

**JUDGING JUDGES: DETERMINING THE APPROPRIATE PROCEDURAL  
FRAMEWORK THAT THE JSC CAN USE TO HANDLE CASES OF JUDGES'  
CRIMINAL MISCONDUCT**

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## DECLARATION

I, TIMONA PEPELA CHORE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.



Signed: .....

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This dissertation has been submitted for examination with my approval as University Supervisor.

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## **ABSTRACT**

In recent years, we have witnessed an unprecedented number of instances in which judges have been accused of criminal behaviour and other serious acts of misconduct. In the event of such misconduct, the Judicial Service Commission (JSC) should be able to intervene and take appropriate disciplinary measures against the judge in question. However, in cases of criminal misconduct by judges, intervention by the JSC has proved to be problematic as it has led to a clash between the JSC's constitutional mandate to deal with judges' misconduct and the Director of Public Prosecution's (DPP) prosecutorial powers. It is within this background that this study seeks to determine the scope of the JSC in dealing with cases of judges' criminal misconduct and thereafter propose an appropriate legal procedural framework that the JSC can use to deal with cases of judges' criminal misconduct.

To determine the scope of the JSC in dealing with cases of judges' criminal misconduct. The study assesses the cases of judges' misconduct that the JSC has handled with the aim of establishing whether the JSC has a limited or unlimited scope when it comes to handling cases of judges' misconduct. In identifying an appropriate legal procedural framework that can be used by the JSC in dealing with judges' criminal misconduct. The study does a comparative study that assesses Nigeria's legal procedural framework governing judges' criminal misconduct with the aim of borrowing best practices from the Nigerian framework. The study uses Nigeria in the comparative study because Nigeria's legal procedural framework governing judges' criminal misconduct adopts an elaborate procedural mechanism that balances their judicial disciplinary body's constitutional mandate to deal with cases of judges' criminal misconduct vis-à-vis their Directorate of Public Prosecutions mandate. The study further seeks to propose a legal procedural framework that safeguards judicial independence and promotes judicial accountability. The study realises its objectives through the use of case law and literature review.

## **LIST OF ABBREVIATIONS**

- 1) DPP- Director of Public Prosecutions.
- 2) JSC- Judicial Service Commission.
- 3) CoK- Constitution of Kenya.
- 4) NJC- National Judicial Council

## LIST OF CASES

- 1) *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.
- 2) *Nganjiwa v FRN* (2017), Court of Appeal of Nigeria.
- 3) *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR.
- 4) *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others* (2018) eKLR.
- 5) *Miguna Miguna v Director of Public Prosecutions & 2 others* (2018) eKLR.

## **LIST OF STATUTES**

- 1) *Anti-Corruption and Economic Crimes Act* (Act No. 2 of 2003).
- 2) *Judicature Act* (Act No. 16 of 1967).
- 3) *Judicial Service Act* (Act No. 1 of 2011).
- 4) *Penal Code* (Act no. 18 of 1948).
- 5) *Public Officer Ethics Act* (Act No. 4 of 2003).
- 6) *The Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013).

# CHAPTER 1

## 1.1 Background of the problem

In recent years, we have witnessed an unprecedented number of instances in which judges have been accused of criminal behaviour and other serious acts of misconduct.<sup>1</sup> The current deputy chief justice, Philomena Mwilu was recently accused of being involved in a series of economic crimes<sup>2</sup>; the former deputy chief justice, Nancy Baraza was accused of physically assaulting a security guard<sup>3</sup>; Justice Mbalu Mutava recently faced corruption allegations which led to his removal from office<sup>4</sup> and Justice Philip Tunoi also recently faced corruption allegations.<sup>5</sup>

The abovementioned cases of misconduct and criminal behaviour among judges, raises major concerns regarding the adherence to ethical and professional standards of conduct among judicial officers. To maintain and restore public confidence in the integrity and impartiality of the judiciary, the 2010 Constitution established the Judicial Service Commission (JSC) with the mandate of disciplining or otherwise removing from office judicial officers accused of engaging in misconduct.<sup>6</sup> The JSC when exercising this mandate also safeguards and enhances judicial independence, because if other arms of government are given disciplinary powers over the judiciary, judicial independence might be compromised.<sup>7</sup> As adverse decisions against the other arms of government might trigger retaliatory investigations and prosecutions against judges, especially from the executive.<sup>8</sup>

In a recent case, *Honourable Philomena Mwilu vs DPP and 3 others*, the JSC's constitutional mandate to deal with cases of judges' misconduct clashed with the DPP's constitutional prosecutorial powers.<sup>9</sup> In the case, the petitioner (a judge) sought orders to stop the

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<sup>1</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 142 and 143.

<sup>2</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>3</sup> Ochieng W, 'The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective' in Ghai J (ed), 12 ed, *Judicial accountability in the new constitutional order*, International Commission of Jurists Kenya, Nairobi, 2016, 62.

<sup>4</sup> Ochieng W, 'The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective', 62.

<sup>5</sup> Karanja S, 'Tribunal ends 200 million shilling bribery probe against Justice Tunoi' Daily Nation, 27 June 2016 -< <https://nation.africa/news/Tribunal-ends-Sh200m-bribery-probe-Tunoi/1056-3269652-f3eflaz/index.html> >- accessed on 30 August 2020.

<sup>6</sup> Article 172(1), *Constitution of Kenya* (2010).

<sup>7</sup> Bhushan P, 'Securing Judicial Accountability: Towards an Independent Commission' 43(42) *Economic and Political Weekly*, 2007, 16.

<sup>8</sup> Shaman j, 'Judicial Immunity from Civil and Criminal Liability' 1(27) *San Diego Law Review*, 1990, 28.

<sup>9</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

DPP from prosecuting her, arguing that the JSC disciplinary process had to be initiated and concluded first.<sup>10</sup> The DPP in his response argued that the JSC and court processes are distinct and not interdependent, as the latter is penal and the former disciplinary.<sup>11</sup> The court, however, citing judicial independence ruled in favour of the petitioner.<sup>12</sup> The DPP being unsatisfied with the High Court decision, filed an appeal which is currently being heard and determined before the Court of Appeal.<sup>13</sup> This means that the High Court's position in *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* is not firmly established and depending on the arguments made by the parties and how the Court of Appeal analyses and determines the matter, it can either uphold the High Court decision or overturn it.

The clash between the JSC's and DPP's mandate in handling cases of judges' criminal misconduct is procedural in nature. As it revolves around which process should be initiated first. There are three possible processes that can be used to handle cases of judges' criminal misconduct between the two entities and each process has implications on the judiciary's ability to properly function as an independent arm of government.

The foremost process entails the DPP process being initiated first before the JSC process.<sup>14</sup> This process has been faulted because there are concerns that the executive can use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution.<sup>15</sup> Though the office of the DPP is established as an independent constitutional office in Kenya.<sup>16</sup> A series of recent events involving criminal cases handled by the office of the DPP casts doubts on the independence of the office.<sup>17</sup> The conduct of the DPP in the cases creates the impression that the DPP is operating under the control of the executive.<sup>18</sup> As the DPP's actions in the cases, seem to

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<sup>10</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>11</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>12</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>13</sup> Kamau M, 'DCJ Mwilu's battle with DPP heads to appeal court' *The Standard*, 4 June 2019, 4.

<sup>14</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>15</sup> Shaman J, 'Judicial Immunity from Civil and Criminal Liability', 28.

<sup>16</sup> Article 157 (10), *CoK*(2010).

<sup>17</sup> Havi N, 'An overzealous DPP is a peril to the rule of law' *The Platform*, 2019.

<sup>18</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

align with executive interests rather than the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.<sup>19</sup> An example of such a case is the Miguna Miguna saga.<sup>20</sup>

The subsequent process entails the DPP and JSC process being initiated simultaneously.<sup>21</sup> This process has also been faulted because it will result in a court and a tribunal hearing and determining the same matter simultaneously.<sup>22</sup> Which becomes problematic when the court and tribunal reach different conclusions on the same matter at the same time. For instance, the tribunal can acquit the judge while the criminal court convicts the judge. This creates a legal conundrum as if the tribunal acquits the judge he or she will have to be reinstated but at the same time he or she has been convicted of a criminal offence and may have to serve a jail term. Having a judge who has been convicted for engaging in a criminal offence hold office has the effect of dampening public confidence in the integrity and impartiality of the judiciary. As a judge whose integrity and impartiality is questionable will be performing judicial functions.

The last process entails the JSC process being initiated first before the DPP process is initiated.<sup>23</sup> This is the legal procedural framework the study seeks to propose as it promotes judicial independence and safeguards the JSC's constitutional mandate to deal with judges' misconduct. Judicial independence is promoted as the JSC, an independent constitutional body, deals with cases of judges' misconduct at the first instance. The JSC is most suited for this role as it has safeguards to protect judges against malicious or frivolous claims as it always conducts preliminary investigations to establish whether a complaint establishes

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<sup>19</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

<sup>20</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

<sup>21</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>22</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>23</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

a prima facie case.<sup>24</sup> This is unlike the court process where no preliminary investigations are conducted by the court. As the DPP directly charges and prosecutes a judge once a criminal complaint has been made. The veracity of the charges are usually determined at a later stage of the criminal trial process. This makes it possible for malicious prosecutions to be initiated against judges with the aim of exerting undue influence and pressure on them.

