of the JSC, fifteen are selected more for their broadly political views than their standing as lawyers, of whom at least twelve are likely to be loyal in the first instance to the ruling party in Parliament", Hugh Corder, (2011).

Judges are competitively recruited, the positions are advertised, JSC interviews the shortlisted candidates and recommends to the president those to appoint, and the

president is bound to appoint as recommended, Hugh Corder, (2011). The appointment of Constitutional Court judges however takes a different trajectory, with JSC required to send to the President three more than the number of vacancies available, the President then selects any nominee(s) from the list upon consultation with the Chief Justice and leaders of parties in the National Assembly, Hugh Corder, (2011). The President may reject as many nominees in the list and require the JSC to supplement the list, Hugh Corder, (2011). According to Corder the JSC has been relatively fair and efficient in conducting the appointment of judges, the interviews are done in public, and the quality of judges appointed have largely not elicited any criticism. Jade Weiner, (2018) notes that the requirement for appointment of a judge include among other requirements that the person be a 'fit and proper person', interpreted to require that one be a person of integrity.

The South African Constitution make no provision on discipline of judges other than removal from office, Hugh Corder, (2011). To remove a judge from office, the JSC must return a finding that *the judge is guilty of gross misconduct,* suffers from an incapacity or is grossly incompetent, the finding must then be supported by a vote of at least two-thirds of the members of the National Assembly, and upon which the President must remove the judge from office, Hugh Corder, (2011). The JSC Amendment Act, 20 of 2018 establishes a Judicial Conduct Committee to receive, consider and deal with complaints against judges and report to JSC, Hugh Corder, (2011). According to Hugh Corder, (2011) another key provision in maintaining judges' integrity is the prohibition of judges from holding any other office of profit or receiving payment for any service other than as a judge,.

In his general assessment, Hugh Corder, (2011) concludes that "..it can safely be said that the various statutory provisions, founded as they are on the Constitutional guarantees of security of tenure and judicial independence and impartiality, more or less satisfactorily respect the doctrine of separation of powers", he however adopts a wait and see stance on *whether the formally improved structure will secure compliance with the Constitutional values in practice***.** According to Siyo & Mubangizi, (2016) the Constitution stipulates clear procedures and mechanisms for appointment of judges, there is an elaborate legislative framework for dealing with complaints, disciplinary proceedings and removal of judges. They conclude that, "..generally speaking, *the Constitutional and legislative framework adopted by South Africa sufficiently*

*insulates judges from improper influence" though they are notable vices in practice*, Siyo & Mubangizi, (2016).

#### 2.3.2.4 Summary

Unlike in Kenya, in U.K Judges of Superior Courts may only be removed on the ground of a misbehaviour with a criminal character, the judges may be reprimanded or issued with a formal warning. In Canada the process of removing Superior Court Judges is laborious such that no single judge has been removed despite there being complaints on the conduct of judges. Unlike Kenya, the EPJ (code of conduct) is not binding but merely aspirational. In India complaints against judges are investigated by a judicial council consisting of only judges thus compromising credibility due the obvious conflict of interest. In South Africa to be appointed a judge one is required to be a person of integrity (fit and proper person). Like Kenya the South African judges cannot be disciplined other than removal from office.

The literature shows that the rule-based ethical regime though robust has not tamed unethical conduct among judges in these jurisdictions. And even though there is judicial education and training of judges, it does not centre on judicial ethics in general and particularly on virtue ethics. This researcher notes the inferior place that ethics has taken in the literature as concerns the conduct of judges. This paper seek to bring into focus ethics as a challenge in the conduct of judges, with a Kenyan perspective.

### 2.3.3 Research Question 3. Is the learning and practice of virtue ethics the missing therapy to the ethical challenges among Kenyan Judges?

In the case of *Apollo Insurance Co. Ltd vs Scholastica. K. Kamau & Muthanwa & Co. Advocates, Civil Case No. 1945 of 1999*, Justice Kuloba as he then was rhetorically asked 'who doesn't know that there are laws, yet lawyers are still stealing clients' money?' It could be asked today that, who doesn't know that there are laws governing the conduct of judges, yet judges are still engaging in unethical conduct? Patricia Kameri-Mbote and Muriuki Muriungi, (2016) found it demoralizing that notwithstanding the vetting of judges by the JMVB and the rigorous recruitment process corruption allegations were still to be found within their ranks.

The Judiciary while commenting on the period 2014-2018 noted that, the credibility and image of the judiciary was adversely affected by incidences of real and perceived corruption, The Judiciary of Kenya, (2020). This is a clear demonstration that laws in themselves cannot secure ethical conduct. Peter Kwenjera Mwangi, (2016) casts serious doubt on the ability of the law on its own to secure ethical conduct, he notes that, "It would be very hard for the law to operate in a society whereby there is no prior domestication of human beings: a process which is carried out by various social institutions". PLO Lumumba, (n.d.) was categorical that however exhaustive a code of ethics may be, it cannot guarantee ethical conduct.

It is obvious to me that, despite the sufficiency of laws there is persistent unethical conduct among the Kenyan judges, this points to the fact that there is something missing. According to Peter Kwenjera, (2016), the numerous taskforces, studies and laws on judicial reforms have not attained results that meet the expectations of the people of Kenya with regard to the conduct of judges, he notes that, " Although the aggregate score has been on the decline, the judiciary continues to be ranked among the most corrupt institutions …and this despite the Constitutional and institutional reforms that have been undertaken under the new Constitution 2010". Peter Kwenjera, (2016), notes that, "…the 2010 Constitution was promulgated at a time when Constitutional culture was heavily wanting and therefore implementing these requirements has been and will continue to be an uphill task until an adequate Constitutional culture is fully implanted in the minds and hearts of Kenyans."

The suitability of ethics education as a response to ethical decadence in Kenya was noted as early as 1976, Kaguongo Wambari, (1998). A study carried in 20 education and training institutions on the ethical and moral issues in teaching and training in Kenya found that students who undergo ethical training are more productive, and recommended that "..ethical thinking and learning should be integrated in all the training and educational programmes" Donatus Githui, (n.d.). Two recommendations of the study relevantly worth specific mention here are: Ultimately, higher education should aim at the creation of a new society – non-violent and non-exploitative – consisting of highly cultivated, motivated and morally integrated individuals, inspired by love for humanity and guided by wisdom as explained by Plato and Aristotle theory of virtue ethics; Higher education institutions and their personnel and students should exercise their intellectual capacity and their moral and ethical prestige to defend and

actively disseminate universally accepted values, including peace, justice, freedom, equality and solidarity that have been proposed by virtue ethics on essential values (Donatus Githui, n.d.).

According to Rispah Wepukhulu et al, (2019) there is largely a consensus on the necessity of learning of ethics now more than ever due to the moral decadence presently rife in Kenya compared to two decades ago. Some of the objectives of ethics education identified when Social Education and Ethics (SEE) was introduced in schools and which find greater relevance to this study included: To base decisions on sound ethical principles as an integral part of personality development; To acquire, appreciate and commit oneself to universal values and virtues that cement unity and understanding among the various ethnic communities in Kenya; and To understand and appreciate the social fulfilment and moral rewards accruing from cultivating and adopting virtues and values offered by moral and ethical education.

Wepukhulu et al make a case for teaching of ethics at all education levels "since moral development is a process that takes place across the ages but with varying levels of complexity", Rispah Wepukhulu et al, (2019). According to Wepukhulu et al learning ethics is evidently a life skill that will "result in a person who has the capacity, knowledge, freedom, and willingness to be guided by ethical values in making their decisions and their actions", Rispah Wepukhulu, (2019). They conclude that ethics education is a proven means of securing ethical conduct and to achieve this, learning institutions should be mandated to teach ethics, Rispah Wepukhulu, (2019).

Johnstone Musungu et al, (2018) observe that the need for ethics education has recently gained traction with the President in 2005 directing the Ministry of Education to emphasise ethics and integrity in the curriculum to be taught at all education levels. According to Ruth Mwanzia, (2019) the then Kenyan proposed 2-6-6-6-3 system of education emphasized on the ability of learners, to mentally process issues and made proposals for a practical framework geared at nurturing learners competencies on the basis of their talents and passions, however "the teaching of ethics as a subject is not emphasized instead it is integrated in other subjects". She concluded that due to its theoretical, broad and exam based design the contemporary curriculum hindered the development of ethics, teachers were under pressure to ensure learners performed well

academically with little or no concern at all on the learners' ethical development, Ruth Mwanzia, (2019).

The International Bar Association pointed to the necessity of training in ethics as a measure of securing ethical conduct among Kenyan Judges thus:

> There is also a need to raise awareness of judicial officers and staff on issues of integrity, accountability, and professionalism. The Judicial Training Institute in conjunction with the JSC and KMJA should take a lead role in this area by designing and implementing relevant in-service training programmes. ILAC and IBA, (2010)

To eradicate ethical challenges among the judges, Peter Kwenjera, (2016) favours fostering of ethics which centres on development of one's character such as to be capable of proper exercise of freedom as opposed to the approach of motivations and penalties in promoting ethical conduct and deterring unethical conduct. He criticises the prevailing approach which is mostly concerned with the working conditions and environmental set up, while ignoring the learning of virtues by judges which is the foundation of judicial independence. He makes a case for learning of virtues and opines that the rational nature of human beings requires that their actions be based on knowledge, an insofar as virtue is concerned this knowledge is attained through education and experience, Peter Kwenjera, (2016). Nyiha recommends the teaching of a culture of ethical excellence and in particular virtue ethics in law schools from the very beginning of lawyers legal training as a "necessary and first step towards achieving excellence in character in lawyers.." Nyiha James, (2020).

Kwenjera attributes ethical challenges among Kenyan lawyers to be partly occasioned by the kind of training they receive at the law faculties, the various challenges facing legal education cumulatively impact on the ethical learning, Peter Kwenjera ( 2016). The professional ethics taught at the Kenya School of Law Advocate Training Programme is largely unconcerned with the philosophical underpinnings of virtue and morals but pay much premium to the do's and do not's of the profession, an approach that leaves the advocates with no moral knowledge on why they ought to behave and act in a certain manner but rules, Peter Kwenjera (2016). According to Kwenjera it is essential for judges to be specifically trained on ethical conduct and virtue formation as a competency necessity for the duty of judging, Peter Kwenjera (2016).

The Kenyan Judiciary Academy conducts Continuous Judicial Education which Kwenjera outlines as follows:

> In the first module, the newly appointed judges are taken through various aspects of judicial work and with regard to ethics, the module contains a profound explanation of the Bangalore Principles of Judicial Conduct with an emphasis on the value of propriety given that judges have to adjust their conduct in order to maintain it and the appearance thereof. The second module of the induction is held six months after the first one and it differs from the first one in terms of pedagogy as the judges are invited to discuss the challenges, they have faced in their first six months as judges. The second module focuses on more subtle issues of ethics such as recognising and dealing with personal bias in order to ensure that it is kept at bay so that it does not in any way end up colouring one's judgements. Other matters dealt with in the second module include the following: judicial temperament with respect to dealing with difficult advocates and litigants; the law on ethics and anticorruption with special focus on the experience in the judiciary; interactions with various actors in the judicial process; ensuring confidentiality with different persons; punctuality; collegiality in cases where a matter is handled by a bench of two or more judges; and dealing with media and publicity Peter Kwenjera (2016).

The teaching of judicial ethics in as much as it enlightens the judges on what is acceptable and unacceptable behaviour, does not however guarantee the formation of ethical values in the individual judges, Peter Kwenjera (2016). Kwenjera concludes that the provisions in the prevailing curriculums in the elementary education institutions suffer a want of elaborate ethical education, he urges legal education institutions to take deliberate steps to provide training in ethics and morality, Peter Kwenjera (2016).

### 2.3.4 Summary

The literature reveals that incidence of corruption and other unethical conduct persists among the judges despite the Constitutional and institutional reforms brought forth by the Constitution of Kenya 2010. The literature notes a lack of training in ethics and recommends that ethical training and learning be integrated in all training and learning

programmes. The training should be directed at achieving morally integrated individuals guided by virtue ethics. This study notes the lack of ethics education in the training of judges and seeks to underscore the importance and effectiveness of learning virtue ethics as a means of securing ethical conduct among the Kenyan judges.

### 2.3.5 Overall research gaps noted

The obtaining literature notes and admits want of ethics (the want of ethics is couched in terms such as corruption, bribery, impartiality etc.) among the Kenyan judges as a manifest problem crying for a solution. The solution is however largely sought in enactment, strengthening of, compliance with and enforcement of a code of conduct for judges and ejusdem generis laws.

This study did not find literature that sought to find out whether the learning and practice of virtue ethics is the missing antidote to the ethical challenges among the Kenyan judges. Okiri et al., (2019) notes that it is time a solution was sought outside legislation and argue for ethics as a plausible solution but does not discuss how ethics may be a solution or what theory of ethics is suitable for such a challenge, he does not consider the learning and practice of virtue ethics as a possible solution. Similarly the JMVB in their report observed that the Constitution presupposes and imply certain ethical values such that in the evaluation of the conduct of judges it is necessary to travel past the provisions and limits of legislation. Judges and Magistrates Vetting Board, (n.d.). However, the report does not make any recommendation on how ethics may be employed in dealing with the ethical challenges among Kenyan judges. The report neither considers nor recommends the learning and practice of virtue ethics.

Luis Franceschi, (2016) analyses the extant legal regime and the Judicial Code of Conduct and Ethics in particular, and approves of it for being virtue ethics oriented, he however finds and wholly attributes the shortcomings of the Code of Conduct and Ethics to the want of provisions of penalties and disciplinary mechanisms for violations of the Code. In this sense, he seeks a solution in legal enactments (rule-based solution) and not the learning and practice of virtue ethics.

Peter Kwenjera, (2016) recommends formal education as a means of attaining and maintaining moral character, and particularly continuous judicial education for judges, he however does not consider whether the learning and practice of virtue ethics is the missing solution to the ethical challenges among Kenyan judges. In his thesis

Kwenjera notes that his paper is largely legally inclined, it does not consider the pros and cons of natural law and positive law, nor does it discuss law and morality. This paper on the other hand is rooted in moral philosophy, delves into the competing naturalist and positivist schools of thought, and is imbued with the relationship between law and morality.

Rispah Wepukhulu et al, (2019), and Ruth Mwanzia, (2019) notes the importance of ethics education in curbing unethical conduct in the society, their studies were however generalised, and not concerned with the particularity of judges conduct neither did they consider the role of virtue ethics in particular. ILAC and IBA, (2010) noted the need to educate judicial officers on integrity, accountability, and professionalism, but did not specifically address the ethical challenges among Kenyan judges and the possible relational effect of learning and practicing virtue ethics.

## 2.4 Summary

The gaps indicated to exist in the literature concerning the ethical conduct of judges calls for further studies. It is therefore necessary to find out whether the prevailing Kenyan rule-based regime respecting the conduct of judges is responsive to the ethical challenges among the Kenyan judges, and whether the learning and practice of virtue ethics may provide a remedy.

## 2.5 Conclusion

The Constitution of Kenya 2010 is noted to have revolutionised the justice sector in general and the judges' ethical regime in particular. The ethical challenges among the judges have however not yielded to this revolution, the literature review reveals a continuation of the pre-2010 Constitution unethical practices among the judges. Noted as absent is the training and education in ethics and morality which is key to a chieving ethical conduct among the judges.

The attempts to solve the problem of ethical challenges among the judges by way of legal enactments with consequential breach penalties have for the longest time undeniably failed. The literature reviewed have noted the problem and the need for education in ethics but have failed to direct themselves to a consideration on how the

learning and practicing of virtue ethics can offer a solution to the ethical, challenges among the judges. This study addresses this notable gap.

# CHAPTER THREE: RESEARCH METHODOLOGY

## 3.1 Introduction

This chapter focuses on the research design, data resources and methods of data analysis. Research methodology involves not only research methods but also the logic behind them, Kothari, (2004), therefor this study provides rational behind the approaches taken. Kothari, (2004) defines research thus:

> The systematic method consisting of enunciating the problem, formulating a hypothesis, collecting the facts or data, analysing the facts, and reaching certain conclusions either in the form of solution(s) towards the concerned problem or in certain generalisations for some theoretical formulation.

The importance of research in social science like the instant is in its understanding of social relationships and finding answers to social challenges Kothari, (2004). Such a research concerns itself with knowledge qua knowledge and practical contributions, Kothari, (2004). This study accordingly seeks to make practical contribution to the area of judges' ethics and in the same breadth gain knowledge for the sake of knowledge.

Being qualitative research, it is exploratory. According to Goddard & Melville, (2011), such a research bear three characteristics thus:

*Immaturity* of the concept for want of previous research – this study notes that there is want of literature appraising the suitability of rule-based ethics in securing ethical conduct among Kenyan judges;

*A notion that the prevailing position may be, inappropriate, biased or inaccurate* – this study has the notion that the prevailing rule-based ethics is inappropriate in securing ethical conduct among Kenyan judges;

*The need to explore the phenomena and prefer a solution* - this study holds that securing ethical conduct among Kenyan judges is a very important issue therefore calling for exploration and solution.

This study explores judges' ethics based on the questions thus:

a) Is the Kenyan ethical regime responsive to the ethical challenges among the Kenyan judges?
b) How does the ethical regimes in five other select common-law jurisdictions compare?
c) Is the learning and practice of virtue ethics the missing therapy to the ethical challenges among the Kenyan judges?

In determining the responsiveness of the prevailing ethical regime, this study found in the legal enactments, the expectations of the Kenyan people respecting judges' ethics and contrasted them with the conduct of judges. This involved delving into the Constitution and relevant statutes to find the expectations of the Kenyan people. The reality of the judges' conduct is gleaned from the complaints made to JSC, Reports of Tribunals appointed by the President to investigate complaints against specific judges on recommendations of JSC, Determinations of JMVB as it were, Reports of various Tribunals appointed to generally investigate the conduct of judges, Reports of Task Forces on Judiciary, SOJARs, Case law, and Journal articles.

The ethical regime in other common law jurisdictions involved the study delving into the ethical structure of selected common law jurisdictions namely United Kingdom, Canada, India, and South Africa representing Europe, America, Asia, and Africa respectively. Finally, the determination of whether virtue ethics is the missing therapy involves context analysis – a research technique for making replicable and valid inferences from data to their context, Neuendorf, (2002). In this sense, the vices revealed in the (mis)conduct of judges are inferred from the findings of the JSC and Tribunals and tested against the corresponding virtue that they negate. The study has then explored whether in the learning and practice of such virtues by Judges the vices will be eliminated.

### 3.2 Philosophical Rationale and Assumptions

This study is underpinned in ethical theory of virtue ethics as the guiding philosophical rationale. Virtue ethics prioritise the person as the centre of ethical conduct, this study has therefore assumed its superiority among ethical theories and its suitability to counter vices that define unethical conduct as can be gleaned from the various reports on judges' conduct. This theory will be compared and contrasted meritoriously with two other primary ethical theories, that is, deontology and utilitarian theories.

### 3.3 Research Design

According to Habib et al., (2014) research design "is a map which identifies the means and methods to be pursued for collecting and analysing the data". This study is designed to make a finding on the following: Whether the extant Kenyan ethical regime is responsive to the ethical decadence among the Kenyan judges; How the ethical regime in other select common law jurisdictions correspond; and Whether virtue ethics is the missing therapy to the ethical decadence among the Kenyan judges.

This study has employed virtue ethics theory as the standard evaluation of the ethics in the conduct of Kenyan judges, and as the most appropriate theory to fill the void in securing ethical conduct among the Kenyan judges. Ethical challenges are characterised by a throng of vices, there is therefore merit in accepting a virtue-based approach as fit for purpose of an antidote to the ethical challenges among Kenyan judges.

This study acknowledges that the complaints made against judges as contained in the various reports are particular to specified individual judges as opposed to all judges, accordingly the unethical conduct complained of in the said reports as concern individual judges will be taken as representative of the ethical challenges among the Kenyan judges, so that this study will generalize the instances of ethical challenges reported to judges collectively. This does not in any way mean or even suggest that all Kenyan judges are unethical in their conduct.

This study notes that the judicial authority is exercised by judges, magistrates, Kadhis, judge advocates in courts martial and in various tribunals, it is not however within the purview of this study to venture into looking at the conduct of all custodians of judicial authority. To be specific and practical this study is limited to judges of the superior courts. This study further limits itself to published documentary data as the source of information. This is due to the impracticality of interviewing a fair sample of Kenyans, and most importantly due to the nature of the phenomena of the study – ethics goes to reputation of the person, using unpublished information collected from respondents would not be fair to the would be named judges and would expose me to defamation suits. Such a forum still may be abused by the respondents to deliberately engage in acts of character assassination. Further I lack the capacity to verify the correctness,

accuracy and veracity of such information as may have come from general respondents, this would seriously impact on the reliability of this study.

### 3.4 Data Collection Methods

According to Habib et al., (2014) data collection is determined by the type of data required. This study relied on information that is already in existence, the data therefore is purely secondary. This study applies the Five W and one H rule (Who, What, Where, When, Why and How) to determine the sources of secondary data. This secondary data is sourced from both primary sources and secondary sources as provided herein below.

#### 3.4.1 Primary Sources

The primary sources for this study are:

a) The Constitution of Kenya.
b) The Judicial Service Act, 2020.
c) The Judicial Service (Code of Conduct and Ethics), Regulations, 2020.
d) Kenya Gazette.
e) JMVB Reports.
f) Reports of Tribunals appointed by the President to investigate conduct of judges as recommended by JSC.
g) Reports of Task Forces on Judiciary
h) Case Law
i) SOJARs

The documents number (a) to (h) are published by; the National Council for Law Reporting and hosted in their website, that is eKLR found at www.kenyalaw.org. The websites are public and reliable. The National Council for Law Reporting Act mandates and authorises such publications. The documents number (i) are published by the Kenya Judiciary and hosted in their website www.judiciary.go. The Judicial Service Act mandates and authorises such publications.

#### 3.4.2 Secondary Sources.

The secondary sources for this study are:

a) Ethical Principles for Judges by Canadian Judicial Council found at the official Canadian Judicial Council website, that is, www.cjc-ccm.gc.ca
b) The United Kingdom Guide to Judicial Conduct found at the official UK judiciary website, that is www.judiciary.uk
c) The Indian Re-statement of Values of Judicial Life (1999) - Code of Judicial Ethics found at the official website of Indian Courts, that is, http://indiancourts.nic.in/
d) The South African Judicial Code of Conduct found at the official website of the South African Judiciary, that is, https://www.judiciary.org.za/index.php

### 3.5 Data Analysis

This study made use of primary and secondary sources to get qualitative data. The data obtained thereof has been analysed in the following manner.

- The vices gleaned from the complaints against judges as obtained from JMVB Determinations, Tribunals Reports and JSC Reports juxtaposed against the expectations of the people of Kenya with respect to ethical conduct of judges as expressed and enacted in the Constitution, the Judicial Service Act, 2011 and the Judicial Service (Code of Conduct and Ethics), Regulations, 2020.
- The ethical values in the provisions of the Judicial Service (Code of Conduct and Ethics), Regulations, 2020 as compared with the pertinent Judges ethical enactments of United Kingdom, Canada, India, and South Africa.
- The vices gleaned from the complaints/charges of unethical conduct against judges as obtained from case law juxtaposed against the relevant counteracting virtues.

Based on content analysis of the above data this study has been able to demonstrate the relation between the vices pronounced in the complaints of judges' misconduct, and the absence of specified counteracting virtues. This has enabled the study to determine whether virtue ethics is the missing antidote to the ethical challenges among the Kenyan judges. Content analysis has allowed this researcher to derive specific virtues from the texts of the relevant enactments, complaints and Reports. The researcher was able to analyse communication and interactions without direct involvement of participants, this researcher therefore could not influence the results.

### 3.6 Research Quality and Validity

Accuracy of data is the measure of its quality and quality validates results, Habib et al., (2014). In this sense this researcher notes that the research will be as good as the accuracy of the data relied on.

Both the primary and secondary sources of data that this study will use in harvesting information are verified, reliable and public. The authors of the sources are known and authorised entities. The information harvested by this researcher are in and unquestionably remains in the public domain and available for research purposes. The data and the sources are readily available for ease of reference, as they are accessible via the internet, the links which are provided. The accuracy of the data is undeniable hence the quality of the research is assured. The validity of the research has been evaluated on the standards of its quality. The validity has been strengthened by the collection of data from multiple sources providing internal test.

#### 3.6.1 Research Ethics

The researcher sought and obtained the approval of the Strathmore University Research Ethics Institutional Scientific and Ethical Review Committee. This study relied entirely on secondary data and did not pursue any interviews or experiments. The data is available for public consumption and not restricted for research use. In this sense the approval of NACOSTI was not applicable.

# CHAPTER FOUR: RESEARCH FINDINGS

## 4.1 Introduction

In this chapter the researcher presents the research findings. It discusses the Kenyan ethical regime governing the conduct of judges, to wit, The Constitution of Kenya, The Judicial Service Act, 2011, The Judicial Service (Code of Conduct and Ethics), Regulations, 2020. It presents a detail comparative study of the Codes of Conduct for judges in Kenya and four common-law jurisdictions, namely, U.K, Canada, India and South Africa.' It provides a statistical analysis of the complaints lodged with the JSC against judges for the period 2011 to 2022.The researcher presents an analysis of the complaints against judges as recorded in the JMVB Reports, JSC Reports, Tribunal Reports and Judicial Judgements juxtaposed against the expectations of Kenyans with respect to ethical conduct of judges as expressed and enacted in Constitution of Kenya, 2010, the Judicial Service Act, 2011 and the Judicial Code of Conduct and Ethics. The chapter presents an analysis of the vices gleaned from the complaints against judges as recorded in the JMVB Reports, JSC Reports, Tribunal Reports and Judicial Judgements juxtaposed against the pertinent counteracting virtues. This chapter presents an ethical analysis of the training of judges at the KJA.

## 4.2 Kenyan Ethical Regime Governing the Conduct of Judges

### *4.2.1 Introduction*

It has been demonstrated in chapter two above, that there is a general concurrence in the literature that there are sufficient enactments in Kenya governing judges' ethics. To agree or disagree with this view, it is necessary to delve into the relevant laws. The ethical regime governing judges' ethics in Kenya includes: The Constitution of Kenya, The Judicial Service Act, 2011, The Judicial Service (Code of Conduct and Ethics), Regulations, 2020, The Anti-Corruption and Economic Crimes Act, The Public Officer Ethics Act, 2003, The Leadership and Integrity Act, The Penal Code among other peripheral ones. For purposes of this study, it is sufficient to limit the detailed inquiry only to the first three insofar as they make provisions relevant to the inquiry.

### *4.2.2 The Constitution of Kenya*

In its preambular statement, Kenyans recognise their aspirations for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The Constitution provides for national values which binds all and sundry and includes good governance, integrity, transparency, and accountability (vide Article 10, 2, c). Fairness and impartiality in judicial proceedings is enshrined in the Constitution thus "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body" (vide Article 50,1).

Chapter Six of the Constitution provides generally for leadership and integrity. State authority (including judicial authority) is to be exercised in a manner that, inter alia: demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office (vide Article 73 ,1). Leadership and integrity is to be guided by the principles inter alia that: personal integrity, competence and suitability should be the basis for appointments into office, decision making should be objective and impartial and should not be influenced by nepotism, favouritism, improper motives or corrupt practices, selfless service based on public interest through honesty in the execution of public duties and declaration of conflict of interest in public duties, accountability, discipline and commitment (vide Article 73, 2).State Officers (including Judges) are obliged to behave both in public and private life in a manner that avoids conflict between public/official duties and personal interest, or that demeanes their offices (vide Article 75, 1).

On financial probity, state officers (including judges) are required to surrender to the state any gift or donation made to them unless exempted by law, they are prohibited from maintaining bank accounts outside the country unless by law exempted or accepting a personal loan or benefit that circumstantially compromise their integrity. Articles 79 and 80 oblige Parliament to enact legislations establishing ethics and anti-corruption commission, and procedures for administration of the leadership and integrity chapter respectively.

Chapter Ten of the Constitution establishes the judiciary with the powers to exercise judicial authority. The exercise of judicial authority are governed by the principles thus: justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted provided that such mechanisms is not employed such as to contravene the Bill of Rights, repugnant to justice and morality or results to such repugnancy or is inconsistent with the Constitution or any other written law; justice shall be administered without undue regard to technicalities of procedure (vide Article 159).The independence of the Judiciary is enshrined under Article 161. Judges are protected from any control or direction other than by the Constitution and the law, in the performance of their judicial duties, their offices cannot be abolished while they are in office, their remuneration and benefits cannot be varied downwards, and they are not liable for any act or omission in the course of their lawful judicial function provided that the act or omission is in good faith.