It is within this background that this study seeks to determine the scope of the JSC in dealing with cases of judge's criminal misconduct and thereafter propose an appropriate legal procedural framework that the JSC can use to deal with cases of judges' criminal misconduct. To determine the scope of the JSC in dealing with cases of judges' criminal misconduct. The study assesses the cases of judges' misconduct that the JSC has handled with the aim of establishing whether the JSC has a limited or unlimited scope when it comes to handling cases of judges' misconduct. In identifying an appropriate legal procedural framework that can be used by the JSC in dealing with judge's criminal misconduct. The study seeks propose a legal procedural framework that promotes judicial independence and enhances judicial accountability.

## **1.2 Statement of the problem**

Judges in their judicial capacity are sometimes involved in conduct that falls short of their ethical and professional standards.<sup>25</sup> In the event of such misconduct, the JSC should be able to intervene and take appropriate disciplinary measures against the judge in question.<sup>26</sup>

However, in cases of criminal misconduct by judges, intervention by the JSC has proved to be problematic. As it has led to a clash between the JSC's constitutional mandate to deal with judges' misconduct and the DPP's constitutional prosecutorial powers as was witnessed in *Honourable Philomena Mwilu vs DPP and 3 others*.<sup>27</sup>

It is within this context that this study seeks to determine the scope of the JSC in dealing with cases of judges' criminal misconduct and thereafter propose an appropriate legal procedural framework that can be used by the JSC to deal with judges' criminal misconduct.

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<sup>24</sup> *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR.

<sup>25</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>26</sup> Article 172(1), *Constitution of Kenya* (2010).

<sup>27</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR.

### **1.3 Statement of aim & objectives**

The aim of the study is to determine the scope of the JSC in dealing with cases of judges' criminal misconduct and thereafter propose an appropriate legal procedural framework that can be used by the JSC in dealing with cases of judge's criminal misconduct.

### **1.4 Objectives of the study**

To achieve the above-mentioned aim, this study is going to:

- 1) Assess the JSC's constitutional mandate to deal with judges' misconduct.
- 2) Assess cases of judges' misconduct handled by the JSC.
- 3) Determine how jurisdictions with similar constitutional and legal frameworks as Kenya deal with cases of judges' criminal misconduct.
- 4) Identify an appropriate legal procedural framework that can be used by the JSC in dealing with judges' criminal misconduct.

### **1.5 Hypothesis**

- 1) The JSC's scope in dealing with cases of judges' criminal misconduct has not been clearly defined in the JSC's regulations, statutes or the Constitution of Kenya 2010.
- 2) The JSC does not have an elaborate legal procedural framework that deals with cases of judges' criminal misconduct.
- 3) Jurisdictions with similar constitutional and legal frameworks as Kenya have elaborate legal procedural frameworks that deal with cases of judges' criminal misconduct.

### **1.6 Research questions**

- 1) What is the scope of the JSC in dealing with cases of judges' criminal misconduct?
- 2) How has the JSC previously handled cases of judges' criminal misconduct?
- 3) Why is the current legal procedural framework governing judges' criminal misconduct in Kenya not elaborate?
- 4) How do other jurisdictions with similar constitutional and legal frameworks as Kenya deal with cases of judges' criminal misconduct?
- 5) What is the appropriate legal procedural framework that can be used by the JSC in dealing with cases of judges' criminal misconduct?

## **1.7 Justification and significance of the study**

Judicial integrity, impartiality, accountability and independence are the foundational concepts upon which justice is administered and the rule of law is built upon. It is therefore in the best interest of members of the legal profession, litigants and members of the public in general that there be an integral, accountable, impartial and independent judiciary.

A judiciary without integrity, impartiality, accountability and independence is not only a threat to the administration of justice but also an anathema to the Constitution. This study seeks to enhance judicial independence and promote judicial integrity, impartiality and accountability by establishing an appropriate legal procedural framework that can be used by the JSC to deal with judges' criminal misconduct. Judicial independence is safeguarded as the study seeks to recommend a legal procedural framework under which the JSC's constitutional mandate to deal with judges' misconduct is maintained. Judicial integrity, impartiality and accountability are enhanced as the study seeks to recommend a framework under which judges are held accountable and liable for criminal misconduct they are involved in and appropriate disciplinary and penal measures are undertaken to curb such misconduct.

Whereas a lot of literature has been written on judicial misconduct within the context of judicial disciplinary bodies across many jurisdictions around the world. There is very little literature written by Kenyan authors, yet there are problems with Kenya's judicial disciplinary legal procedural framework. This study seeks to further expand Kenya's limited literature on judicial criminal misconduct.

## **1.8 Literature review**

### **1.8.1 Introduction**

This study seeks to determine the scope of the JSC in dealing with cases of judges' criminal misconduct and thereafter propose an appropriate legal procedural framework that can be used by the JSC in dealing with cases of judge's criminal misconduct. To achieve the above-mentioned aim, this study is going to analyse and review literature on judicial independence; judicial accountability; judicial disciplinary bodies and procedural frameworks used by judicial disciplinary bodies to handle cases of judges' misconduct. As they are the foundational concepts that build the legal procedural framework being examined by the study.

## 1.8.2 The mandate and scope of the judicial disciplinary bodies in handling cases of judges' misconduct

Judicial disciplinary bodies can be defined as entities that investigate complaints of judicial misconduct and discipline judges for engaging in misconduct.<sup>28</sup> Within the Kenyan context, the JSC is a judicial disciplinary body as it is constitutionally mandated to investigate complaints of judicial misconduct and discipline judicial officers for engaging in misconduct.<sup>29</sup> Sankar posits that the rationale for formulating judicial disciplinary bodies, is to achieve the following three main goals.<sup>30</sup> The first one is to ensure that judicial officers observe professional and ethical standards of conduct.<sup>31</sup> The second one is to facilitate adherence to the rule of law and safeguard judicial independence, this reflects a fundamental attribute of a properly functioning judicial system.<sup>32</sup> The last one is judicial accountability, which reflects the need to ensure that there are appropriate measures and mechanisms in place to ensure judicial officers act consistently with judicial values, norms, ethical, professional standards and the law.<sup>33</sup>

Overton discusses the three main circumstances when judicial disciplinary bodies exercise their disciplinary powers over judges.<sup>34</sup> The first circumstance is when a judge is accused of engaging in gross misconduct in contravention of statutes, ethical and professional standards of judicial conduct.<sup>35</sup> Within the Kenyan context, Oganyo posits that judicial misconduct is determined by the leadership and integrity values established under Chapter 6 of the Kenyan Constitution; the Judicial Code of Conduct and the provisions of the Public Officer Ethics Act among other relevant statutes.<sup>36</sup> The second circumstance is when a judge is convicted of a criminal offence and the third circumstance is when a judge is unable to perform his or her official duties.<sup>37</sup> This can be due to factors such as bankruptcy, physical and mental incapacity.<sup>38</sup>

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<sup>28</sup> Gray C, 'How judicial conduct commissions work' 3(38) *Justice System Journal*, 2007, 405.

<sup>29</sup> Article 172(1), *Constitution of Kenya* (2010).

<sup>30</sup> Sankar N, 'Disciplining the Professional Judge' 4(88) *California Law Review*, 1987, 1233.

<sup>31</sup> Sankar N, 'Disciplining the Professional Judge', 1233.

<sup>32</sup> Sankar N, 'Disciplining the Professional Judge', 1233.

<sup>33</sup> Sankar N, 'Disciplining the Professional Judge', 1233.

<sup>34</sup> Overton B, 'Grounds for judicial discipline in the context of judicial disciplinary commissions' 1(54) *Judicial Discipline and Disability Symposium*, 1977, 61.

<sup>35</sup> Overton B, 'Grounds for judicial discipline in the context of judicial disciplinary commissions', 61.

<sup>36</sup> Oganyo R, 'Justiciability of justice: the role of Judicial Service Commission in Kenya in the decisional independence of judicial officers' Published LLM Thesis, University of Nairobi, Nairobi, 2011.

<sup>37</sup> Overton B, 'Grounds for judicial discipline in the context of judicial disciplinary commissions', 61.

<sup>38</sup> Overton B, 'Grounds for judicial discipline in the context of judicial disciplinary commissions', 61.

Gray asserts that if a judge is found culpable for engaging in misconduct, judicial disciplinary bodies can impose sanctions on the judge in question.<sup>39</sup> The most common type of sanction imposed is removal from office.<sup>40</sup> Aside from removal from office, judicial disciplinary bodies usually: suspend judges; issue warnings or reprimands and in exceptional cases require the judge to undertake corrective actions such as issuing public apologies.<sup>41</sup>

Abramovsky and Edelstein argue that judicial codes of conduct are meant to preserve ethical and professional standards of conduct among judges and not to act as a basis for criminal liability.<sup>42</sup> According to them, judicial codes of conduct contain aspirational standards rather than explicit prohibitions. As a result, they can only be enforced by judicial disciplinary bodies and not prosecutors through the institution of criminal proceedings.<sup>43</sup> Abramovsky and Edelstein assert that judges can only be prosecuted for violating penal statute and not judicial codes of conduct.<sup>44</sup>

### **1.8.3 Elements of an appropriate procedural framework governing judges' misconduct**

An appropriate legal procedural framework for governing judges' misconduct should have the following two main elements.<sup>45</sup> The foremost element is that it should be able to safeguard judicial independence.<sup>46</sup> Judicial independence refers to the ability of the judiciary to work independently, free from interference by other arms of government, especially the executive.<sup>47</sup> It is one of the principles provided for in the Bangalore principles of judicial conduct and the Commonwealth (Latimer house) principles on the three branches of government.<sup>48</sup> These two instruments require states to ensure that judicial independence is safe-

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<sup>39</sup> Gray C, 'How judicial conduct commissions work', 405.