Appointment of judges is done by the president in accordance with the recommendation of the JSC, and in the case of the Chief Justice (CJ) and the Deputy CJ (DCJ) a further approval by the National Assembly is required (vide Article 166, 1). One of the qualifications for appointment to the office of a judge and which is especially relevant to this study is that one should "have a high moral character, integrity and impartiality" (vide Article 166, 2, c). The procedure for removal of judges from office is provided for under Article 168. The grounds for removal are thus: inability to perform the functions of office arising from mental or physical incapacity; a breach of a code of conduct prescribed for judges of the superior courts by an act of Parliament; bankruptcy; incompetence or gross misconduct or misbehaviour (vide Article 168, 1). Such removal is initiated by the JSC on its own motion or on the petition by any person to it, and which petition it shall consider and if it satisfactorily discloses a ground for removal, send it to the president who is then obliged to suspend the judge and appoint a tribunal to inquire into the matter and make binding recommendations to the president to either remove or reinstate the judge (vide Article 168, 2-7). The decision of the tribunal is appealable to the supreme court within 10 days of such decision (vide Articles 168, 8).

The JSC is established and constituted under Article 171. The functions of JSC are, the promotion and facilitation of the independence and accountability of the judiciary, and the efficient, effective, and transparent administration of justice (vide Article 171, 2). In performing these functions, the JSC is obliged to inter alia: recommend to the president persons for appointment as judges; prepare and implement programmes for the continuing education and training of judges and judicial officers and advising the national government on improving the efficiency of administration of justice. The JSC is obliged to adopt a competitive and transparent process in the appointment of judicial officers (vide Article 171, 2).

### *4.2.3 The Judicial Service Act, 2011*

The objects of the Act are to inter alia ensure that the JSC and the Judiciary: upholds, sustains and facilitates an independent and impartial judiciary that is subject only to the Constitution and the law; facilitate a judicial process that renders justice to all; are accountable to the people; facilitate a judicial process that is committed to the expeditious determination of disputes; facilitate a judicial process that is committed to a just resolution of disputes (vide s. 3 of the Act). The JSC is empowered to make regulations to provide for inter alia "the code of conduct and ethics for judges…" (vide s. 47 of the Act). The First Schedule of the Act provide for the procedure for appointment of Judges under s. 30 of the Act. Once a vacancy has been declared, properly advertised and applications received and published for the public to give their views on suitability of the applicants, the JSC is obliged to carry out background investigations on the applicants (vide generally Part III of the First Schedule). *Section 10 (5)* obliges JSC to conduct the interviews in public.

The criteria for evaluating qualifications of applicants are thus: professional competence; written and oral communication skills; integrity; fairness; good judgment; legal and life experience; demonstrable commitment to public and community service (vide s. 13 of the First Schedule). The elements of integrity include: a demonstrable consistent history of honesty and high moral character in professional and personal life; respect for professional duties, arising under the codes of professional and judicial conduct; and ability to understand the need to

maintain propriety and the appearance of propriety (vide s. 13 c of the First Schedule). The elements of fairness include: a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views (vide s. 13, d of the First Schedule). The elements of good judgment include: a sound balance between abstract knowledge and practical reality (vide s. 13, e of the First Schedule). The elements of commitment to public and community service include the extent to which the interviewee has demonstrated a commitment to the community generally and to improving access to the justice system in particular (vide s. 13, g of the First Schedule). The qualifications question as to who is to be recommended for appointment is finally settled by a majority vote of the JSC members (vide s. 14 of the First Schedule).

The procedure of the Tribunal for removal of judges is provided for in the Second Schedule under s. 30 of the Act. The Tribunal proceedings are held in camera unless the judge chooses otherwise (vide s. 9 of the Second Schedule). The Tribunal is obliged to uphold the principle of substantial justice (vide s. 9 of the Second Schedule).

### *4.2.4 The Judicial Service (Code of Conduct and Ethics), Regulations, 2020.*

It is worth noting that this is the only enactment that specifically deals with the code of conduct and ethics for the judiciary. This study will limit itself to Part II of the Regulations that provide for code of conduct and ethics for judges. Regulation 7 of the Regulations provide for *Independence*. On this front, judges are obliged to inter alia: uphold and exemplify independence as individuals and as an institution; be and be seen to be free from inappropriate connections with, and influence by other government branches; maintain an independence of mind in the performance of judicial duties and exercise judicial function without being influenced by personal feelings, prejudice, or bias.

Regulation 9 of the Regulations provides for *Impartiality*. To this end a judge shall at all times, carry out the duties of the office with impartiality and objectivity in accordance with Article 10, 27, 73 (2)(b) and 232 of the Constitution and shall not practice favouritism, nepotism, tribalism, cronyism, religious and cultural bias.

Regulation 11 of the Regulations provide for *Integrity*. A judge must exercise all powers vested in the judge's office by the Constitution and statute law for the maintenance of the dignity of the court and for sustaining integrity of the court processes, and the regular discharge of all proceedings coming up before the court. A judge shall act honourably and shall not deliver an oral decision, alter the substance of reasons given, or the transcript of evidence or of the summing up thereof. A judge shall not accept any gifts, personal loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would compromise the judge's integrity. A judge shall conduct personal and extrajudicial activities in such a manner as to minimise the risk of conflict with the obligations of judicial office.

Regulation 14 of the Regulations provide for *Propriety***.** A judge shall avoid impropriety or appearance of impropriety and shall not lend the prestige of the judicial office to advance any private interest. Regulation 15 of the Regulations provide for *Equality and non-discrimination*. A judge shall safeguard the right of equality before the law, and right of equal protection, and benefit of the law, without bias or prejudice.

Regulation 13 of the Regulations provide for *Accountability and prohibition against bribery and other corrupt practices.* A judge shall not use the judicial office for unlawful or wrongful enrichment of self or any other person. A judge or any member of a judge's family shall not directly or indirectly negotiate or accept remuneration, loan, gift, advantage, or privilege that is incompatible with judicial office or that can be reasonably be perceived as being intended to influence the judge in the performance of judicial duties, or to serve as a reward. A judge or any member of a judge's family shall not ask for or accept any bribe, gift, loan, hospitality, advantage, privilege, or favour in relation to anything done or to be done or omitted to be done by the judge, in connection with the conduct of judicial duties or which might reasonably be perceived as being intended to influence the discharge of judicial duties.

Regulation 16 of the Regulations provide for *Professionalism*. A judge is obliged to inter alia: take reasonable steps to maintain and enhance knowledge, skills and personal qualities necessary for the proper performance of judicial duties; perform all judicial duties efficiently, fairly and with reasonable promptness; maintain order and decorum in proceedings and be patient, dignified and courteous.

### *4.2.5 Summary*

From the foregoing, it is evidently safe to conclude that there are sufficient enacted laws in Kenya dealing with matters that concern ethics of judges, therefore the ethical decadence among the Kenyan Judges is not attributable to lack of enacted laws. On these points, this study is at *ad idem* with Okiri et al (supra). However despite these laws, it is common ground that want of ethics is a reality among the Kenyan Judges, Judges and Magistrates Vetting Board, (n.d.). This study finds that the extant Kenyan ethical regime governing the conduct of judges is not responsive to the ethical challenges among the judges. The antidote to the ethical challenges among judges therefore needs to be sought elsewhere further to the rule-based ethical enactments.



## 4.3 A comparative study of the codes of conduct of other common-law jurisdictions

### *4.3.1 Introduction*

The choice of common-law jurisdictions for this study is founded in the Kenyan Constitutional proviso that judges be appointed from persons who inter alia hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or *possess an equivalent qualification in a common-law jurisdiction* (vide Article 166, 2, a). In dealing with this question, the study will consider four jurisdictions: one European jurisdiction namely United Kingdom; one American jurisdiction namely Canada; one Asian jurisdiction namely India; and one African jurisdiction namely South Africa. It is beyond this study and not necessary for its

objective to delve into the entire constitutional and statutory regimes of these jurisdictions therefore this study limits itself to the Codes of Conduct for Judges or their equivalents insofar as they are pertinent to judges in the subject Jurisdiction.

### *4.3.2 United Kingdom (UK)*

The UK's Judge's Council published the Guide to Judicial Conduct (the Guide) in 2003, due to changes in various laws and the rise of social media the Guide was reviewed and published in March 2020, Guide to Judicial Conduct, (2020). In the Forward statement Lord Burnett of Maldon observes that:

> What remains the same, however, is the basic set of principles guiding judicial conduct. Judicial Independence, impartiality and integrity provided judges with a guide, not only as to the way they discharge their judicial functions, but also as to how they conduct their private lives to the extent that this affects their judicial role. They remain at the heart of this Guide and at the centre of every judicial officeholder's conduct, Guide to Judicial Conduct, (2020).

The Opening remarks (preambular statement) to the Guide states that the Guide is based on the principle that responsibility for deciding whether or not a particular activity or course of conduct is appropriate rests with each individual judge, the Guide is not a code, rather it contains core principles to help judges reach their own decision, Guide to Judicial Conduct, (2020). In this sense the Guide has a non-binding nature, accordingly no disciplinary consequence may arise from the breach thereof. The Guide leaves no doubt as to its inapplicability in disciplinary proceedings, it expressly states that the Judicial Conduct Investigations Office while handling complaints, and the Lord Chancellor and Lord Chief Justice while exercising their disciplinary powers are not obliged to follow the Guide in as much as they may choose to (vide Part 1 of the Guide).

The Guide identifies Judicial independence, Impartiality and Integrity as the basic principles guiding judicial conduct and which it describes as "a distillation of the six fundamental values set out in the Bangalore Principles of Judicial Conduct…and which form the Key statement on judicial ethics" (vide Part 2 of

the Code). It may be worth noting that the Guide provide guidance on specific issues (vide Part 3 of the Code) which are largely tailored to the UK set-up, this study however will only deal with the identified three basic principles.

Judicial Independence is described as the cornerstone of UK's system of government and a safeguard of the freedom and rights of citizens under the rule of law (vide Part 2 of the Guide). The Judiciary both as a whole and as individuals must be seen to be independent of the other arms of government, therefore "Judges should bear in mind that the principle of judicial independence extends well beyond the traditional separation of powers and require that a judge be, and, be seen to be independent of all sources of power or influence in society, including the media and commercial interests" (Vide Part 2 of the Guide). Judges are obliged to be immune to both favourable and unfavourable effects of publicity, while remaining alive to the profound effect their decisions may have on the parties before them and the public in general (vide Part 2 of the Guide).

On Impartiality the Guide advises judges to strive to ensure that their, in and out of court conduct maintains and enhances the confidence of the public, the legal profession and litigants in their individual impartiality and that of the judiciary (vide Part 2 of the Guide). Judges are advised to avoid insofar as it is practicable extra-judicial activities that are likely to cause them to recuse themselves due to reasonable apprehension of bias or conflict of interest (vide Part 2 of the Guide). Regarding Integrity, the Guide expects judges to have their judicial obligations take precedent over their personal interests, hence display: Intellectual honesty; Respect for the law and observance of the law; Prudent management of financial affairs; Diligence and care in the discharge of judicial duties; and Discretion in personal relationships, social contacts and activities (vide Part 2 of the Code).

The Guide has sacrificed useful and necessary detail at the altar of brevity, in as much as it expressly adopted the Bangalore Principles of Judicial Conduct. This however does not appear to have affected the proper dealing with misconduct and the high regard to ethical standards. This can be drawn from

the findings in some of the complaints made against judges: A complaint of serious delay in producing judgement against His Honour Judge Marc Dight was upheld and the Judge's conduct found to have amounted to misconduct having fallen below the standards expected of a member of the judiciary. A complaint of use of inappropriate language at an event attended in private capacity against His Hon our Judge Jinder Singh Boora was upheld to had the potential to undermine the reputation of the judiciary (Judicial Conduct Invistigations Office, n.d.). In the year 2015 there was no (competent) complaint made against any judge, 1 in 2016, none in 2017, 2018 and 2019, and 8 in 2020, Judicial Conduct Invistigations Office, (n.d.).

### *4.3.3 Canada*

The Canadian Judicial Council (CJC) the equivalent of the Kenyan JSC developed the Ethical Principles for Judges, Canadian Judicial Council, (2004). In the Forward statement to the principles, the then Canadian Chief Justice Beverley McLachlin noted that "The ability of Canada's legal system to function effectively and to deliver the kind of justice that Canadians need and deserve depends in large part on the ethical standards of our judges", Canadian Judicial Council, (2004). Canada does not have a binding Code of Conduct for judges, the Ethical Principles for Judges (EPJs) are advisory in nature and are not to be to be used as a code setting out prohibited behaviour or defining judicial misconduct, Canadian Judicial Council, (2004). The Purpose of EPJs is to provide ethical guidance for *federally appointed* (emphasis supplied) judges, Canadian Judicial Council, (2004), in this sense therefore, no disciplinary action can arise out of non-compliance thereof.

Chapter 2 of the EPJs provide for the principle of *Judicial Independence* and require judges to uphold and exemplify judicial independence in both its individual and institutional aspects. Judicial independence is explained to be "the necessary individual and collective or institutional independence required for impartial decisions and decision making", Canadian Judicial Council, (2004). It is two pronged: first it is a state of mind – in this sense it is concerned with the impartiality of the judge in fact; secondly it is a set of institutional and operational arrangements – in this sense it is concerned with the defining how the judiciary relates with other

branches of government such that the independence and impartiality is assured in reality and in appearance, Canadian Judicial Council, (2004).

Chapter 3 of the EPJs provide for *Integrity* and require judges to conduct themselves with integrity to sustain and enhance public confidence in the judiciary. Judges should strive to conduct themselves whether in private or in public in a manner that is beyond reproach in the standards of a reasonable, fair minded and informed person, Canadian Judicial Council, (2004).

Chapter 4 of EPJs provide for *Diligence* and require judges to be diligent in the performance of their judicial duties. Diligence is explained to concern the skilful, careful, attentive and prompt attendance to judicial function, and to this end they must take reasonable steps to maintain and enhance the knowledge, skills and personal qualities attendant to judicial duties which include not only presiding in court and making decisions (adjudicative duties) but also other judicial tasks necessary for the court's operation (administrative duties) Canadian Judicial Council, (2004).