<sup>40</sup> Gray C, 'How judicial conduct commissions work', 415 and 416.

<sup>41</sup> Gray C, 'How judicial conduct commissions work', 415 and 416.

<sup>42</sup> Abramovsky A and Edelstein J, 'Prosecuting Judges for Ethical Violations: Are Criminal Sanctions Constitutional and Prudent, or Do They Constitute a Threat to Judicial Independence?' 3(33) *Fordham Urban Law Journal*, 2006, 145 and 146.

<sup>43</sup> Abramovsky A and Edelstein J, 'Prosecuting Judges for Ethical Violations', 145 and 146.

<sup>44</sup> Abramovsky A and Edelstein J, 'Prosecuting Judges for Ethical Violations', 145 and 146.

<sup>45</sup> Franceschi G, 'Judicial independence and accountability in light of the judiciary code of conduct and ethics of Kenya' in Ghai J (ed), 12 ed, *Judicial accountability in the new constitutional order*, International Commission of Jurists Kenya, Nairobi, 2016, 103 and 104.

<sup>46</sup> Franceschi G, 'Judicial independence and accountability in light of the judiciary code of conduct and ethics of Kenya', 103 and 104.

<sup>47</sup> Franceschi G, 'Judicial independence and accountability in light of the judiciary code of conduct and ethics of Kenya', 107 and 108.

<sup>48</sup> Principle 1, *Bangalore principles of judicial conduct*, 26 November 2002 and Principle 2, *Commonwealth (Latimer house) principles on the three branches of government*, 1 December 2003.

guarded and promoted. As it is an integral aspect of a properly functioning judicial system.<sup>49</sup>

Edwards argues that judicial independence is important as it ensures that the judiciary can work towards the realisation of justice, equality, fairness and the rule of law.<sup>50</sup> According to Nyanjong and Ochiel, judicial independence entails both institutional and individual autonomy.<sup>51</sup> Institutional autonomy refers to the ability of the judiciary as an arm of government to act independently from the other arms of government.<sup>52</sup> Individual autonomy refers to the capacity of judges to make independent decisions free from interference or pressure from government agents.<sup>53</sup>

The subsequent element is that it should be able to promote and enhance judicial accountability. Judicial accountability refers to the justification of the exercise of judicial powers, functions and operations to bodies having an oversight mandate.<sup>54</sup> Griffen asserts that there are three interdependent levels of judicial accountability: political, decisional and behavioural accountability.<sup>55</sup> Political accountability is concerned with the accountability of the judiciary to members of the public and other arms of government such as the legislature on matters such as the utilization of allocated funds.<sup>56</sup> Decisional accountability is concerned with the manner in which judges are held accountable for their rulings and decisions.<sup>57</sup> Lastly, behavioural accountability involves the aspect of judicial conduct being subject to disciplinary proceedings, in cases of misconduct or contravention of the law.<sup>58</sup>

On behavioural accountability, Bhushan argues that if external bodies or other arms of government are given disciplinary powers over the judiciary, judicial independence might be compromised.<sup>59</sup> According to Bhushan, an independent and impartial body needs to be

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<sup>49</sup> Principle 1, *Bangalore principles of judicial conduct*, 26 November 2002 and Principle 2, *Commonwealth (Latimer house) principles on the three branches of government*, 1 December 2003.

<sup>50</sup> Edwards H, 'Regulating judicial misconduct and divining 'good behaviour' for federal judges' (87) *Michigan Law Review*, 1989, 796.

<sup>51</sup> Franceschi G, 'Judicial independence and accountability in light of the judiciary code of conduct and ethics of Kenya', 107 and 108.

<sup>52</sup> Franceschi G, 'Judicial independence and accountability in light of the judiciary code of conduct and ethics of Kenya', 107 and 108.

<sup>53</sup> Franceschi G, 'Judicial independence and accountability in light of the judiciary code of conduct and ethics of Kenya', 107 and 108.

<sup>54</sup> Griffen W, 'Judicial accountability and discipline' 3(61) *Michigan Law Review*, 1998, 75.

<sup>55</sup> Griffen W, 'Judicial accountability and discipline', 75.

<sup>56</sup> Griffen W, 'Judicial accountability and discipline', 75.

<sup>57</sup> Griffen W, 'Judicial accountability and discipline', 75.

<sup>58</sup> Griffen W, 'Judicial accountability and discipline', 75.

<sup>59</sup> Bhushan P, 'Securing Judicial Accountability: Towards an Independent Commission' 43(42) *Economic and Political Weekly*, 2007, 16.

formed to handle disciplinary issues involving judges. Such bodies are usually judicial disciplinary bodies, such as the JSC.<sup>60</sup> Aside from enhancing judicial behavioural accountability, judicial disciplinary bodies also promote and enhance judicial political accountability as they create a platform through which members of the public can hold judicial officers accountable. For instance, within the Kenyan context, the JSC comprises of two members of the public who are appointed by the president with the approval of the National Assembly, in a process that involves public participation.<sup>61</sup>

#### **1.8.4 The problem with the current procedural framework governing judges` criminal misconduct in Kenya**

One of the rationales for the formulation of judicial disciplinary bodies, such as the JSC, is to facilitate judicial independence because if other arms of government are given disciplinary powers over the judiciary, judicial independence might be compromised.<sup>62</sup> As adverse decisions against the other arms of government might trigger retaliatory investigations and prosecutions against judges, especially from the executive.<sup>63</sup> For instance, in some jurisdictions, the executive has been known to use the office of the directorate of public or criminal prosecutions to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution.<sup>64</sup> In such jurisdictions, the executive usually exercises a certain level of control over the office of the directorate of public or criminal prosecutions.<sup>65</sup>

This is further illustrated by Gloppen within the context of judicial corruption. Corruption is one of the most prevalent forms of misconduct that leads to the prosecution of judges.<sup>66</sup> Gloppen asserts that corruption is a plague that affects many judicial systems and appropriate measures should be undertaken to eradicate corruption.<sup>67</sup> However, the measures should be undertaken with caution. As misuse of anti-corruption efforts by governments has had the effect of undermining judicial independence through unwarranted threats of

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<sup>60</sup> Bhushan P, 'Securing Judicial Accountability: Towards an Independent Commission', 16.

<sup>61</sup> Article 171, *Constitution of Kenya* (2010).

<sup>62</sup> Bhushan P, 'Securing Judicial Accountability: Towards an Independent Commission', 16.

<sup>63</sup> Shaman j, 'Judicial Immunity from Civil and Criminal Liability', 28.

<sup>64</sup> Shaman j, 'Judicial Immunity from Civil and Criminal Liability', 28.

<sup>65</sup> Shaman j, 'Judicial Immunity from Civil and Criminal Liability', 28.

<sup>66</sup>Gloppen S, 'Courts, Corruption and Judicial Independence' in Tina S and Williams A (ed), *Corruption, Grabbing and Development: Real World Challenges*, Edward Elgar Publishing, Northampton, 2014, 68.

<sup>67</sup> Gloppen S, 'Courts, Corruption and Judicial Independence', 68.

arrests, investigations and prosecutions geared towards making judges give in to executive pressure.<sup>68</sup>

The problem with the current legal procedural framework governing judges' criminal misconduct in Kenya is that the framework does not clearly establish a process that can be followed by the DPP and JSC when handling cases of judges' criminal misconduct. This means that it is possible for the DPP process to be initiated first before the JSC process. If the DPP process is initiated first before the JSC process when handling cases of judges' criminal misconduct, as was the case in *Honourable Philomena Mbeti Mwilu vs DPP and 3 others*.<sup>69</sup> There are concerns that the executive can use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution, which amounts to a threat on judicial independence.<sup>70</sup>

Though the office of the DPP is established as an independent constitutional office in Kenya.<sup>71</sup> A series of recent events involving criminal cases handled by the office of the DPP casts doubts on the independence of the office.<sup>72</sup> The conduct of the DPP in the cases creates the impression that the DPP is operating under the control of the executive.<sup>73</sup> As the DPP's actions in the cases, seem to align with executive interests rather than the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.<sup>74</sup> An example of such a case is

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<sup>68</sup> Gloppen S, 'Courts, Corruption and Judicial Independence', 73.

<sup>69</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 142 and 143.

<sup>70</sup> Shaman J, 'Judicial Immunity from Civil and Criminal Liability', 28.

<sup>71</sup> Article 157 (10), CoK(2010).

<sup>72</sup> Havi N, 'An overzealous DPP is a peril to the rule of law' The Platform, 2019.