Chapter 5 of the EPJs provide for *Equality* and require judges to conduct themselves and the proceedings before them to assure equality according to law. Equality finds linkage to impartiality, judges should not be influenced by attitudes based on stereotype, myth or prejudice, it is important therefore for judges to recognise and understand these attitudes and demonstrate sensitivity such as to have consideration for all persons without discrimination, Canadian Judicial Council, (2004).

Chapter 6 of the EPJs provide for *Impartiality* and oblige judges to be and to appear to be impartial with respect to their decisions and decision making. Impartiality is concerned with perception and more importantly the actual absence of bias and prejudgment, judges should avoid deliberate use of words or conduct in and out of court that, could reasonably be perceived as impartial, Canadian Judicial Council, (2004). Impartiality is noted in the judges demeanour, civic and community services, political activity and relations and conflict of interest, Canadian Judicial Council, (2004).

The CJC has been in the process of revising the EPJs and has published draft EPJs which the Canadian Chief Justice – the Chairperson of CJC has commented on thus "A public consultation has revealed clear support for the existing key principles of integrity, equality, diligence and impartiality while indicating the need for guidance on new and emerging issues such as post-retirement return to practice and the use of social media", Canadian Judicial Council, (2019).

The draft EPJs retain the non-binding nature, this to some stakeholders is a miss. While acknowledging that Canada have a highly competent and responsible judiciary, Amy Salyzyn and Richard Devlin who are respectively the President and Chairperson of the Canadian Association for Legal Ethics (CALE) noted that this was a case of extreme luck as the judges have no binding ethics code to govern their behaviour, Amy Salyzyn & Richard Devlin, (2020). They decry this state of affairs and argue for change, "Canadian judges should be proud of the high ethical standards under which they operate. Clearly articulating and enforcing such standards as required behaviour enhances not only public confidence in the judiciary but also provide more clarity and certainty to members of the judiciary themselves….The CJC should revise its draft EPJs to make clear that it is a binding code of ethical conduct for judges", Amy Salyzyn & Richard Devlin, (2020). The Judicial Issues Committee of the Canadian Bar Association in its reaction to the draft EPJs stated that "modern guidance on judicial ethics requires more than aspirational guidelines", Amy Salyzyn & Richard Devlin, (2020).

Ironically in some Canadian Provinces, the Provincial Courts have binding codes of conduct which provide valuable justification for their binding nature. The British Columbia province for instance, in its Code of Ethics notes that "The correct exercise of judicial authority necessarily requires self-discipline. Otherwise, authority becomes oppression. This is the fundamental reason for which the code is offered…..In attempt to define the ideal of proper judicial conduct it serves both as a guide and a standard", Code of Judicial Ethics, (1994). In dismissing the concern that making binding codes is a threat to judicial independence, the leadership of CALE argued that "…in our own front yard, Quebec's provincial court judges are bound by a Code of Conduct and there is

nothing to suggest that they lack independence", Amy Salyzyn & Richard Devlin, (2020).

It is important to note that the CJC is constituted of 41 members who are all judges Canadian Judicial Council, (n.d.), the reluctance to make the EPJs binding may reasonably be understood from this perspective – self-preservation and fear of the unknown. The Canadian EPJs despite their non-binding nature are better drafted and explained than the Kenyan JCC, though the principles are largely the same. It is also noteworthy that despite the non-binding nature of the EPJs, there appear to be compliance with them, as observed by the leadership of CALE, the judiciary is highly competent and responsible, Amy Salyzyn & Richard Devlin, (2020). It can be concluded that despite the CJC lacking any specific effort at inculcating virtue ethics among the judges, the individual judges have demonstrated virtue in their judicial conduct.

### *4.3.4 India*

Indian Judges are governed by a Code of Judicial Ethics known as 'Restatement of Values of Judicial Life' (RVJL) adopted by the Indian Judiciary in the Chief Justices' Conference in 1999, and described as the 'restatement of the pre-existing and universally accepted norms, guidelines and conventions' observed by all Indian Judges, Restatement of Values of Judicial Life, (1999).

The RVJL does not specifically identify the ethical principles, nevertheless some of the principles are readily decipherable from the code. Code 1 requires that justice must not merely be done but it must be seen to be done, therefore the behaviour and conduct of judges must reaffirm the people's faith in the impartiality of the judiciary. The acts of judges, whether in official or personal capacity must be such as not to erodes the credibility of impartiality, Restatement of Values of Judicial Life, (1999). Code 2 prohibits judges from contesting election to any office of a club, society or other association nor hold such elective office except in a society or association connected with the law, Restatement of Values of Judicial Life, (1999).

Code 3 obliges judges to eschew close association with individual member of the Bar and in particular those who practice in their courts, Restatement of Values of Judicial

Life, (1999). Code 4 prohibits judges from permitting any member of their immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative who are members of the bar, to appear before them or even be associated in any manner with a cause before them, Restatement of Values of Judicial Life, (1999). Code 5 prohibits judges from permitting members of their family who are members of the bar to use the residence in which the judges actually resides or other facilities for professional work, Restatement of Values of Judicial Life, (1999). Code 6 require a judge to practice a degree of aloofness consistent with the dignity of his office, Restatement of Values of Judicial Life, (1999). Code 7 prohibits a judge from presiding over a matter in which a member of his family, a close relation or a friend is concerned, Restatement of Values of Judicial Life, (1999). Code 8 prohibits a judge from publicly debating or expressing his views on political matters or matters that are pending or likely to arise for judicial determination, Restatement of Values of Judicial Life, (1999).

Code 9 Prohibits judges from giving interviews to the media on matters concerning the merits of their judgements, Restatement of Values of Judicial Life, (1999). Code 10 prohibits Judges from accepting hospitality or gifts save from family, close relations and friends, Restatement of Values of Judicial Life, (1999). Code 11 prohibits judges from presiding over a matter concerning a company in which they hold shares unless such interest is disclosed and no objection is raised, Restatement of Values of Judicial Life, (1999). Code 12 prohibits judges from speculating in shares, stocks or the like, Restatement of Values of Judicial Life, (1999). Code 13 prohibits judges from engaging in trade or business directly or indirectly either personally or in association, Restatement of Values of Judicial Life, (1999). Code 14 bars judges from asking for or accepting contributions, or actively associating with fundraiser for any purpose, Restatement of Values of Judicial Life, (1999). Code 15 Prohibits judges from seeking financial benefit in the form of perquisite or privilege attached to their offices save when it is clearly available, Restatement of Values of Judicial Life, (1999). Code 16 obliges judges to be conscious of their public image and not to conduct themselves such as to imperil public confidence in their offices, Restatement of Values of Judicial Life, (1999).

The RVJL acknowledges not to be exhaustive but illustrative of the conduct expected of judges Restatement of Values of Judicial Life, (1999). The RVJL is binding on judges and give rise to disciplinary action. Despite having 16 codes, the RJVL is extremely limited and can be reduced to only three principles, that is Impartiality, Probity and Integrity. It speaks not to judicial independence, diligence and equality. Codes 12 and 13 are drafted in such wide and general terms that is extreme in the sense that they totally and unreasonably deny judges economic right to earn income other than judicial income. Further it is contradictory and senseless to prohibit judges from presiding in matters involving a company in which they hold shares (vide code 11 above), while they are prohibited from engaging in trade (vide code 12 & 13 above). The prohibition on judges from associating themselves with fundraisers (vide code 14 above) is also couched too widely and generally to the negative. Such prohibitions need to be restrictive only to the extent that such engagement may interfere with judicial ethics, in this sense there should be exceptions.

Appraised generally, the drafting and phraseology of the RVJL is poor, confused and wanting in detail. RVJL fails to identify with any specificity or at all the values of judicial life that it directs itself to. In sum it doesn't fit the tenets of a reliable ethical guide for a reasonable person even as it disclaims exhaustivity.

Notwithstanding the limitations of RVJL the Indian Judges have largely demonstrated their appreciation and commitment to judicial ethics. Through judicial pronouncements in their judgements they have emphasized the place of judicial ethics, for instance in the case of *In High Court of Judicature at Bombay vs Udaysingh*, (1997), the Supreme court was instructive thus:

> Maintenance of discipline in the judicial service is a paramount matter and since the acceptability of the judgment depends upon the credibility of the conduct, honesty, integrity, and character of the office and since the confidence of the litigant public gets affected or shaken by the lack of integrity and character of the judicial officer...

### *4.3.5 South Africa*

The South African Parliament approved the Code of Judicial Conduct (the Code), as drafted by the Chief Justice and tabled by the Minister for Justice, the same was

published in the government gazette of 18th October 2012, Code of Judicial Conduct, (2012).

In its preamble the Code recognises in part that "it is necessary for public acceptance of its authority and integrity in order to fulfil its constitutional obligations that the judiciary should conform to ethical standards that are internationally generally accepted, more particularly as set out in the Bangalore Principles of Judicial Conduct (2001) as revised at the Hague (2002)" Code of Judicial Conduct, (2012). A breach of the Code constitutes a ground for lodging a complaint against a judge (vide *Article 2, 3 of the Code)*, and in this sense it has a binding nature with disciplinary consequences.

The objects of the Code are instructive, thus: to assist every judge in dealing with ethical and professional issues; and to inform the public about the judicial ethos of the Republic (vide Article 3, 1 of the Code).

Judicial Independence is provided for under *Article 4 of the Code* and oblige judges to uphold the Independence and integrity of the judiciary and the authority of the courts, and in so doing: maintain an independence of mind in their judicial duties; take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts; and not to seek nor accept any special favour or dispensation from the executive or any interest group. Judicial independence is explained as not being a private right or a principle for the benefit of judges as individuals, but denoting freedom of conscience for judges and non-interference in their decision-making, it does not provide an excuse for misbehaviour, want of diligence, or acts contrary to the Code (vide Note 4, iv of the Code).

*Article 5 of the Code* obliges judges to act honourably, and in this sense to always act honourably and in a manner befitting judicial office even outside the discharge of official duties, such that all their activities must be compatible to the status of judicial office. The test of judicial conduct is an objective one and of a reasonable person (vide Note 5, iv of the Code). *Article 6 of the Code* obliges judges to comply with the law of the land at all times whether in judicial or non-judicial conduct.

*Article 7 of the Code* provide for Equality and oblige judges to: personally, avoid and dissociate themselves from discriminatory conduct or comments by persons under their charge; refrain from bias or prejudice in performance of their judicial functions; and be courteous and respectful of others' dignity. To achieve this, judges are required to strive to be aware of and understand the many differences between persons and remain informed of the changing social attitudes and values (vide Note 7, ii of the Code).

Transparency is provided for under *Article 8 of the Code* and mandatorily require judges to take reasonable steps to enhance courts' accessibility and to improve understanding of judicial proceedings by the public, and to conduct judicial proceedings including delivery of decisions in open court unless otherwise required by special circumstances.

*Article 9 of the Code* provide for Fair trial and mandatorily enjoin judges to: resolve matter by application of law to the facts in a fair hearing by observing the letter and spirit of *audi alteram partem* rule, remaining manifestly impartial and giving adequate reasons for decisions made; maintain order, act with decorum and remain patient and courteous in conducting judicial proceedings; manage proceeding such as to be expeditious and cost effective and to avoid shifting responsibility of presiding over a matter to another judge; not to unduly influence a party to promote settlement or obtain a concession. Fair trial however does not preclude a judge from keeping a firm hand on proceedings (vide Note 9, i of the Code).

Diligence is provided for under *Article 10 of the Code* and oblige judges to perform all assigned duties diligently, thoroughly investigate the matter at hand, promptly and efficiently dispose of court business, take reasonable steps to maintain the necessary level of professional competence the law. Unnecessary postponements, point-taking, undue formality and the like must be avoided (vide Note 10, i of the Code).

*Article 11 of the Code* speaks to Restraint, and mandatorily enjoin judges not to comment on the merits of any case pending before or determined by the courts except in their discharge of judicial office, not to enter into a public debate despite criticism levelled against them or their judgements, avoid actions that may be understood as meant to stifle valid criticism of judges, avoid personality issues and foster

collegiality, avoid public criticism of other judges or branch of judiciary except when necessary for to judicial proceedings or for scholarly work designed to enhance legal studies. Whereas private consultations and debates between judges are necessary for judicial function, such may not be used to influence a judge on how to decide a particular case (vide Note 10, ii of the Code).

*Article 12 of the Code* speaks to Association, and mandatorily prohibits judges from belonging to any political party or secret organization, becoming involved in any political controversy or activity save for when it is necessary for judicial function, taking part in activities that practice discrimination. Social associations including with members of the legal profession should such as not to create the impression of favouritism or to enable the other party to abuse the relationship (vide Note 12, i of the Code).

Recusal is provided for under *Article 13 of the Code*, it obliges judges to recuse themselves if there is a real or reasonable perceived conflict of interest or reasonable suspicion of bias based upon objective facts but shall not recuse themselves on insubstantial grounds. It is explained that if a judge is of the view that there are no grounds for recusal but believes that there are facts which, if known to a party, might result in an application for recusal, such facts must be made known timeously to the parties and the parties allowed adequate time to consider the matter (vide Note 13 (iv) of the Code). It is clarified a recusal decision is in the province of the concerned judge, who need not defer to the opinion of the parties or their legal representatives (vide Note 13, v of the Code).

*Article 14 of the Code* addresses Extra-judicial activities of judges on active service and provides that: judges' judicial duties take precedence over all other duties and activities whether statutory or otherwise; judges may engage in extra-judicial activities provided they are neither incompatible with the confidence in, impartiality or independence of the judges, nor affect or perceived to affect the judges' availability to judiciously attend to their judicial duties. It is elucidated that whereas judges should be available to use their judicial skill and impartiality to further the public interest, they must respect the separation of powers and the independence of the judiciary when

considering a request to perform no -judicial functions for or on behalf of the State, or when performing such functions (vide Note 14. ii of the Code).

*Article 15 of the Code* speaks to Extra-judicial income, judges are prohibited from receiving any income or compensation that is incompatible with judicial office; directly or indirectly negotiate or accept remuneration, gifts, advantages or privileges which are incompatible with judicial office or which can reasonable be perceived as being intended to influence judges' judicial duties or to serve as a reward for them; and accept, hold or perform any other office of profit, or receive in respect of any service any fees, emoluments or other remuneration apart from the salary and any allowance payable to the judge in a judicial capacity. It is explained that judges may deliver public lectures or papers on appropriate subjects or teach at academic institutions (vide Note 15, ii of the Code).

Reporting inappropriate conduct is addressed under *Article 16 of the Code*, judges are mandatorily required to: when in possession of reliable evidence of serious misconduct or gross incompetence on the part of a legal practitioner or public prosecutor to inform the relevant professional body or Director of Public Prosecutions of the same; when in reasonable belief that a colleague has been acting in a manner unbecoming of judicial office, raise the matter with that colleague or with the head of the court concerned. It is explained that reference to the appropriate authority is to be made in a neutral fashion and may not be judgmental (Vide Note 16, 9, ii of the Code).

*Article 17 of the Code* speaks to Judges discharged from active service, judges who are not in active service or liable to be called upon to perform judicial duties are mandatorily required to act honourably and, in a manner befitting their status as retired judges, and not to act as an advocate, attorney or legal advisor. It is explained that a retired judge may accept an appropriate appointment as a judge, whether as a judge in another jurisdiction, or as an arbitrator or mediator, in professional or semi-professional disciplinary matters (vide Note 17, i of the Code). It is clarified that a retired judge must not enter party politics (vide Note 17, iv of the Code).

The South African Code of conduct is very elaborate, detailed and sufficiently explained, such that it provides reliable ethical guidance to the judges in fashioning their conduct, and information to the public in determining whether a judge's conduct

warrants a complaint for violating the Code. It makes specific reference to the Bangalore Principles and adopt the ethical standards in the Bangalore Principles of Judicial Conduct. This study finds further merit in its making of provisions dealing with retired judges.

#### *4.3.6 Summary*

The U. K's Guide to Judicial Conduct and the Canadian EPJ's are not codes of conduct and are not binding on the judges, they are merely advisory with no disciplinary consequences. Despite the non-binding nature of these ethical guides, the U. K and Canadian judges have demonstrated virtue in their conduct and high regard to ethical standards.

The Indian RVJL is a binding code of conduct. It suffers serious drafting challenges and is largely lacking specifics on ethical conduct. However, despite limitations in the code of conduct, the Indian judges have demonstrated high level of Judicial ethics appreciation and compliance.

The South African Code of conduct is binding, very elaborate, detailed and sufficiently explained, such that it provides reliable ethical guidance to the judges in fashioning their conduct, and information to the public in determining whether a judge's conduct warrants a complaint for violating the Code. South African Judges still faces serious ethical challenges, although ethical breaches are firmly dealt with.

### 4.4 Recorded Judges' Unethical Conduct

#### 4.4.1 Statistical Summary of number of Complaints against Judges Received by JSC in the Years 2011 to 2021 as reported in the SOJARs.

The study has chosen to start at the year 2011 because it is immediately after the 2010 Constitution, the provisions upon which the complaints are appraised came into force. Further, the inaugural SOJAR report was published for the period 2011/2012, The Judiciary of Kenya, (n.d.).

| Financial Year / Reporting Period | Number of Complaints against Judges Received by JSC |
|---|---|
| 2011/2012 | No data specific to judges |
| 2012/2013 | No data specific to judges |
| 2013/2014 | No data specific to judges |
| 2014/2015 | No data specific to judges |
| 2015/2016 | 72 |
| 2016/2017 | 44 |
| 2017/2018 | 74 |
| 2018/2019 | 137 |
| 2019/2020 | 121 |
| 2020/2021 | 103 |

For the period 2011 up to 2015 the reporting lumped together the complaints against judicial officers, it was therefore not possible for this study to point out complaints against judges. It is worth noting that during this period, the JMVB was vetting judges. The data shows that the number of complaints against judges are still high, pointing to ethical challenges among the Kenyan judges. The fact that most of the complaints do not lead to a recommendation for tribunal investigation of the judges should not be interpreted to mean that the complaints are unmerited. The complaints reveal unethical conduct by the judges but are however found or deemed not to warrant removal of a judge from office. There being no other disciplinary measure other than removal from office, JSC is left with no choice but to dismiss the complaints. The disciplinary mechanism against judges needs to be relooked. This study will make proposals to that end.

### *4.4.2 Complaints against judges*

Complaints against judges as derived from the JMVB Reports JSC Reports, Tribunal Reports and Judicial Judgements juxtaposed against the expectations of Kenyans with respect to ethical conduct of judges as expressed and enacted in the Constitution of Kenya, 2010, the Judicial Service Act, 2011 and the Judicial Service (Code of Conduct and Ethics), Regulations, 2020.

| Complaints against Judges | Expectations of Kenyans |
|---|---|
| Inordinate delay in delivery of rulings and judgments | Expeditious disposal of cases. Justice shall not be delayed. (Vide Article 159 of the Constitution) |
| Lack of independence | A judge must exercise judicial authority independently, uphold the independence of the judiciary and the authority of the courts; maintain an independence of mind in the performance of judicial duties; take all reasonable steps to ensure that no person, forum, or organ of state, interferes with the functioning of the court (vide Regulation 7 of the Judicial Service (Code of Conduct and Ethics), Regulations, 2020). |
| Lack of integrity | High moral character and integrity (vide Article 166.2.c of the Constitution)<br>A judge must exercise all powers vested in the judge's office by the Constitution and statute law for the maintenance of the dignity of the court and for sustaining integrity of the court processes, and the regular discharge of all proceedings coming up before the court. A judge shall act honourably and shall not- deliver an oral decision, alter the substance of reasons given, or the transcript of evidence or of the summing up thereof. A judge shall not accept any gifts, personal loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would compromise the judge's |

| | |
|---|---|
| | integrity. A judge shall conduct personal and extrajudicial activities in such a manner as to minimise the risk of conflict with the obligations of judicial office (vide Regulation 11 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020). |
| Incompetence | A judge must take reasonable steps to maintain and enhance knowledge, skills and personal qualities necessary for the proper performance of judicial duties, and perform judicial duties competently, diligently and maintain high standards of performance and professionalism (vide Regulation 15 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020). |
| Gross misconduct or misbehaviour | A judge shall conduct private and official affairs in such a manner as preserve the public confidence in the integrity of the judicial office, cooperate with other judges, and court officials in the administration of court business, comply with administrative rules or reasonable directives of a presiding judge, act courteously and respect the dignity of others (vide Regulations 14 and 15 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020). |
| Undue influence | Judges must not be under any control or direction other than by the Constitution or the law in the performance of their judicial duties (vide Article 161 of the |

| | |
|---|---|
| | Constitution). A judge shall not subject self to improper influences (vide Regulations 14 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020). |
| Corrupt practices | High moral character and integrity (vide Article 166.2 c of the Constitution)<br>A judge shall not use the judicial office for unlawful or wrongful enrichment of self or any other person. A judge or a member of a judge's family must not ask or accept a bribe, gift, loan, hospitality, advantage, privilege, or favour in relation to performance of judicial duty or which might reasonably be perceived as being intended to influence the performance of judicial duties or to serve as a reward (vide Regulations 14 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020). |
| Bias | A judge shall safeguard the right of equality before the law, and right of equal protection, and benefit of the law, without bias or prejudice (vide Regulations 15 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020). |
| Dishonesty | A judge shall not knowingly give false or misleading information to any person or falsify any records or knowingly misrepresent information to the public (vide Regulations 33 of the Judicial Service (Code of Conduct and Ethics) |

| | |
|---|---|
| | Regulations, 2020). A judge shall pay any taxes due from the judge as prescribed by law (vide Regulations 27 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020). |
| Partiality | A judge shall at all times, carry out the duties of the office with impartiality and objectivity in accordance with Article 10, 27, 73 (2)(b) and 232 of the Constitution and shall not practice favouritism, nepotism, tribalism, cronyism, religious and cultural bias (vide Regulations 9 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020). |
| Conflict of interest | A judge shall use the best efforts to avoid being in situations where personal interests conflict or appear to conflict with the judge's official duties (vide Regulations 20 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020). |
| Fraud | A judge must not falsify records, commit offences. A judge must honestly and accurately represent information to the public (vide Regulation 6 of the Judicial Service (Code of Conduct and Ethics), Regulations, 2020). |
| Lack of accountability | A judge is bound to be accountable to the public for decisions and actions and transparent in the performance of |

| | |
|---|---|
| | judicial duties (vide Articles 10.2.c and 73.2.d of the Constitution). |
| Impropriety | A judge shall avoid impropriety or appearance of impropriety and shall not lend the prestige of the judicial office to advance any private interest (vide Regulation 14 of the Judicial Service (Code of Conduct and Ethics), Regulations, 2020). |

This analysis demonstrates that the expectations of Kenyans as to the conduct of judges are not being met. Despite these expectations being robustly enacted the expectations of Kenyans remain merely aspirational in the face of continued ethical challenges among judges.

### 4.4.3 The vices gleaned from the complaints against judges

The vices gleaned from the complaints against judges as recorded in the JMVB Reports, JSC Reports, Tribunal Reports and Judicial Judgements juxtaposed against the pertinent counteracting virtues.

| **Vices gleaned from Complaints against Judges** | **Counteracting Virtues** |
|---|---|
| Corruption/Fraud | Integrity |
| Pride/Contempt/Arrogance | Humility |
| Insensibility | Temperance |
| Irascibility | Patience |
| Vanity | Magnanimity |
| Cowardice/Conflict of interest/Undue influence | Prudence |
| Injustice | Justice |
| Folly | Fortitude |
| Impropriety | Integrity |
| Dishonesty | Honesty |

The juxtaposition of vices gleanable from the complaints made against judges by Kenyans as against pertinent counteracting virtues demonstrates that the learning and practising of virtue ethics will provide a solution to ethical challenges among judges.

## 4.5 Possible explanations to the discrepancy between Expectations of Kenyans and Conduct of Judges

### *4.5.1 The Positivist Challenge*

The ethical challenges among the Kenya judges may be explained from the contraries of two schools of thought, namely the natural law school of thought and the positive law school of thought. Whereas the natural law adherents hold that law is founded in human nature that govern how human beings ought to conduct their affairs to conform their existence to nature Wolfe, (2003). In this sense principles of true morality and justice informs law and are inherently discoverable by human reason, man - made/enacted (positive) law that contradicts these principles are invalid, Hart, (1972), laws therefore necessarily have moral values (Bennett, 2011). The Positivists on the other hand reject this naturalists thesis and assert that, laws are posited, conformity to moral values is not necessary but contingent Raz, (2002). The moral value of law therefore depends on the specific law's content and the relevant conditions of the people to which the law actually governs Raz, (2002).

Judges who ascribe to the positivist school are likely therefore to deny the moral values impact in the interpretation and application of law. To them the law is that which is enacted, that is the law as it 'is' or the law properly so called. Their interpretation of the law is devoid of any moral conscience, as opposed to their naturalist counterparts who take the Dworkin's path that the principles of morality are the ultimate determinants of legal disputes in courts of law, Meng, (2004). The positivists' compliance with the law also follows the same trajectory of thought, in this sense, only enacted law is to be complied with and only so because it is enacted law and non-compliance thereof attract sanctions. Lord Patrick Devlin in his Morals and the Criminal Law criticises this positivist thesis, he argues that any community of persons worth its purpose necessarily sets standards that are above the law (moral standards) to guide its members and a person who governs his conduct with the sole goal of avoiding punishment is for all purposes worthless, Dworkin, (1977).

According to Selznick, (2000) a legal enactment should be understood as something more than formalism, in this sense it is not enough to validate a law merely on the premise that the officially prescribed procedures for enactment of laws was complied with in its enactment. Laws must have a commitment to standards, these standards are derivatives of moral ideas, accordingly legal enactments cannot find justification in themselves but in moral principles, otherwise their authority is diminished and they can be rightly disobeyed Selznick, (2000). Lord Devlin speaking to the necessity of a moral qualification for laws observed that immorality in whatever form carries with it the ability to injure the societal good and as a matter of course, it does inflict injury of different proportions, it is in this that the law finds its standing, Dworkin, (1977). H. L. A. Hart who is a positivist, accepts though qualifiedly the necessity of moral opinion on posited laws, he opines that "Laws against murder, theft, and much less would be of little use if they were not supported by a widely diffused conviction that what these laws forbid is also immoral", Dworkin, (1977).

Another positivists' challenge is what Dworkin, (1977) refers to as "the positivist theory of legal obligation" which holds that there can only be a legal obligation when an enacted law formally imposes that legal obligation. In this sense judges are obliged to only concern themselves with the 'is' of the law and not the 'ought'. According to Geng, (2017) whereas laymen (the public) define into judges the concepts of morality, jurists deem such concepts as alien to the role of judges, who must limit themselves strictly the black and white of enacted law. Dworkin, (1977), employs the example of the principle that 'no one is supposed to gain from his own wrong' as set out in the US case of Riggs vs Palmer, where a grandson heir of his grandfather who killed his grandfather so as to inherit him was denied inheritance despite the fact that the black and white of enacted law decreed that he should have inherited, to support his argument that in such a case the judges look beyond legal rules (enacted laws) into legal principles (moral values).

According to Ben-Zvi, (2016), many great judges are "rule breakers" in the sense that they interpret and develop the law outside the strict 'black and white'. This is to say, they look more into the moral value 'ought' (spirit) of the law rather than merely the letter 'is' of the law. In the precedent setting case of *Moses Kasine Lenolkulal vs*

*Directorn of Public Prosecutions*, [2019]eKLR Justice Mumbi Ngugi relied on moral values beyond enacted law (vide sec. 62, 6 ACECA) in finding that elected leaders (governors) charged with corruption cases ought to step aside from their offices pending determination of the proceedings against them, she observed in part "…he has been accused of being in 'moral ill-health'…. He is alleged to have exhibited moral turpitude …", This manner of attendance to judicial duty is what Ben-zvi describes as "a voluntary project" outside the judicial adjudicative duty, Ben-Zvi, (2016).

Whitehead, (2014) criticised formalistic application of rules, "any view that reduces judging to the mechanical finding and applying of the proper rules is dangerously short sighted". The Supreme Court has also spoken strongly against positivistic approach to constitutional interpretation as follows:

> The rules of Constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259 (1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and Society. The values and principles articulated in the pre-amble, in Article 10, in chapter 6 and in various other provisions, reflect historical, economic, social, cultural, and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159 (1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts, *In the Matter of Interim Independent Electoral Commission*, (2011).

The Supreme Court of the United States of America has equally been more willing to interpret the law such as to give meaning to the spirit of natural justice, Raphael, (2003).