<sup>73</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

<sup>74</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

the Miguna Miguna saga.<sup>75</sup>

### **1.8.5 How jurisdictions with similar constitutional and legal frameworks as Kenya deal with cases of judges' criminal misconduct**

Nigeria's constitutional and legal framework for dealing with judicial misconduct is similar to Kenya's. Nigeria has a judicial disciplinary body, the National Judicial Council, which can be equated to the JSC in Kenya.<sup>76</sup> As its composition, functions, procedure and model for dealing with judicial misconduct is similar to Kenya's JSC but with a few differences.<sup>77</sup> The major difference is that the NJC has powers to discipline judges (reprimand and suspend them) while the JSC only has powers to initiate the process of removing a judge from office.<sup>78</sup>

With regards to matters involving criminal judicial misconduct, the NJC has developed two categories of judges' criminal misconduct. The first category of judges' criminal misconduct encompasses criminal offences committed within the scope of judicial office such as bribery while the second category encompasses criminal offences committed outside the scope of judicial office such as rape, murder or assault.<sup>79</sup> Where a judge commits a criminal offence within the scope of his or her judicial functions or office, such judicial misconduct complaints have to pass through the NJC disciplinary process before being subjected to the criminal trial process.<sup>80</sup> However, where a judge commits a criminal offence outside the scope of his or her judicial functions or office, such judicial misconduct can be subjected

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<sup>75</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

<sup>76</sup> Article 153, *Constitution of Nigeria* (1999).

<sup>77</sup> For instance, the NJC is constitutionally mandated to perform the following functions: recommending to the president and state governors persons for appointment as judges at the national and state levels respectively; disciplining and recommending the removal from office of judges found culpable for engaging in misconduct; advising the president and state governors on any matter concerning the judiciary; collecting, controlling and disbursing judiciary funds; dealing with all policy and administrative matters involving the judiciary. Similarly, the JSC's constitutionally mandated functions in Kenya include; recommending to the president persons for appointment as judges; initiating the process of removing judges accused of engaging in misconduct from office; appointing, disciplining and removing from office registrars, magistrates and other judiciary staff; advising the national government on how it can improve on the administration of justice.

<sup>78</sup> Third schedule, *Constitution of Nigeria* (1999).

<sup>79</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>80</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

to the criminal trial process before being subjected to the NJC disciplinary process.<sup>81</sup> This framework was established in the Nigeria case of **Nganjiwa v FRN**.<sup>82</sup>

### **1.8.6 Conclusion**

The literature analysed above indicates that judicial disciplinary bodies, such as the JSC in Kenya, form an integral part of judiciaries across the world. As they not only ensure that judges adhere to their professional and ethical standards of conduct, but they also safeguard, enhance and promote judicial independence and judicial accountability. The literature further indicates that judicial disciplinary bodies' mandate when handling cases of judge's misconduct extends to ethical, professional and criminal misconduct.

The literature also highlights the problem with the current legal procedural framework governing judges' criminal misconduct in Kenya. The problem is that the framework does not clearly establish a process that can be followed by the DPP and JSC when handling cases of judges' criminal misconduct. If the DPP process is initiated first, there is a danger that the executive can use the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution.

Lastly, the literature indicates that jurisdictions with similar constitutional and legal frameworks as Kenya have elaborate legal procedural frameworks that deal with cases of judges' criminal misconduct. It is within this context that the study seeks to determine the scope of the JSC in dealing with judges' criminal misconduct and thereafter propose an appropriate legal procedural framework that can be used by the JSC in dealing with judge's criminal misconduct.

## **1.9 Research methodology**

The study will adopt a doctrinal research methodology. The doctrinal research methodology will entail the review and analysis of existing literature in the form of relevant primary and secondary sources. The literature to be analysed and reviewed will include statutes, case law, books, journals, reports, online internet resources and other relevant material.

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<sup>81</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>82</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

To determine the scope of the JSC in dealing with cases of judges' criminal misconduct. The doctrinal analysis assess the cases of judges' misconduct that the JSC has handled with the aim of establishing whether the JSC has a limited or unlimited scope when it comes to handling cases of judges' misconduct. The cases to be analysed include cases such the former Deputy Chief Justice Nancy Baraza's case, Justice Mbalu Mutava's case and Justice Philip Tunoi's case.

In identifying an appropriate legal procedural framework that can be used by the JSC in dealing with cases of judge's criminal misconduct. The doctrinal analyses does a comparative study that assesses Nigeria's legal procedural framework governing judges' criminal misconduct with the aim of borrowing best practices from the Nigerian framework. The study uses Nigeria in the comparative study because Nigeria's legal procedural framework governing judges' criminal misconduct adopts an elaborate procedural mechanism that balances their judicial disciplinary body's constitutional mandate to deal with cases of judges criminal misconduct vis-à-vis their Directorate of Public Prosecutions mandate.

### **1.10 Limitations**

Whereas a lot of literature has been written on judicial misconduct within the context of judicial disciplinary bodies across many jurisdictions around the world. There is very little literature written by Kenyan authors. As a result, the main limitation of the study is that the topic has not been widely researched on or written on in Kenya. Thus, material from local scholars and authors is scarce and limited.

### **1.11 Chapter breakdown**

The entire study will be divide into five chapters. Chapter I brings out the importance of the study, highlights its background and states its aim, objectives, hypothesis, research problem and research questions. Chapter II discusses and analyses the conceptual framework underpinning the study. Chapter III analyses cases of judges' misconduct that the JSC has handled with the aim of determining whether the JSC has a limited or unlimited scope when it comes to handling cases of judges' misconduct. Chapter IV gives an in-depth analysis of the legal procedural framework currently governing judges' criminal misconduct in Kenya, focusing on the JSC's and DPP's mandate in handling cases of judges' criminal misconduct. The chapter further highlights the problems that plague the current legal procedural framework governing judges' criminal misconduct in Kenya. The chapter also does

a comparative study that assesses Nigeria`s legal procedural framework governing judges` criminal misconduct with the aim of borrowing best practices from the Nigerian framework. Lastly, an analysis of the findings of the study will be presented in Chapter V, together with the recommendations and a conclusion.

## CHAPTER 2

### Conceptual framework

#### 2.1 Introduction

The conceptual framework underpinning this study is self-regulation. Self-regulation is a mechanism through which an entity ensures its own adherence to certain legal, ethical or professional standards without any third-party monitoring, enforcement or interference.<sup>83</sup> Self-regulation as a concept has been applied in different contexts. It has been applied within an industrial context where industries in a certain sector are allowed to ensure their own compliance and adherence to certain standards with minimal monitoring, enforcement or interference from regulatory authorities or third parties.<sup>84</sup> Self-regulation has also been applied within the professional sector, whereby bodies or associations comprising of members of a certain profession are set up to regulate other members within the profession.<sup>85</sup> For instance, in the legal profession in Kenya, the Law Society of Kenya plays such a role.<sup>86</sup>

Self-regulation within the professional context can be categorised into two main typologies.<sup>87</sup> The first typology is pure self-regulation, pure self-regulation refers to a situation where bodies or associations comprising of members of a certain profession are set up to regulate other members within the profession.<sup>88</sup> Such bodies or associations usually comprise of members of the profession only.<sup>89</sup> Such a model is prominent among professionals such as lawyers, doctors, engineers, architects etcetera.<sup>90</sup> This model has, however, been heavily criticised as they have been numerous instances where bodies comprised only of

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<sup>83</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation' 3(89) *Michigan Law Review*, 1990, 609.

<sup>84</sup> Zayenne D and Anne M, 'The legal framework for self-regulation in the Netherlands' 2(3) *Utrecht Law Review*, 2007, 116-118.

<sup>85</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

<sup>86</sup> Section 4, *Law Society of Kenya Act* (Act no. 12 of 2012).

<sup>87</sup> Zayenne D and Anne M, 'The legal framework for self-regulation in the Netherlands', 119. The typologies have been applied to different contexts with different meanings but have been reconceptualised to a context relevant for the study.

<sup>88</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

<sup>89</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

<sup>90</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

professionals from the same sector handling other professionals' complaints, have covered up the complaints and favoured their colleagues.<sup>91</sup>

Because of the deficiencies of the pure self-regulation model, the impure self-regulation model was developed.<sup>92</sup> Impure self-regulation refers to a situation where bodies regulating professionals in a certain profession comprise of both members and non-members of the profession.<sup>93</sup> The rationale behind having non-members is to prevent members of the profession from being overly protective of their colleagues, which is one of the main criticisms of the pure self-regulation model.<sup>94</sup> The non-members are usually drawn from members of the public because there is usually public interest in the activities of most professions as the professions usually offer services to the public.<sup>95</sup>

## **2.2 Self-regulation within the context of the Judicial Service Commission**

To safeguard and enhance judicial independence, many judiciaries across the world use the impure self-regulation model as a mechanism to regulate judicial conduct.<sup>96</sup> This has been realised by setting up commissions, bodies or councils to handle matters involving the conduct of judicial officers.<sup>97</sup> These bodies are usually referred to as judicial disciplinary bodies.<sup>98</sup> Judicial disciplinary bodies manifest self-regulation through the three main features of self-regulation, which are: independence and autonomy<sup>99</sup>; having members of a profession or an industry regulating each other<sup>100</sup> and the power to make rules and regulations.<sup>101</sup>

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<sup>91</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

<sup>92</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

<sup>93</sup> For instance, within the Kenyan context, the impure self-regulation model has been applied in the Judicial Service Commission (a body mandated to regulate judicial conduct) as it comprises of members of the judiciary and non-members. See Article 171, *Constitution of Kenya* (2010).