#### *4.5.1.1 Summary*

In moral knowledge there are many different acts that are morally good, all aiming to the complete and general goodness of the person, and this goodness need to be shared for man is a social being and necessarily co-exist. The philosopher said "…for though it is worthwhile to attain the end merely for one man, it is finer and more godlike to attain it for a nation or for city-states," Aristotle, (2000,1.2). The judiciary will attain

the highest ethical compliance if all judges in the judiciary or at least a majority of them cultivate the moral good, as opposed to when only one or a few are capable of acts that are morally good.

When making moral judgments, the actual choice is determined by the virtues (habits of moral principles) possessed, Hardin, (2009). Judges' ethical decisions therefore needs to be based on pragmatic considerations which depends on the moral knowledge that they possess. A person can only be said to possess moral knowledge, if his moral judgments are true (and they can only be said to be true if they are in agreement with nature) and are held with good reason, Gilson & Maurer, (1993). To acquire virtue ethics (moral knowledge), Kenyan judges need to internalize given incontestable moral principles based on which considered with some empirical knowledge they can determine that their individual action is ethical (a moral good) or unethical (a moral bad), Sayre-McCord, (1998). That which is desired by ethical inquiry is a practical end, accordingly the judges do not need moral knowledge qua knowledge (for possession or state) but for internalization and practice, so that by activity they become ethical (moral), London, (2001).

### *4.5.2 The Concept of Justice.*

The courts of law are often referred to as the courts of justice, and the judges as justices, there is therefore a necessary and inherent defining relation of judges and justice, such that the letter is a standard qualifying measure of the former. The Kenyan National Anthem seeks that "justice be our shield and defender" (vide Article 9, 2 as read together with the Second Schedule of the Constitution of Kenya). The oath of Judges obliges judges to an undertaking to "impartially do justice" (vide Article 74 as read together with the Third Schedule of the Constitution of Kenya). Judicial authority is intended primarily for the attainment of justice in the nation (vide Article 159 of the Constitution). According to Aristotle all virtues are contained in justice and justice is the most important of all virtues, Raphael, (2003). Justice therefore merit space in this discourse. The Constitution and the relevant pieces of legislation do not however define justice.

The definition of justice that has stood the test of time is that by the Roman jurist Ulpian (Domitius Ulpianus), he defined justice as "giving to each his due" Olsthoorn,

(2016). Spinoza follows Kensen's finding of fault in this definition as lacking the constitutive aspect of 'one's due nor its determination, he then defines justice as "a constancy of mind in apportioning to each person what belongs to him according to civil law", and injustice as "taking away from someone, under the pretext of right, what belongs to him according to the true interpretation of the laws" Olsthoorn, (2016). Spinoza reduces justice to pure legalism, such that justice entails no more than a compliance with laws as enacted by the state, from this perspective justice does not constitute a substantial normative standard external to law and capable of availing its evaluation, Olsthoorn, (2016). In his positivist thesis Spinoza heads to the extreme and argues that there can be no sin without a law and which law is only law insofar as it is enacted by the legislature, since God or Nature are not the legislator, Devine or natural law are only laws in a figurative sense not capable of commanding compliance or noncompliance, Olsthoorn, (2016). Therefore, to the extent that sin is an injustice, injustice necessarily require positive law, Olsthoorn, (2016).

This positivist theses eliminates natural law from the realm of laws in the adjudication of justice, so that, it is just that which is not prohibited by a legal enactment, in this sense positive law cannot be invalid for being unjust. Judges who belong to this school of thought, the strict interpretation of law as 'is' disregards principles of natural justice and functionally deliver injustice for justice. It is the kind of justice without principles of justice and unconcerned with ethics that Coyle assigns justice as delivered by the courts, he writes; "Judicial decisions do not state 'principles of justice' but articulate justifications addressed to the litigants in the light of the concreate circumstances of the case" Coyle, (2012).

Kamenka & Alice E.-S. Tay, (1986) adopts Ulpian's definition of justice and defines justice as "the prescription that the same norm should be applied to all members of what is to be taken as the one class of applying the norm" and rejects the Positivist thesis that justice is merely action in compliance with the law, rules recognition and how to draft the rules of recognition. They deconstruct the rule-based justice in the following manner:

> Justice involves and must involve concreate evaluation, consideration of factual situations, belief and disbelief of testimony, selection of principles and descriptions, ordering of preferences and interests. It would be nonsensical to

call such an activity purely formal, nor concerned with substance, or to say that it can be exhaustively covered by pre-existing rules.

Kameri-Mbote & Akech, (2011) identify constitutive elements of justice as the rightness, fairness, appropriateness or deservedness of an action. The scarcity of nature's resources means that human beings have to compete for them, in such a context it becomes necessary to determine an action's rightness, fairness, appropriateness or deservedness. Kameri-Mbote & Akech, (2011) opines that "In the absence of mechanism to determine what is justly due to one human being in relation to another human being relative to a given resource, it can be expected that 'the natural lawlessness of human beings' will lead to the strong trampling over the weak". This determination of justice is agreeable, the assertion of human beings' natural lawlessness is however disputed, Human beings are naturally social hence just, Mbote and Akech reflect a discipleship of the Hobbesian state of nature. Law is an instrument of social control and it can only be accepted that the law has rendered justice when it succeeds in a fair and legitimate distribution of the available resources, and upholding the social fabric, Kameri-Mbote & Akech, (2011).

John Rawls in his "A Theory of Justice" defines justice as fairness based on equality and equity in rights and resource allocation and liberty, Rawls, (1999). Arrigo Colombo follows on Rawls' path and takes into consideration the principles of liberty, equality and solidarity in his definition of justice, that is "the reciprocation of the dignity and rights of human beings of every person to every person in their own existence and in co-existence" Colombo, (2000). The reciprocity demands that justice cannot be a one-way affair, one must therefore do justice to deserve justice, justice in this sense is to be found only among the just- they who do justice not only to themselves but also to others. This assumes the Ulpian definition.

Ahmad & Ali, (2011) in their definition of justice distinguishes between formal justice and substantial justice, the former deals with external forms, that is the application of enacted laws by judges, whereas the latter deals with the exterior forms, concerns substance of justice and goes beyond the enacted laws, that is to say, it proceeds further than where the law ends and delivers natural justice. It is proper to

define formal justice into the law-based ethics and substantive justice into the virtue-based ethics.

According to Aristotle justice is about morality, the philosopher wrote that "All men mean by the term justice a moral state such that in consequence of it men have the capacity of doing what is just, and actually do it and with it" Huang, (2007). A moral state refers to the interiority of the human being and the virtue as opposed to exteriority of human being and the law. It is virtue therefore that empowers man to be just and commands man into practicing justice, in other words justice is a fruit of virtue.

John Stuart Mill emphasizes the primacy of moral principles in the meaning of justice, he defines justice as a name for certain classes of moral rules, which concern the essentials of human well-being more clearly, and are therefore of more absolute obligations than any other rules for the guidance of life, (Kamenka & Alice E.-S. Tay, 1986). This definition underscores the indispensability of moral principles in the business of 'giving to each his due' and the superiority of virtue-ethics to rule-based ethics in the exercise and practice of justice.

Skitka et al in discussing hypothesis of justice, suggests an authority independent hypothesis of justice in the terms that perceived fairness in moral contexts is driven largely by internal moral judgments about right or wrong rather by social rules, a compulsion to obey legitimate authorities or non-moral factors such as due process or respectful treatment, (Skitka et al., 2008). They conclude that there is found in human-beings active resistance of decisions that run contra to their core moral principles.

#### *4.5.2.1 Summary*

It is evident from the above analysis that the justice that is due to our land and its inhabitants cannot be secured by the externally held ethics and/or the enacted laws as proposed by the positive theses. To be just and to do justice our judges must look beyond the enacted laws. To secure the conduct of our judges and eradicate misconduct therefore, the judges must strive beyond the law 'is' the law and delve deeper into their interior proper moral commands and the 'ought' of the law as engraved in the natural law and therein find virtues. It becomes necessary for judges to be persons who have learned ethics and attained moral knowledge with the attendant

praxis such as to attain ethical excellence in their conduct. Without learning and practicing virtue ethics, the best of laws will not avail ethically compliant judges. To the question, is virtue ethics the missing therapy to the ethical challenges among Kenyan judges, it is answered in the affirmative.

#### *4.5.2.2 Conclusion*

A review of the Kenyan ethical regime governing the conduct of judges finds that, it is sufficiently robust in a deontological sense, there is no shortage of ethical rules yet ethical challenges among judges persist unabated. It is therefore evident that the prevailing Kenyan ethical regime governing the conduct of judges is not responsive to the ethical challenges among judges. The comparative study of judges' codes of conduct shows that, the disciplinary codes do not necessarily secure judges ethical conduct than the aspirational codes. Ethics therefore do not depend on a categorical enactment.

The complaints against judges remain high, demonstrating the persistent ethical challenges among judges. For judges to overcome ethical challenges they need moral knowledge and therefore they need training and education in ethics and morals, and to internalise the moral principles and flourish in the practice of virtue ethics. Justice should be understood to mean giving to each their due in an equitable sense. To achieve justice therefore it becomes necessary that the interpretation and application of enacted legal norm follow moral principles, otherwise justice will remain to be what Thrasymachus thought it to be, the interest of the stronger, Raphael, (2003).

# CHAPTER FIVE: DISCUSSION AND RECOMMENDATIONS

## 5.1 Introduction

This chapter discusses the three research questions of this dissertation, with major focus on research question 3, under which a solution to the research problem is to be found. The chapter discusses the two school of thoughts, that is the positivist school of thought and the naturalist school of thought on the question of law and morality in the practice of judges. The end of the desire to secure ethical conduct among judges is to have judges who in their judging deliver justice to the people of Kenya, this chapter therefore finds space for a discussion on justice.

Finally, this chapter make recommendations on how the ethical challenges among Kenyan judges can be resolved. The recommendations take a virtue ethics perspective, prescribing a focus on virtue building as opposed to the technical rule-based dictates.

### 5.2 Research Question 1. Is the Kenyan Ethical regime on the conduct of judges responsive to the ethical challenges among the judges?

In the pre-2010 Constitution era, Kenyan judges suffered loss of public confidence majorly due to corruption (read unethical conduct) among the judges. This state of affairs was largely attributed to a weak ethical regime, Republic of Kenya, (2010). The 2010 Constitution transformed the ethical regime on the conduct of judges, KNCHR, (2014). There is sufficiency of enactments that constitute the ethical regime governing the conduct of judges.

The literature review finds unanimity that the Kenyan rule-based ethical regime has adequate provisions in respect to the moral conduct of judges. Luis Franceschi, (2016) notes that the constitutional dictate that judges be of 'high moral character' is a derivative of Aristotelian virtue ethics and is very commendable in putting in-check ethical conduct of judges. Patricia Kameri-Mbote et al, (2016) finds the extant Kenyan ethical regime on the conduct of judges to be adequate and in consonance with the acceptable best practices internationally. Peter Kwenjera, (2016) and Okiri et al., (2019) also agrees on the adequacy of the prevailing Kenyan ethical regime on the conduct of judges.

Despite the adequacy of the rule-based ethical provisions, ethical challenges among the Kenyan judges persists. The complaints made against judges in the post-2010 Constitutional dispensation are largely the same with the complaints made against judges in the pre-2010 Constitutional dispensation. The complaints against the judges attacked their integrity and moral propriety.

According to Whitehead, (2014) "rules are powerless on their own .. if the rule of law is to prevail, judges must develop the right values". There need to be a correspondence between the ethical rules and transcendent reason, Whitehead, (2014). The norms and values of the society should define the ways of acting, and by way of a social practice fidelity to the ethical rules find validity, Whitehead, (2014). In this sense right reason becomes autonomously guided to the truths of virtue as opposed to just aligning to the rules.

It is therefore evident that the Kenyan ethical regime on the conduct of judges, which as demonstrated is purely rule-based and therefore deontological has failed to secure ethical conduct among the judges, and accordingly is not responsive to the ethical challenges among the judges. However robust and pointed a rule-based ethical regime is, rules "cannot anticipate the multiplicity of contexts and situations" of ethical challenges, Whitehead, (2014). To effectively deal with the ethical challenges among the Kenyan judges therefore, there is need to find a solution outside formalistic do and don'ts rules.



### *5.2.1 Summary*

It is clear to me, that the rule-based ethical regime however robust cannot in itself secure ethical conduct. It will take more than just good rules to secure ethical conduct among the Kenyan judges. This more is to be found in ethics itself. The Kenyan judges need ethics to overcome ethical challenges. How and from whence then are judges to acquire ethics? Research question 3 will discuss this aspect.

### 5.3 Research Question 2. How does the rule-based regimes governing the ethical conduct of judges in other common-law jurisdictions compare?

This study chose four common-law jurisdictions from Europe, America, Asia and Africa, that is, UK, Canada, India and South Africa respectively for the comparative analysis.

**In the UK,** emphasis is made on the character of a prospective judge, the JAC is obliged to ensure that a candidate being appointed as a judge is of good character, Nail Andrews, (2011). This is important, as it ensures that only persons of good character ascend to the hallowed seat of a judge. It is easy for such persons to conduct themselves ethically without any compelling rules and sanctions. As noted by Kate Malleson, (2011) judges of the superior court may be removed from office only on the ground of a misbehaviour with a criminal character, and the removal must be approved by both houses of Parliament. The insistence that, the conduct complained of must be of a criminal character is problematic in two fronts. Firstly, unethical conducts are not necessarily of a criminal nature, for instance a judge who inordinately delay delivery of judgments/rulings is unethical in conduct, but the conduct carries no criminal elements, yet it causes injustice. Secondly it raises the standard of proof to that required of criminal proceedings, that is beyond reasonable doubt, and this can gift escape route to unethical judges.

The UK's Guide to Judicial Conduct though robust is not a code of conduct and is not binding on the judges, it is merely advisory with no disciplinary consequences. Even though the non-binding nature of the ethical guides is a weak point from a deontological point, the UK judges have demonstrated virtue in their conduct and high regard to ethical standards.

**In Canada**, the EPJs in its preambular statement recognises and emphasizes the centrality of ethical conduct of judges in the functional effectiveness of the judiciary and in meeting the needs and expectations of Canadians, Canadian Judicial Council, (2004). The EPJ require judges to conduct their public and private affairs with integrity and in a manner that is beyond reproach, Canadian Judicial Council, (2004).

The EPJ is however not binding on the judges but merely a guide with no disciplinary sanctions, in this sense the EPJ is not compelling. As demonstrated in chapter 2, a

formal inquiry into the conduct of a judge is done in public, thus lending itself to public scrutiny and enhancing transparency and accountability. The CJC can other than removal of a judge prefers disciplinary measures.

**In India**, the Indian Constitution does not speak to the ethical requirements for judges. The RVJL is a binding code of conduct with disciplinary consequences. It bears serious drafting weaknesses and is largely vague in its provisions on ethical conduct. The binding nature of the RVJL has however not secured ethical conduct among the judges.

**In South African** the Constitution requires that, to be appointed to the office of a judge, a person must be a 'fit and proper person'. To this end the Constitution demands of judges' moral fitness. To remove a judge from office, the Constitution requires a finding of gross misconduct, incapacity, or gross incompetence by JSC, but even then, the President will only be obliged to remove such a judge upon a two third majority parliamentary approval of the JSC finding. This subject the judicial process to political game play and may erode judicial independence, the lack of which breeds unethical conduct among judges.

The Code of conduct is binding, very elaborate, detailed and sufficiently explained, such that it provides reliable ethical guidance to the judges in fashioning their conduct, and information to the public in determining whether a judge's conduct warrants a complaint for violating the Code. However, South African Judges still faces serious ethical challenges, although ethical breaches are firmly dealt with.

### *5.3.1 Summary*

The comparative study shows that there is no direct link between the rules of ethics governing the conduct of judges and the ethical compliance of the judges**.** India and South Africa that, like Kenya have binding codes of conduct for judges do not show higher ethical compliance than UK and Canada, that have non-binding ethical guidelines. It is therefore not the rules that secure ethical compliance, but something outside and maybe superior to rules. We explore this something in the next question.

### 5.4 Research Question 3. Is the learning and practice of virtue ethics the missing therapy to the ethical challenges among Kenyan Judges?

The rule-based ethical regime has failed to secure ethical conduct among the Kenyan judges. The failure of a rather robust ethical regime is a demonstration that ethical conduct cannot be secured by compulsion. Aristotle was of the wise opinion that ethics cannot be codified, Jacobs, (2022). The ethical judge must have certain virtues, and in as much as the judge must act on certain ethical rules, ethics require exercise of judgment based on moral knowledge and not merely a matter of complying with rules, Jacobs, (2022).The learning and practice of virtue ethics is absent in the Kenyan ethical regime for judges. The professional ethics taught at the Universities' LL.B program and the Kenya School of Law Advocate Training Program is largely unconcerned with the philosophical underpinnings of virtue and morals but pay much premium to the do's and do nots of the profession, this approach leaves the advocates with no moral knowledge on why they ought to behave and act in a certain manner but rules, Peter Kwenjera, (2016). Since judges are sourced from this pool of advocates, they suffer the same ethical deficiency that is lack of moral knowledge. In as much as "membership in a profession obligates" adherence to ethical principles and standards particular to the professional technicalities and professional virtues, the professional ethical norms should not be abstract, they cannot be justified if they do not agree with the virtues of ethics, in this sense to be an ethical professional, the professional necessarily need to be an ethical person, Campbell, (2007).

The provisions in the prevailing curriculums in the elementary education institutions suffer a want of elaborate ethical education, Peter Kwenjera, (2016). Concerning judges' training at the Kenya Judiciary Academy (KJA) formerly JTI, the SOJAR 2020/2021 reported that the curriculum "seeks to ensure that … there is a balance in terms of training programs related to substantive law, judicial management, decision making, social context, information and ICT, and judicial wellness programs," SOJAR 2021. Ethics and moral Knowledge training does not feature in key concerns of the curriculum.

In the reporting years 2011/2012, 2012/2013, 2013/2014, 204/2015, 2015/2016, 2016/2017,2017/2018, 2018/2019, 2020/2021 and 2021/2022 training programs and judges' annual colloquiums were held for judges but none of them was concerned

with ethics (moral knowledge). The SOJAR 2019/2020, The Judiciary of Kenya, (2021), reported that, the Annual Judges' Colloquium theme was "Balancing Judicial Independence and Accountability". Consequent to the theme a paper titled "Judicial Independence, Accountability and Integrity" was presented, and that is the closest issues of ethics was at play in judges' trainings and colloquiums.

Learning ethics and gaining moral knowledge is evidently a life skill that capacitates a person with the willingness and desire to be guided by virtues in their actions and decision making, Rispah Wepukhulu et al, (2019). Moral education is a proven means of securing ethical conduct and to achieve this, learning institutions should be mandated to teach ethics, Rispah Wepukhulu et al, (2019). According to Githui, research carried out in Kenya found that students who undergo ethical training are more productive, and recommended that learning of ethics need to be included in all the training and educational curriculum, Donatus Githui, (n.d.).

Moral knowledge as a good does not just happen by some luck nor is it fortuitous, one must make a deliberate effort to acquire it, in this sense it must not only be learned but cultivated, the philosopher opined "..happiness seems however, even if it is not god-sent but come as a result of excellence and some process of learning or training; to entrust to chance what is greatest and most noble would be a very defective arrangement", Aristotle, (2000,9). To overcome ethical challenges, the judges must have moral knowledge. Therefore, they need to be brought up in that knowledge, they must be led to grow through the path of virtue ethics.

Judges must have proper knowledge of what is morally good and what is not, it is only then that they will be able to make a right moral decision, and to do this they must learn and inculcate in themselves moral knowledge, the philosopher says "Now each man judges well the things he knows, and of these he is a good judge…..and the man who has received an all-round education is a good judge in general", Aristotle, (2000,1.3).

The teaching of judicial ethics in as much as it enlightens the judges on what is acceptable and unacceptable behaviour, does not however guarantee the formation of ethical values in the individual judges, Peter Kwenjera, (2016).The mere possession

of moral knowledge maybe of no effect as knowledge without action is useless, it is necessary that the Judges put their moral knowledge in to activity by making right moral decisions. The philosopher opined "it makes …no small difference whether we place the chief good in possession or in use, in state or in activity. For the state may exist without producing any good result …. But the activity cannot; for one who has the activity will of necessity be acting and acting well", Aristotle, (2000,1.8). In the Bible a story is told of some gentlemen who were given some money, and whereas the others invested their share, one stored it safely and had no return other than what he was given, his possession of the money did not profit him, and so is the mere possession of moral knowledge without activity, the philosopher opined, "For to such persons as to the incontinent, knowledge brings no profit, but to those who desire and act in accordance with rational principle, knowledge about such matters will be of great benefit", Aristotle, (2000,1.3).

If judges are to be ethical in their conduct, they must always be guided and directed by their moral knowledge to decide well, not only for the goods that are easy to acquire but also for the goods that are most difficult to acquire, it is only then that they will attain ethical excellence. In Aristotle we find that, the highest end to which our moral activities tend, is only proper to the human being insofar as it is a virtuous activity of the soul, Aristotle, (2000,1.9).

The moral knowledge through the first moral principle of synderesis (which is inherent in human nature), directs us to do good and avoid evil, and through this we are able to attain the highest end, the philosopher had this to say, "It seems to be also from the fact that it is a first principle; for it for the sake of this that we all do all that we do, we claim, something prized and divine", Aristotle, (2000,1.12). The goods that we seek by the proper use of our moral knowledge are not those that are of the body but those that are of the soul, "By human virtue we mean not that of the body but that of the soul", Aristotle, (2000,1.12).

All men inherently possess the knowledge of the first principle directing them to do good and avoid evil, they are not however equal achievers, some by their own individual efforts are more and better guided than others, Gilson, (1978). Moral knowledge is of the soul, and that which is of the soul ought to be rational, for in this

we are distinguishable from the animals, but just like for the good we choose there is evil we decline, the rational soul does not rule unopposed, "No doubt, however, we must non the less suppose that in the soul too there is something contrary to the rational principle, as we said at any rate in the continent man it obeys the rational principle", Aristotle, (2000,1.12). The part that is contrary to the rational part is the irrational part, and it is has two parts namely the vegetative and the appetitive part, Aristotle, (2000,12). The vegetative part lacks activity and does not participate in the rational principle. The appetitive part (equivalent of Plato's dark horse) is active and participates in the rational principle in the sense that it can be governed and directed by the rational part of the soul, Aristotle, (2000,1.12).

When the appetitive always obeys the directives of the rational part, and this happens only in men who possess moral knowledge and who have trained themselves in exercise of the virtue of self-restraint and bear the desire to attain the highest end, it results into a morally good act, Aristotle, (2000,1.5). However, in the incontinent men the appetitive does not obey the rational principle and it is them who thrive in acts that are unethical (morally bad). Moral knowledge is informed by and must agree with reason which defines the qualities of the individual. The possession of proper moral knowledge thus requires, the individual judge to make deliberate efforts to gain more in moral habits, that is virtues.

### 5.5 Summary

For every action there is an equal and opposite reaction. For a virtuous act, the equal and opposite reaction takes the form of vice. Virtue does not exist without opposition nor thrive automatically without help. Accordingly, virtue need to be cultivated and natured by the individual judge. Moral knowledge and the acquisition of virtues calls for a deliberate effort and courageous desire by an individual person. This involves learning and practice, for knowledge is a primary pre-requisite to ethical conduct yet knowledge alone does not suffice.

### 5.6 Conclusion

The extant Kenyan ethical regime on the conduct of judges is robust and rich both in its prohibitions and sanctions but has spectacularly failed to secure ethical conduct among the judges, proving nonresponsive to the ethical challenges among the judges.

The ethical challenges among judges have evidently defied the extant ethical regime. This failure of enactments calls for a paradigm shift from external control to internal controls, from enactments to virtues.

The Codes of Conduct are important in the governance of judges' ethics but are not the solution to the ethical challenges among judges. The Codes are important in providing ethical guidance tailored to the judges' duty and environment. Whereas there is need to punish unethical conduct, ethical compliance is not secured by sanctions. There is no evidence of ethical compliance in the jurisdictions with Codes of Conduct that sets sanctions (disciplinary/binding codes) any better than those with Codes of Conduct that do not set sanctions (aspirational/non-binding codes).

Ethical conduct cannot be a function of enactments alone. The desire for ethical judges must be directed not at merely 'tightening' rules and penalties on the conduct of judges but at the making of ethical judges. The making of ethical judges is an interior formation of moral habits and virtues, which then guide and control the external actions and decisions of judges. Ethics secured by law a lone is (in my opinion) a hyena in a sheep skin, trust it not with your flock.

## 5.7 Recommendations

### *5.7.1 Introduction*

The research findings demonstrate beyond peradventure that there are indeed enough enactments quantitatively and qualitatively, insofar as judges' conduct is concerned. The place of ethics in our Constitution need not be gainsaid, the Tribunal set up to investigate the conduct of Deputy Chief Justice Nancy Baraza as she then was, in concluding that it was necessary to include the broad range of constitutional ethical values in the standard of proof applicable in investigating the conduct of the judge, opined thus:

> From the perspective of Social Justice, there are basic ethical values presupposed and implied in the interpretation and application of Articles 10, 28, 73 and 168 of the Constitution of the Republic of Kenya, 2010. Thus, the evaluation of conduct of the holders of public office at all levels extends beyond the provisions and limits of legislation. It includes and presupposes the social domain whose expectations are taken for granted within society though

not expressed in written law Tribunal to Investigate the Conduct of the Deputy Chief Justice of the Republic of Kenya, (2012)eKLR.

The place of ethical values as necessary governing tools of the conduct of judges cannot be gainsaid. The people of Kenya have expressed their expectations on the conduct of judges and to avoid being second guessed, enacted these expectations in the Constitution, the Judicial Service Act and the Judicial Code of Conduct and Ethics. These expectations have been met with disappointment. I make the following recommendations intended at offering a solution to the ethical challenges among Kenyan judges.

### *5.7.2 Education, Training and Mentorship*

In the life of man, he goes through trials and tribulations, he receives those that cause suffering and those that cause joy, a bit of either does not upset the equilibrium but excess does, the philosopher observed that:

> Now many events happen by chance, and events differing in importance; small pieces of good fortune or of its opposite clearly do not weigh down the scales of life one way or the other, but a multitude of great events if they turn out well, will make life more blessed … while if they turn out ill they crush and maim blessedness; for they both bring pain with them and hinder many activities, Aristotle, (2000,1.9).

However for the man who possesses moral knowledge and has it in activity so that he is always guided by the moral principle of his soul and he judges well on moral issues with patience and restraint, even the most suffering will not deem his happiness, Aristotle says "Yet even in these nobility shines through, when a man bear with resignation many great misfortunes, not through insensibility to pain but through nobility and greatness of soul", Aristotle, (2000,1.9). That is the continent man, he will not out of dire poverty justify stealing because his moral knowledge will always direct him against theft. The philosopher opined "For the man whom is truly good and wise we think bears all the chances of life becoming and always makes the best of circumstances", Aristotle, (2000,1.9).

Judges face numerous temptations in the course of their duty. The litigants appearing before them are not necessarily ethical, and a party of them would in some cases attempt to compromise the judges to find in their favour. This can be done either by offers of material gain and favours or by threats and coercion. The judges' friends, relatives and even colleagues also find themselves in judicial proceedings and the temptation to 'help' them out can be overbearing on a judge. To overcome these 'chances of life' requires nobility and greatness of soul', and this is only available to the judge who has been educated and trained in ethics and has acquired moral knowledge.

The common man we see in our society identifies happiness with wealth and worldly pleasures, and the world indeed honours wealth, but Aristotle defines the highest end to include honour, suffering and misfortunes, he says " For the many, it is some plain and obvious thing; like pleasure, wealth, or honour, Aristotle, (2000,1.4), ….But people of superior refinement and of active disposition identify happiness with honour … with the greatest sufferings and misfortunes; but a man who was living so, no one call happy", Aristotle, (2000,1.5). We can take for instance, of a continent judge who declines to cooperate in a scheme to legitimise an illegal act of the executive and is consequently harassed, humiliated, and made to suffer by the powers of the executive, he will be a man of honour and happy man, yet no one will deem him happy on account of his suffering.