<sup>94</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

<sup>95</sup> Zacharias C, 'The myth of self-regulation' 9(93) *Minnesota Law Review*, 2009, 1149.

<sup>96</sup> Edwards H, 'Regulating judicial misconduct and divining 'good behaviour' for federal judges' 4(87) *Michigan Law Review*, 1989, 766.

<sup>97</sup> Gray C, 'How judicial conduct commissions work', 405.

<sup>98</sup> Gray C, 'How judicial conduct commissions work', 405.

<sup>99</sup> The self-regulation model is usually characterised by lack of external interference or third-party interference which means that entities in a self-regulation model enjoy a certain level of independence and autonomy. See Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609. For instance, within the Kenyan context, the Judicial Service Commission (a self-regulatory body) is an independent constitutional commission established under Chapter 15 of the Constitution of Kenya 2010.

<sup>100</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

<sup>101</sup> For instance, in Kenya, under section 47 of the Judicial Service Act, the Judicial Service Commission has powers to make rules and regulations governing its operation.

The foremost feature of self-regulation is independence and autonomy.<sup>102</sup> Within the Kenyan context, the Judicial Service Commission is an independent constitutional commission established under Chapter 15 of the Constitution of Kenya 2010.<sup>103</sup> The Judicial Service Commission being an independent constitutional commission means that its operations are autonomous and are not subject to the control of any entity, person or authority other than the Constitution and the laws of Kenya.<sup>104</sup> This manifests self-regulation as it makes the operations of the Judicial Service Commission autonomous, free from control or interference from the other arms of government or third parties.<sup>105</sup>

The subsequent feature of self-regulation is having members of a profession or an industry regulating each other.<sup>106</sup> Juridical disciplinary bodies usually comprise of members of the judiciary among other non-members. This manifests self-regulation as members of the judiciary are used to regulate the conduct of other members of the judiciary. For instance, the Judicial Service Commission in Kenya, comprises of eleven commissioners who include the following members from the judiciary: the chief justice, one judge from the Supreme Court, one judge from the Court of Appeal, one judge from the High Court and one magistrate.<sup>107</sup> The judges and magistrates who are commissioners in the Judicial Service Commission, excluding the chief justice, are usually elected by other judges and magistrates.<sup>108</sup>

The remaining commissioners who are not members of the judiciary include: the Attorney-General, two advocates who are elected by members of the Law Society of Kenya, one person nominated by the Public Service Commission and two non-lawyer members of the public appointed by the president with the approval of the National Assembly, in a process that involves public participation.<sup>109</sup> Among the eleven commissioners, the Chief Justice is the chairperson.<sup>110</sup>

The rationale behind having persons who are not members of the judiciary in judicial disciplinary bodies is to prevent members of the judiciary from being overly protective of their

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<sup>102</sup> Gray C, 'How judicial conduct commissions work', 405. For instance, in Kenya, the Judicial Service Commission is an independent body established under Article 248 of the Constitution.

<sup>103</sup> Chapter 15, *Constitution of Kenya* (2010).

<sup>104</sup> Article 249 (2), *Constitution of Kenya* (2010).

<sup>105</sup> Gray C, 'How judicial conduct commissions work', 405.

<sup>106</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

<sup>107</sup> Article 171, *Constitution of Kenya* (2010).

<sup>108</sup> Article 171, *Constitution of Kenya* (2010).

<sup>109</sup> Article 171, *Constitution of Kenya* (2010).

<sup>110</sup> Article 171, *Constitution of Kenya* (2010).

colleagues, which is one of the criticisms of self-regulation in the professional sector, where self-regulating bodies only comprise of members from the profession being regulated.<sup>111</sup>

The last feature is the making of rules and regulations.<sup>112</sup> Judicial disciplinary bodies are usually empowered by law to make rules and regulations governing their operations.<sup>113</sup> For instance, in Kenya, under section 47 of the Judicial Service Act, the Judicial Service Commission has powers to make rules and regulations governing its operation.<sup>114</sup> This manifests self-regulation as the Judicial Service Commission makes the rules and regulations used to regulate its operations.

### **2.3 The role of self-regulation in promoting judicial independence and judicial accountability**

The self-regulatory framework within the context of judicial disciplinary bodies. As has been discussed above, is an integral element of a properly functioning judicial system. As it promotes judicial independence and enhances judicial political and behavioural accountability, which are the foundational principles upon which justice is administered and the rule of law is built upon.<sup>115</sup>

One of the rationales for the formulation of judicial disciplinary bodies is to facilitate judicial independence because if other arms of government are given disciplinary powers over the judiciary, judicial independence might be compromised.<sup>116</sup> As adverse decisions against the other arms of government might trigger retaliatory investigations and prosecutions against judges, especially from the executive.<sup>117</sup> The self-regulatory framework safeguards and enhances judicial independence as it creates a framework under which the Judicial Service Commission operates as an independent and autonomous body free from external interference.

Judicial behavioural accountability involves the aspect of judicial conduct being subject to disciplinary proceedings, in cases of misconduct or contravention of the law.<sup>118</sup> The self-

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<sup>111</sup> Anthony D, 'Self-regulation of judicial misconduct could be mis-regulation', 609.

<sup>112</sup> Zayenne D and Anne M, 'The legal framework for self-regulation in the Netherlands', 127.

<sup>113</sup> Gray C, 'How judicial conduct commissions work' 3(38) *Justice System Journal*, 2007, 415 and 416.

<sup>114</sup> Section 47, *Judicial Service Act* (Act No. 1 OF 2011).

<sup>115</sup> Franceschi G, 'Judicial independence and accountability in light of the judiciary code of conduct and ethics of Kenya', 107 and 108.

<sup>116</sup> Bhushan P, 'Securing Judicial Accountability: Towards an Independent Commission', 16.

<sup>117</sup> Shaman j, 'Judicial Immunity from Civil and Criminal Liability', 28.

<sup>118</sup> Griffen W, 'Judicial accountability and discipline', 75.

regulatory framework promotes and enhances judicial behavioural accountability as it creates a framework under which an independent and impartial body, the Judicial Service Commission, handles disciplinary issues involving judges. Judicial political accountability is concerned with the accountability of the judiciary to members of the public and other arms of government such as the legislature on matters such as the utilization of allocated funds.<sup>119</sup> The self-regulatory framework promotes and enhances judicial political accountability as it creates a platform through which members of the public can hold judicial officers accountable. As the Judicial Service Commission comprises of two members of the public who are appointed by the president with the approval of the National Assembly, in a process that involves public participation.<sup>120</sup>

## 2.4 Conclusion

This study seeks to determine the scope of the JSC as a self-regulatory body in handling cases of judges' criminal misconduct. Especially, in circumstances where the JSC's disciplinary mandate clashes with the Director of Public Prosecutions' (DPP) penal mandate. As if the DPP has unfettered prosecutorial powers over judges there is a danger that the executive can use the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution.<sup>121</sup> This amounts to an external interference on the JSC's constitutional disciplinary mandate, which is a threat to the JSC's autonomy and independence as a self-regulatory body. Consequently, this study seeks to propose a legal procedural framework of dealing with cases of judges' criminal misconduct under which the JSC's constitutional mandate as a self-regulatory body is safeguarded. As this promotes judicial independence and enhance judicial political and behavioural accountability.

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<sup>119</sup> Griffen W, 'Judicial accountability and discipline', 75.

<sup>120</sup> Article 171, *Constitution of Kenya* (2010).

<sup>121</sup> Shaman j, 'Judicial Immunity from Civil and Criminal Liability', 28.

## CHAPTER 3

### 3.1 Introduction

This chapter assesses the JSC's constitutional mandate to deal with cases of judges' misconduct and determines the scope of the JSC in dealing with cases of judges' criminal misconduct. By analysing cases of judges' misconduct that the JSC has handled with the aim of determining whether the JSC has a limited or unlimited scope when it comes to handling cases of judges' misconduct.

### 3.2 The JSC's constitutional mandate to deal with judges misconduct

One of the constitutional mandates of the JSC is to receive complaints against judges for allegedly engaging in misconduct, investigate the complaints and initiate the process of removing a judge from office.<sup>122</sup> If the JSC finds merits in the complaints against the judge.<sup>123</sup> Apart from investigating complaints or petitions submitted to the JSC by individuals, the JSC can on its own motion initiate investigations on a judge's misconduct and consequently initiate the process of removing the judge from office, if it finds merits in its investigations.<sup>124</sup>

The JSC initiates the process of removing a judge from office by sending a petition to the president.<sup>125</sup> The president then suspends the judge in question and appoints a tribunal, which will hear and determine the judge's case.<sup>126</sup> If the tribunal acquits the judge, the judge retains his or her judicial position. If the tribunal finds the judge culpable, the president on recommendation from the tribunal removes the judge from office.<sup>127</sup>

According to Article 168 (1) (e) of the CoK 2010, one of the grounds upon which the JSC can initiate the process of removing a judge from office is gross misconduct or misbehaviour.<sup>128</sup> 'Gross misconduct or misbehaviour' are two very broad terms, which have not been defined in the Constitution, Judicial Service Act, Judicial Code of Conduct or any other legal instrument governing judicial misconduct in Kenya. Scholars have, however,

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<sup>122</sup> Article 172, *Constitution of Kenya* (2010).

<sup>123</sup> Article 172, *Constitution of Kenya* (2010).

<sup>124</sup> Article 168, *Constitution of Kenya* (2010).

<sup>125</sup> Article 168, *Constitution of Kenya* (2010).

<sup>126</sup> Article 172, *Constitution of Kenya* (2010).

<sup>127</sup> Article 172, *Constitution of Kenya* (2010).

<sup>128</sup> Article 172, *Constitution of Kenya* (2010).

discussed these two terms in two main contexts. The foremost context is a criminal context. In the criminal context, judicial misconduct or misbehaviour refers to instances in which judges have been involved in criminal acts such as assault, corruption, murder or even sexual offences.<sup>129</sup>

The subsequent context is a professional and civil context. In the civil context, judicial misconduct or misbehaviour refers to instances in which judges have been involved in civil wrongs such as breach of contract or tortious act.<sup>130</sup> In the professional context, judicial misconduct or misbehaviour refers to instances in which judges have been involved in acts that breach their professional codes of conduct or ethics, such as the Judicial Code of Conduct in Kenya.<sup>131</sup> The professional context has also been extended to instances in which judges have been involved in acts that have been defined as ‘conduct that is prejudicial to the administration of justice and brings the judicial office into disrepute’.<sup>132</sup> Such conduct includes acts such a judge using vulgar or offensive language; being rude to litigants in court or performing judicial duties while being intoxicated.<sup>133</sup>

Some scholars have argued that judicial codes of conduct are meant to preserve ethical and professional standards among judges and not to act as a basis for criminal liability.<sup>134</sup> According to these scholars, judicial codes of conduct contain aspirational standards rather than explicit prohibitions.<sup>135</sup> As a result, they can only be enforced by judicial disciplinary bodies and not prosecutors through institution of criminal proceeding.<sup>136</sup> These scholars posit that judges can only be prosecuted for violating penal statutes and not judicial codes of conduct.<sup>137</sup>

The Kenyan legal framework on judicial misconduct has not defined, what ‘gross misconduct or misbehaviour’ entails or means. Consequently, questions have arisen as to the JSC’s scope when handling matters involving judges’ criminal misconduct. Does ‘gross misconduct or misbehaviour’ as a ground upon which a judge can be removed from office under

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<sup>129</sup> Overton B, ‘Grounds for judicial discipline in the context of judicial disciplinary commissions’, 61.

<sup>130</sup> Overton B, ‘Grounds for judicial discipline in the context of judicial disciplinary commissions’, 61.

<sup>131</sup> Overton B, ‘Grounds for judicial discipline in the context of judicial disciplinary commissions’, 59-65.

<sup>132</sup> Overton B, ‘Grounds for judicial discipline in the context of judicial disciplinary commissions’, 59-65.

<sup>133</sup> Overton B, ‘Grounds for judicial discipline in the context of judicial disciplinary commissions’, 59-65.

<sup>134</sup> Abramovsky A and Edelstein J, ‘Prosecuting Judges for Ethical Violations’, 145 and 146.

<sup>135</sup> Abramovsky A and Edelstein J, ‘Prosecuting Judges for Ethical Violations’ 145 and 146.

<sup>136</sup> Abramovsky A and Edelstein J, ‘Prosecuting Judges for Ethical Violations’, 145 and 146.

<sup>137</sup> Abramovsky A and Edelstein J, ‘Prosecuting Judges for Ethical Violations’, 145 and 146.

Article 168 of the CoK 2010 extend to judges` criminal misconduct? Although the definitions of ‘gross misconduct or misbehaviour’ have not been expressly provided for in codified law, the answer to the above-mentioned question can be implicitly obtained from practice by looking at how the JSC has handled cases of judges’ misconduct.

### **3.3 How the JSC has handled cases of judges` professional and civil misconduct**

Unlike ordinary members of the public who can be sued based on all manner of civil wrongs, judges enjoy a certain level of immunity against civil suits.<sup>138</sup> This immunity is commonly referred to as judicial immunity. Judicial immunity is a legal concept established in both common law and statutes that protects judges from civil liability for actions done in the course of their official capacity as judges.<sup>139</sup> Judicial immunity is important, as it promotes judicial independence and protects judges from harassment and external pressures.<sup>140</sup>

In Kenya, judicial immunity is established under section 6 of the Judicature Act and Article 160(5) of the CoK 2010.<sup>141</sup> Article 160(5) provides that, ‘a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.’<sup>142</sup> Section 6 of the Judicature Act on the other hand provides that, ‘no judge, magistrate or any other person acting judicially, shall be liable to be sued in a civil court for an act done in good faith and in the discharge of judicial duty.’<sup>143</sup> Consequently, within the Kenyan legal framework, judicial immunity only applies where a judge acts in good faith and in lawful performance of his or her mandate as evidence of malice, ill intention or bad faith can lead to the waiver of judicial immunity.<sup>144</sup>

Judicial immunity only extends to civil liability. It does not protect judges from criminal liability as the threats posed to judicial independence by criminal liability are not strong enough to override the importance of enforcing criminal liability against judges.<sup>145</sup> Even

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<sup>138</sup> Ghai J, ‘Other mechanisms of accountability’ in Ghai J (ed), 12 ed, *Judicial accountability in the new constitutional order*, International Commission of Jurists Kenya, Nairobi, 2016, 157-164.

<sup>139</sup> Ghai J, ‘Other mechanisms of accountability’ 157-164.

<sup>140</sup> Shaman J, ‘Judicial Immunity from Civil and Criminal Liability’, 28.

<sup>141</sup> Ghai J, ‘Other mechanisms of accountability’, 157-164.

<sup>142</sup> Article 160 (5), *Constitution of Kenya* (2010).

<sup>143</sup> Section 6, *Judicature Act* (Act No. 16 of 1967).

<sup>144</sup> Ghai J, ‘Other mechanisms of accountability’, 157-164.

<sup>145</sup> Shaman J, ‘Judicial Immunity from Civil and Criminal Liability’, 28.

though judicial independence should be guarded by some degree of immunity, the immunity should not enable judges to hide behind their offices to shield themselves from criminal behaviour that is harmful and prejudicial to society.<sup>146</sup> Although judicial immunity protects judges from civil suits in court. It does not protect them from the jurisdiction and mandate of judicial disciplinary bodies such as the JSC.<sup>147</sup>

Though the JSC has not handled any case of explicit judicial civil misconduct by judges, it has handled a case of professional misconduct involving a group of judges who refused to perform their judicial duties. Between September and October 2015, three judges of the Supreme Court of Kenya participated in what was described as a ‘strike’.<sup>148</sup> The three judges, Justice Mohamed Ibrahim, Justice JB Ojwang and Justice Njoki Ndung’u stopped performing their judicial duties as a form of protest against the JSC’s decision to limit their mandatory retirement age at 70.<sup>149</sup> The three judges were also protesting against the ‘early’ retirement of two of their colleagues, Justice Kalpana Rawal and Justice Philip Tunoi, who had attained the constitutionally mandated retirement age of 70.<sup>150</sup> Because of the three judges refusing to perform their judicial duties, the quorum required for the Supreme Court of Kenya to conduct business could not be met. As a result, the court could not hear or determine cases.<sup>151</sup>

Mr. Apollo Mboya, the then Chief Executive Officer of the Law Society of Kenya, submitted a complaint against the three judges to the JSC.<sup>152</sup> The complaint requested the JSC to initiate the process of removing the three judges from office as they had refused to perform their judicial duties as is required of them. The JSC after receiving the petition, conducted investigations and found the three judges culpable for judicial misconduct.<sup>153</sup> The JSC,

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<sup>146</sup> Shaman J, ‘Judicial Immunity from Civil and Criminal Liability’, 28.

<sup>147</sup> Gray C, ‘How judicial conduct commissions work’, 415 and 416.

<sup>148</sup> Ochieng W, ‘The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective’ in Ghai J (ed), 12 ed, *Judicial accountability in the new constitutional order*, International Commission of Jurists Kenya, Nairobi, 2016, 62.

<sup>149</sup> Mwaniki M, ‘Kenya: Supreme Court judges issue strike threat’ The Standard, 27 September 2015 <- <https://www.standardmedia.co.ke/nairobi/article/2000177703/kenya-supreme-court-judges-issue-strike-threat> >- accessed on 30 August 2019.

<sup>150</sup> Mwaniki M, ‘Kenya: Supreme Court judges issue strike threat’ The Standard, 27 September 2015 <- <https://www.standardmedia.co.ke/nairobi/article/2000177703/kenya-supreme-court-judges-issue-strike-threat> >- accessed on 30 August 2019.

<sup>151</sup> Mwaniki M, ‘Kenya: Supreme Court judges issue strike threat’ The Standard, 27 September 2015 <- <https://www.standardmedia.co.ke/nairobi/article/2000177703/kenya-supreme-court-judges-issue-strike-threat> >- accessed on 30 August 2019.

<sup>152</sup> Ochieng W, ‘The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective’, 62.