The moral good is different in every human activity but it is properly "that for whose sake everything else is done. In medicine this is health, in strategy victory, in architecture a house, in any other sphere something else, and in every action and pursuit, the end", Aristotle, (2000,1.7). In the act of judging, the end is justice. Moral acts such as of speaking the truth or giving alms are ends which are good in themselves, but in speaking the truth and in giving alms we are constructing a whole moral knowledge. Judges need to practice virtue in all respects, as opposed to only in their judicial function, so as to enable them build and inculcate virtue ethics The philosopher said "honour, pleasure, reason and every virtue we choose indeed for themselves, but we choose them also for the sake of happiness, judging that by means of them we shall be happy", Aristotle, (2000,1.7).

It is practical to bend a young tree and direct it to a desired direction and shape but for a mature tree such direction will not work. The education and training of judges on ethics and moral knowledge need to start from their early education at undergraduate level, so that by the time they are qualified to be judges they have acquired moral knowledge. It does not help to start training judges on moral knowledge only when they become judges. This approach leads to the technical deontological application of ethics by judges due to lack of moral knowledge hence the continued challenges of ethics among the Kenyan judges.

Heinrichs et al., (2013) notes that, "…education is interested in intentional change", ethical education leads to the acquisition of moral knowledge. Ethical conduct is an external exhibition of internal operations of moral judgment, Heinrichs et al., (2013). It is essential for judges to be specifically trained on ethical conduct and virtue formation as a competency necessity for the duty of judging, Peter Kwenjera, (2016). Judges are sourced from a pool of advocates. The education and training of all lawyers need therefore to focus on moral education. Accordingly, this study recommends that, the Council of Legal Education need to make it mandatory for legal education providers both at undergraduate and at the Advocates Training Programme levels to have in their curriculum virtue ethics and moral education course as a compulsory core unit. From this large pool of advocates who have acquired moral education, the best in the practice of virtue ethics should be considered for duty of determining disputes in the superior courts.

The training of judges on ethics at the Kenya Judiciary Academy should then be more of a refresher/continuous development course as opposed to an introductory/induction course. The training should then be designed to guide the judges on how to employ their moral knowledge on the specifics of judicial ethics. Beck et al., (2016) noted that moral education is "aimed not at those who lack practical wisdom and moral virtue but at those who possessing those characteristics, nevertheless fail to do as they aught because they do not know what they are doing". Equally important is the practice of mentorship. The Kenya Judiciary Academy need to identify experienced and eminent ethicists to mentor judges about ethics.

### *5.7.3 Recruitment Qualifications*

In Aristotelian perspective man's moral acts, like all things necessarily intend to achieve some good, he explains it, "Every art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim", Aristotle, (2000,1.1). This good at which a thing aims is the end, and the end is superior to the thing(s) that aim at it "…. It is the nature of the products to be better than the activities...the end of medical art is health, that of shipbuilding a vessel, that of strategy victory, that of economics wealth", Aristotle, (2000,1.1). But of the goods there is also a hierarchy insofar as some goods are pursued to achieve superior goods "ends of master arts are to be preferred to all subordinate ends, for it is because of the former that the latter is pursued", Aristotle, (2000,1.1).

The requirement for a competitive and transparent process in the recruitment of judges (vide *Article 171, 2 of the Constitution)* is intended to have the best men and women occupy the seats of judges to meet the expectations and aspirations of Kenyans that when issues fall for adjudication before the judges, justice shall be done to all irrespective of their status. To achieve this, judges must be recruited only from among those who have been trained and educated in ethics and moral knowledge.

The expectations of Kenyans is that persons being appointed to offices of judges must be persons who have 'a high moral character' (vide *Article 166, 2, c of the Constitution*). It is not merely a seasonal moral character that is expected but demonstrable consistent history of honesty and high moral character (vide *section 13 c of the First Schedule to the JSC Act, 2011*). These expectations are not being met by JSC in their recruitment of judges. The interviews have been largely concerned with the candidate's knowledge and appreciation of the law (intellectual skills), judicial precedents, and judicial management.

The question of moral character is given an abstract attention and only come to the fore if and when an objection against a candidate is made on such grounds, but even then, such objections are subjected to high standards of proof which can hardly be met by the objectors. Absent any objection, JSC has been assuming the high moral character of the candidates. Instead of tasking the candidates to demonstrate their

consistent history of high moral character, JSC has been gifting the candidates a presumption of high moral character, such that the candidates are presumed to be of high moral character until proved otherwise. This presumptive prism is not only erroneous but contrary to the expectations of Kenyans and is one of the main reasons JSC still recruit judges with ethical challenges. I recommend a legislative amendment of the JSC Act, 2011introducing a provision making it mandatory for JSC to task candidates during the interviews to demonstrate their consistent history of high moral character as a primary prerequisite to recruitment to the offices of a judge.

JSC are not and have refused to be accountable on their recruitment function. The selection and recommendation for appointment is opaque. Kenyans can therefore not know the reasons for selection and recommendation for appointment of a particular candidate and not the other, the process in this sense does not lend itself to any audit. Further the procedure of determination of the successful candidates by way of a majority vote lends itself to the politics of JSC, lobbying, horse-trading and external influences defeating the essence of merit-based recruitment and allowing unethical persons to assume offices of judges. The merit and benefits of public and open interviews are negated by the opaque and unaccountable selection and recommendation for appointment process. Judges who do not have consistent high moral character have found space in the judiciary due to this unaccountable process which is contrary to the expectations of Kenyans that the selection process should be based on merit. Other than intellectual abilities and practical skills, moral qualities is a necessary evaluation criteria for merit, Van Smit et al, (2015). This study recommends a legislative amendment of the JSC Act, 2011, to make it mandatory for JSC to avail a score sheet particularizing the performance of the candidates and detailing the reasons for the selection and recommendations made. The best performers need to be selected meritoriously and not by way of a vote. The decision of JSC on recruitment should then be available for judicial review.

### *5.7.4 Disciplinary Framework*

The question of morality and ethics is one that can be straight forward or complicated as one wills it to be. It is common to be faced with the challenging question of 'whose morality?' mainly from relativists whenever one adjudges an act to be immoral. Jacobs, (2022) observed that, "The amoralist regards moral considerations as either

wrongheaded, unimportant, or otherwise seriously objectionable". Ethics for judges cannot be left for personal choice, the unethical conduct of judges further to affecting them internally, affects the public at large. Ethical regimes provide for the ethically right and wrong actions with their attendant good and bad, virtues and vices, and rewards and punishment for ethically praiseworthy and blameworthy actions respectively, Zimmerman, (2010). Whereas ethical actions call for reward, unethical actions must be punished hence the need to take disciplinary measures against judges. Sankar, (2000) identifies three values, the protection of which necessitates disciplining of judges:

- Democratic Public Accountability – the public must retain control over their government to validate the surrender of their power to the government, it is only then that the public may safely surrender their judging power to the judges. Without accountability judges may become despotic, care must however be taken to maintain a mean otherwise democratic accountability in its excess poses a threat to judge's independence.
- Fidelity to the Rule of Law – ensures that a judge's decision is informed by neutral principles as opposed to personal preferences.
- Adherence to Public Norms of Professionalism – ensures that in the exercise of their judicial authority judges retain the respect of those who are subjected to their authority. This is what is referred to as public confidence. Lack of public confidence in the judges renders their work meaningless and maybe worthless.

I find appropriate and adopts Stolz, (1969) four characteristics of a good mechanism for discipling judges:

- Antiseptically of politics and partisanship.
- Confidential at least up to the point of formal hearing.
- Supported by a permanent staff for investigation and informal persuasion.
- Procedurally fair to the judge who is being investigated.

The Kenyan mechanism is largely satisfactory when measured against these four characteristics. The process is free of political persuasion and partisan interests, however since the tribunal is ad hoc and unilaterally appointed by the President (a political actor and holder of an office whose decisions or decisions of interest are subject to judges' action), the risk-possibility of the President appointing cronies or persons amenable to political control as tribunal members with the instructions to

'save' a politically correct or friendly judge is not remote. To ameliorate the risk, this study recommends a constitutional amendment amending *Article 168 (5) of the Constitution* to provide that the judges being appointed to the tribunal be judges or retired judges from common law jurisdictions excluding Kenya and members being appointed to the tribunal be persons who have no association with the President, the judge, and any political party. Further constitutional amendment is recommended to amend *Article 168 (8) of the Constitution*, to allow JSC or the complainant to appeal the decision of the tribunal if aggrieved. Allowing only one party (the judge) the right of appeal is unfair and unjust, as it fails to consider the rights of the complainant, and worse still, allows a bad decision of the tribunal to stand.

The only disciplinary measure that can be taken against a judge is the removal from office, and there is merit in the position that not any breach of the Code of Conduct should necessarily lead to removal of a judge from office, Van Smit et al, (2015). It follows that, judges get away with unethical conducts that are or are deemed not to warrant removal from office. This encourages these unethical conducts to pass as permissible and in turn clothe them with a false ethical character. This study recommends a constitutional amendment, amending *Article 172 (1) of the Constitution* to provide for powers of JSC to take other disciplinary measures against judges when the breaches in question do not warrant removal. These measures may include for instance admonition letters, monetary fines. This study takes the view that disciplinary measures are not intended to injure but as "a way of respecting the offender as a rational agent, and … help the offender acknowledge his wrong and motivate him to self-correct" Jacobs, (2022). In this sense further amendment is recommended to empower JSC to offer a resignation window to judges whose conduct warrant the removal process. Resignation is less embarrassing to a judge than the removal process, further it will save on the resources employed in the tribunal processes.

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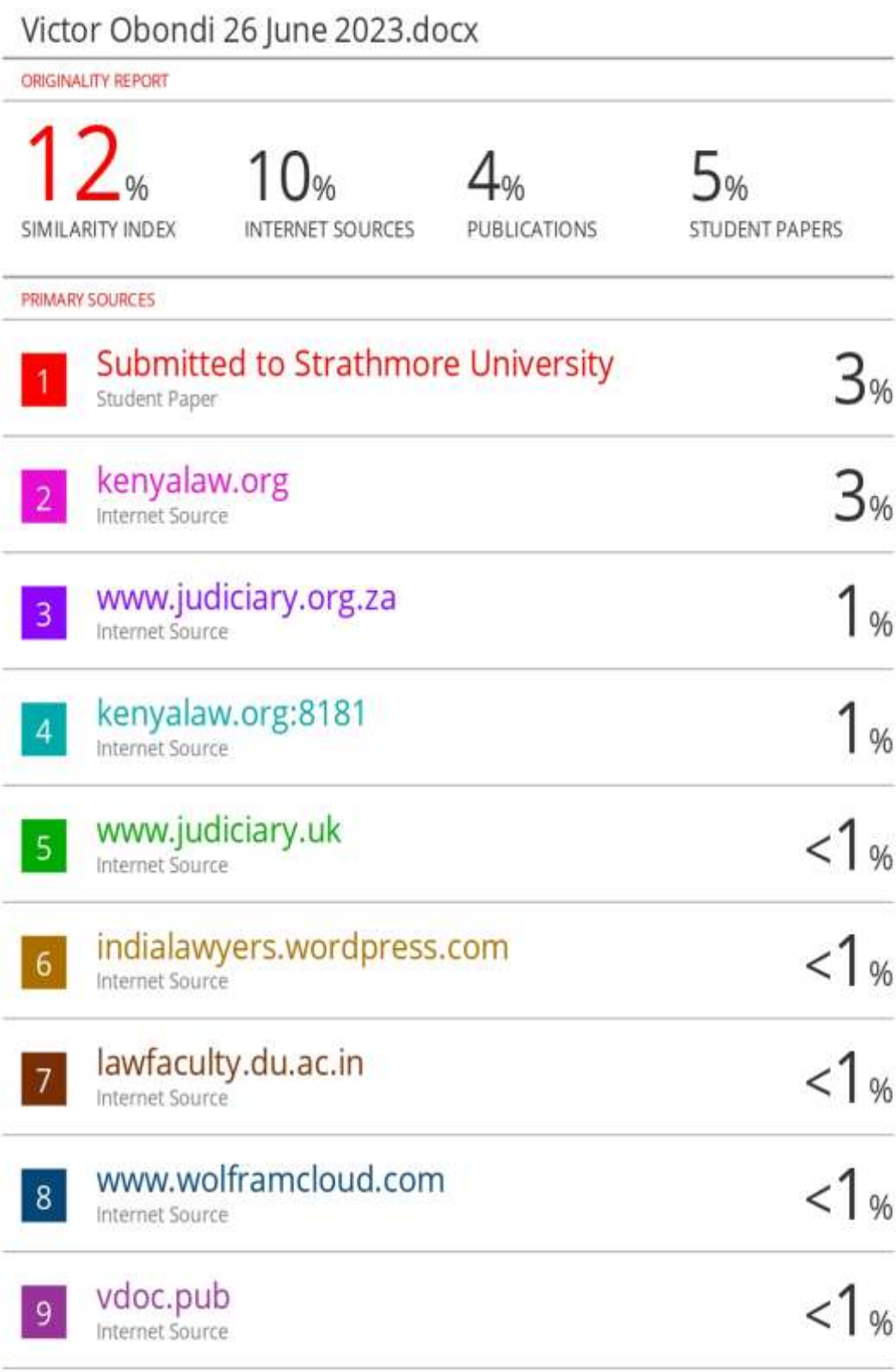
# APPENDICES

**Originality Report**



Victor Obondi 26 June 2023.docx

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**Ethical approval**

Strathmore UNIVERSITY

**18th May 2023**

Mr Obondi Victor,
Obondiv@gmail.com

Dear Mr Obondi,

**RE: An Inquiry into the Efficacy of the Kenyan Ethical Regime on the Conduct of Judges**

This is to inform you that SU-ISERC has reviewed and **approved** your above **SU-masters** research proposal. Your application reference number is **SU-ISERC1760/23.** The approval period is from **18th May 2023 to 17th May 2024.**

This approval is subject to compliance with the following requirements:

i. Only approved documents including (informed consents, study instruments, MTA) will be used.
ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-ISERC.
iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-ISERC within 72 hours of notification.
iv. Any changes anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-ISERC within 72 hours.
v. Clearance for the export of biological specimens must be obtained from relevant institutions.
vi. Submission of a request for renewal of approval at least 60 days prior to the expiry of the approval period. Attach a comprehensive progress report to support the renewal.
vii. Submission of an executive summary report within 90 days of completion of the study to SU-ISERC.

Before commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) https://research-portal.nacosti.go.ke/ and obtain other clearances needed.

Yours sincerely,

for: **Mr Ambrose Rachier,**
**Chairperson; SU-ISERC**

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