<sup>153</sup> Ochieng W, ‘The composition, functions, and accountability of the Judicial Service Commission

however, stated that the misconduct was not ‘gross’ enough to warrant the JSC to initiate the process of removing the judges from office. The JSC instead reprimanded the judges for their misconduct.<sup>154</sup>

### 3.4 How the JSC has handled cases of judges’ criminal misconduct

Judges’ criminal misconduct can either be in an official capacity or non-official capacity.<sup>155</sup> It is in an official capacity, if it is proximately or closely linked to a judge’s constitutionally mandated functions.<sup>156</sup> Such misconduct includes criminal offences such as taking bribes from litigants so as to rule in their favour.<sup>157</sup> Judicial criminal misconduct is in a non-official capacity if it is not proximately or closely linked to a judge’s constitutionally mandated functions.<sup>158</sup> Such misconduct includes criminal offences such as rape, murder or assault conducted outside the scope of a judge’s constitutionally mandated functions.<sup>159</sup> The JSC has handled cases of both official and non-official criminal misconduct. For instance, the bribery allegations that faced Justice Philip Tunoi amounted to official criminal misconduct while the assault allegations that faced the former deputy chief Justice, Nancy Baraza amounted to non-official criminal misconduct.<sup>160</sup>

On 31 December 2012, the then deputy chief justice, Nancy Baraza was entering the village market shopping complex but refused to be searched by the guards at the entrance.<sup>161</sup> Due to her refusal, an altercation ensued between her and the guard at the entrance who insisted

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from a comparative perspective’, 62.

<sup>154</sup> Ochieng W, ‘The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective’, 62.

<sup>155</sup> Martineau J, ‘Disciplining Judges for Nonofficial Conduct: A Survey and Critique of the Law’ 2(10) *University of Baltimore Law Review*, 1981, 226.

<sup>156</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR, para. 379.

<sup>157</sup> Martineau J, ‘Disciplining Judges for Nonofficial Conduct’, 226.

<sup>158</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR, para. 379.

<sup>159</sup> Martineau J, ‘Disciplining Judges for Nonofficial Conduct’, 226.

<sup>160</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15 and Nzau M, ‘Secrets of Justice Philip Tunoi report to president’ *The standard*, 4 December 2016 -< <https://www.standardmedia.co.ke/kenya/article/2000225681/secrets-of-justice-philip-tunoi-tribunal-report-to-president-uhuru> >- accessed on 30 August 2020.

<sup>161</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

on searching her.<sup>162</sup> During the altercation, it is alleged that the deputy chief justice pinched the guard, pointed her gun at her and even threatened to kill her.<sup>163</sup>

The former deputy chief justice's conduct if analysed based on criminal law can lead to criminal liability. As numerous criminal charges can be levelled against her. For instance, the act of pinching the security guard can lead to criminal liability under section 250 of the Penal Code, which makes it a criminal offence to assault a person.<sup>164</sup> The act of pointing the gun at the guard and even threatening to kill her can lead to criminal liability under section 223 of the Penal Code, which makes it a criminal offence to threaten to kill a person.<sup>165</sup> Because of the criminal nature of the former deputy chief justice's conduct, the security guard reported the matter as a criminal offence at Gigiri police station but, for reasons unknown to the public, the DPP did not initiate criminal proceedings against the former deputy chief justice.<sup>166</sup>

A complaint was, however, submitted before the JSC petitioning for the removal of the former deputy chief justice from office for engaging in gross misconduct and misbehaviour.<sup>167</sup> The JSC upon receiving the complaint investigated the matter and found merits in the complaint. The JSC then initiated the process of removing the former deputy chief justice from office by sending a petition to the president.<sup>168</sup> Upon receipt of the petition, the president set up a tribunal to hear and determine the former deputy chief justice's case.<sup>169</sup>

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<sup>162</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>163</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>164</sup> Section 250, *Penal Code* (Act no. 18 of 1948).

<sup>165</sup> Section 250, *Penal Code* (Act no. 18 of 1948).

<sup>166</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>167</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>168</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>169</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

The tribunal found the former deputy chief justice culpable for engaging in gross misconduct and recommended her removal from office.<sup>170</sup> However, before she was removed from office, the former deputy chief justice resigned.<sup>171</sup>

Justice Philip Tunoi, a former judge of the Supreme Court of Kenya, was accused of allegedly taking a bribe worth 200 million Kenyan shillings from the former Nairobi Governor, Mr. Evans Kidero.<sup>172</sup> So as to rule in his favour in an election petition filed by one of his opponents after the 2013 general elections.<sup>173</sup> A judicial officer such as Justice Philip Tunoi taking a bribe is a criminal offence under section 47 of the Anti-Corruption and Economic Crimes Act.<sup>174</sup> In this case, the JSC on its own motion instituted investigations against Justice Philip Tunoi for taking a bribe.<sup>175</sup> Upon completing the investigations, the JSC found merits in the investigations and initiated the process of removing Justice Philip Tunoi from office by sending a petition to the president.<sup>176</sup> Upon receiving the petition, the president set up a tribunal to hear and determine Justice Tunoi's case.<sup>177</sup> Before the tribunal completed hearing and determining the case, Justice Tunoi retired and the tribunal was dissolved as its mandate was extinguished upon his retirement.<sup>178</sup>

Justice Mbalu Mutava was also accused of taking a bribe, which is a criminal offence under section 47 of the Anti-Corruption and Economic Crimes Act.<sup>179</sup> A complaint was submitted before the JSC petitioning for the removal of Justice Mbalu Mutava from office for

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<sup>170</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>171</sup> Wahome T, 'Nancy Baraza finally resigns' *The Standard*, 19 October 2012 -< <https://www.standardmedia.co.ke/kenya/article/2000068767/nancy-baraza-finally-resigns> >- accessed on 30 August 2020.

<sup>172</sup> Karanja S, 'Tribunal ends 200 million shilling bribery probe against Justice Tunoi' *Daily Nation*, 27 June 2016 -< <https://nation.africa/news/Tribunal-ends-Sh200m-bribery-probe-Tunoi/1056-3269652-f3eflaz/index.html> >- accessed on 30 August 2020.

<sup>173</sup> Karanja S, 'Tribunal ends 200 million shilling bribery probe against Justice Tunoi' *Daily Nation*, 27 June 2016 -< <https://nation.africa/news/Tribunal-ends-Sh200m-bribery-probe-Tunoi/1056-3269652-f3eflaz/index.html> >- accessed on 30 August 2020.

<sup>174</sup> Section 47, *Anti-Corruption and Economic Crimes Act* (Act no. 3 of 2003).

<sup>175</sup> Nzau M, 'Secrets of Justice Philip Tunoi report to president' *The standard*, 4 December 2016 -< <https://www.standardmedia.co.ke/kenya/article/2000225681/secrets-of-justice-philip-tunoi-tribunal-report-to-president-uhuru> >- accessed on 30 August 2020.

<sup>176</sup> Nzau M, 'Secrets of Justice Philip Tunoi report to president' *The standard*, 4 December 2016 -< <https://www.standardmedia.co.ke/kenya/article/2000225681/secrets-of-justice-philip-tunoi-tribunal-report-to-president-uhuru> >- accessed on 30 August 2020.

<sup>177</sup> Nzau M, 'Secrets of Justice Philip Tunoi report to president' *The standard*, 4 December 2016 -< <https://www.standardmedia.co.ke/kenya/article/2000225681/secrets-of-justice-philip-tunoi-tribunal-report-to-president-uhuru> >- accessed on 30 August 2020.

<sup>178</sup> Nzau M, 'Secrets of Justice Philip Tunoi report to president' *The standard*, 4 December 2016 -< <https://www.standardmedia.co.ke/kenya/article/2000225681/secrets-of-justice-philip-tunoi-tribunal-report-to-president-uhuru> >- accessed on 30 August 2020.

<sup>179</sup> Ochieng W, 'The composition, functions, and accountability of the Judicial Service Commission

engaging in gross misconduct.<sup>180</sup> The JSC upon receiving the complaint investigated the matter and found merits in its investigations. The JSC then initiated the process of removing Justice Mbalu Mutava from office by sending a petition to the president. Upon receiving the petition, the president set up a tribunal to hear and determine Justice Mbalu Mutava's case.<sup>181</sup> The tribunal found Justice Mbalu Mutava culpable for engaging in gross misconduct and recommended his removal from office.<sup>182</sup> On the basis of the tribunal's recommendation, Justice Mbalu Mutava was removed from office.

### **3.5 Conclusion**

It can be argued that the JSC has an unlimited scope when handling cases of judges' misconduct. As an analysis of the cases of judges' misconduct that the JSC has handled indicates that the JSC has handled cases of judges' misconduct that are both professional and criminal in nature. In cases of criminal misconduct, where a judge has been found culpable, the JSC has always initiated the process of his or her removal from office. In cases of professional and civil misconduct, where the JSC finds a judge culpable for misconduct, it weighs whether the misconduct is 'gross' or severe enough to warrant the JSC to initiate the process of removing the judge from office. If it is not severe enough the JSC will not initiate the process of removing the judge from office. If the professional and civil misconduct is deemed to be 'gross' or severe, the JSC might initiate the process of removing the judge from office.

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from a comparative perspective', 62.

<sup>180</sup> Ochieng W, 'The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective', 62.

<sup>181</sup> Ochieng W, 'The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective', 62.

<sup>182</sup> Ochieng A, 'Joseph Mutava loses bid to remain judge' The Nation, 12 March 2019 -< <https://nation.africa/kenya/news/joseph-mutava-loses-bid-to-remain-judge-147426> >- accessed on 30 August 2020.

## CHAPTER 4

### 4.1 Introduction

This chapter gives an in-depth analysis of the legal procedural framework currently governing judges' criminal misconduct in Kenya, focusing on the JSC's and DPP's mandate in handling cases of judges' criminal misconduct. The chapter further highlights the problems that plague the current legal procedural framework, which are not only threat to judicial independence but also judicial accountability. The chapter also does a comparative study that assesses Nigeria's legal procedural framework governing judges' criminal misconduct with the aim of borrowing best practices from the Nigerian framework. The chapter then concludes by proposing a legal procedural framework that promotes judicial independence and accountability while also safeguarding the JSC's constitutional mandate to deal with judges' misconduct.

### 4.2 The DPP's constitutional mandate to deal with judges' criminal misconduct

Article 157 of the CoK 2010 establishes the office of the Director of Public Prosecutions (DPP) with the mandate of investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.<sup>183</sup> The office of the DPP usually invokes its mandate in two circumstances. The foremost is when a person makes a criminal complaint against another person.<sup>184</sup> In such a scenario, the criminal complaint is forwarded to office of the DPP for criminal prosecution in court.<sup>185</sup> Alternatively, the office of the DPP can on its own motion investigate criminal matters and initiate criminal proceedings against persons accused of engaging in criminal misconduct.<sup>186</sup>

The office of the DPP has been involved in some cases involving judges' criminal misconduct. For instance, in the Justice Philomena Mwilu's case, the office of the DPP on its own motion conducted criminal investigations against the judge and afterwards initiated criminal proceedings against her in court.<sup>187</sup> In Justice Nancy Baraza's case, a criminal complaint was filed against her at Gigiri police station but for unknown reasons the DPP did

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<sup>183</sup> Article 157, *Constitution of Kenya* (2010).

<sup>184</sup> Section 5, *office of the Director of Public Prosecutions Act* (Act no.2 of 2013).

<sup>185</sup> Section 5, *office of the Director of Public Prosecutions Act* (Act no.2 of 2013).

<sup>186</sup> Article 157 (10), *Constitution of Kenya* (2010).

<sup>187</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

not take up the matter and initiate criminal proceedings against her.<sup>188</sup> The matter was instead solely handled by the JSC after a complaint against the judge was filed before the JSC.<sup>189</sup>

### **4.3 The JSC`s constitutional mandate to deal with judges` criminal misconduct**

One of the constitutional mandates of the JSC, as established under Article 172 (1) (c) of the CoK 2010, is to receive judicial misconduct complaints, investigate the complaints and initiate the process of removing a judge from office. If the JSC finds merits in the complaints against the judge.<sup>190</sup> The JSC has handled numerous complaints in which judges have been accused of engaging in criminal misconduct. For instance, when the former deputy chief justice, Nancy Baraza was accused of assaulting and threatening to kill a security guard.<sup>191</sup> The JSC upon finding merits on its investigations on the alleged criminal misconduct, initiated the process of removing the former deputy chief justice from office.<sup>192</sup> Similarly, the JSC has initiated the process of removing two other judges from office for allegedly engaging in criminal misconduct after it found merits in the investigations on their alleged criminal misconduct.<sup>193</sup>

### **4.4 The clash between the DPP and JSC in handling cases of judges` criminal misconduct**

The DPP and JSC both have a mandate in handling cases of judges` criminal misconduct. However, the nature of the mandate varies between the two entities. The DPP`s mandate is of a penal nature as it is meant to punish a judge for engaging in criminal offences while

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<sup>188</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>189</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>190</sup> Article 172, *CoK(2010)*.

<sup>191</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>192</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>193</sup>Ochieng W, ‘The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective’, 62 and Karanja S, ‘Tribunal ends 200 million shilling bribery probe against Justice Tunoi’ Daily Nation, 27 June 2016 -< <https://nation.africa/news/Tribunal-ends-Sh200m-bribery-probe-Tunoi/1056-3269652-f3eflaz/index.html> >- accessed on 30 August 2020.

the JSC`s mandate is of a disciplinary nature as it is meant to discipline a judge for breaching judicial ethical and professional standards of conduct.<sup>194</sup> In the DPP`s case, if a judge is found culpable for engaging in criminal offences, the judge will be fined or imprisoned.<sup>195</sup> In the JSC`s case, if a judge is found culpable for engaging in criminal misconduct, the JSC`s will initiate the process of removing the judge from office.<sup>196</sup>

Notwithstanding, the differences between the JSC`s and DPP`s mandate in handling cases of judges` criminal misconduct, the two mandates have clashed. In *Honourable Philomena Mwilu vs DPP and 3 others*, the JSC`s constitutional mandate to deal with judges` misconduct clashed with the DPP`s constitutional prosecutorial powers.<sup>197</sup> In the case, the petitioner (a judge) sought orders to stop the DPP from prosecuting her; arguing that the JSC disciplinary process had to be initiated and concluded first before the DPP could prosecute her in court.<sup>198</sup> The DPP in his response argued that the JSC and court processes are distinct and not interdependent, as the latter is penal and the former disciplinary. The DPP consequently argued that he can initiate criminal proceedings against a judge without necessarily initiating the JSC process first. The court, however, citing judicial independence ruled in favour of the petitioner.<sup>199</sup> The DPP being unsatisfied with the High Court decision, filed an appeal which is currently being heard and determined before the Court of Appeal.<sup>200</sup> This means that the High Court`s position in *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* is not firmly established and depending on the arguments made by the parties and how the Court of Appeal analyses and determines the matter, it can either uphold the High Court decision or overturn it.

The clash between the JSC`s and DPP`s mandate in handling cases of judges` criminal misconduct is procedural in nature as it revolves around which process should be initiated first. There are three possible processes that can be used to handle cases of judges` criminal misconduct between the two entities and each process has implications on the judiciary`s ability to properly function as an independent arm of government. In *Honourable Philo-*

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<sup>194</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>195</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>196</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>197</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>198</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>199</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>200</sup> Kamau M, 'DCJ Mwilu`s battle with DPP heads to appeal court' *The Standard*, 4 June 2019, 4.

*mena Mwilu vs DPP and 3 others*, the three possible processes were discussed. The foremost process entails the DPP process being initiated first before the JSC process.<sup>201</sup> The subsequent process entails the DPP and JSC process being initiated simultaneously.<sup>202</sup> The last process entails the JSC process being initiated first before the DPP process is initiated.<sup>203</sup>

#### **4.5 Executive interference in the operations of the office of the DPP**

The office of the DPP is an independent constitutional office.<sup>204</sup> Its independence is guaranteed by Article 157 (10) of the CoK, which provides that the office of the DPP shall not be under the control or direction of any person, entity or authority when exercising its mandate.<sup>205</sup> This section implies that the office of the DPP should operate independently without any external interference or control. However, a series of recent events show that there has been some level of executive interference in operation of the office of the DPP. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*.<sup>206</sup>

The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences. In the saga, Miguna Miguna was accused of engaging in treason for being present and consenting to the administration of an oath of presidency to a person who was not the president.<sup>207</sup> Interestingly, he was the only one charged by the DPP yet he was not the one taking the oath and there were also quite a number of other people present during the alleged treasonous offence.<sup>208</sup> If the DPP was operating

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<sup>201</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>202</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>203</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>204</sup> Article 157, *Constitution of Kenya* (2010).

<sup>205</sup> Article 157 (10), *Constitution of Kenya* (2010).

<sup>206</sup> *Miguna Miguna v Director of Public Prosecutions & 2 others* (2018) eKLR and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others* (2018) eKLR.

<sup>207</sup> *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others* (2018) eKLR, para. 18.

<sup>208</sup> *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others* (2018) eKLR, para. 18.

independently and had a genuine case to make, he would have charged all the persons present including the person who took the oath.

The alleged treasonous offence was committed in Nairobi yet the DPP chose to charge him in Kajiado outside Nairobi.<sup>209</sup> If the DPP was operating independently and had a genuine case to make, he would have charged Miguna in Nairobi where the alleged offence was committed. The DPP was persistent in presenting Miguna before a criminal court for charges yet an order of habeas corpus had been issued requiring him to be presented before the High court at Milimani law courts.<sup>210</sup> If the DPP was operating independently and had a genuine case to make, he would have ensured that the habeas corpus order had been complied with before proceeding with the criminal proceedings against Miguna. As at the time, Miguna was under the DPP's custody. Because of the habeas corpus order, the criminal court before which Miguna was being charged declined to take up the matter and instead instructed that the accused be presented before the High court in compliance with the habeas corpus order.<sup>211</sup>

Miguna was later on illegally deported to Canada.<sup>212</sup> If the DPP was operating independently and had a genuine case to make, he would have followed up on the matter and even made requests for Miguna to be extradited back to the country for him to face criminal charges. Especially considering the fact that treason is a very serious offence that carries the death penalty under section 40 (3) of the Penal Code.<sup>213</sup> Once Miguna was deported, the DPP went silent on the matter. He did not follow up or make any requests for extradition.

Another event that casts doubts on the independence of the office of the DPP, is the controversial arrest of three senators during the revenue allocation stalemate.<sup>214</sup> In August 2020, three senators: Cleophas Malala , Steve Lelegwe and Christopher Langat were arrested.<sup>215</sup>

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<sup>209</sup> *Miguna Miguna vs Cabinet secretary, ministry of interior and coordination of national government and 6 others* (2018) eKLR, para. 26.

<sup>210</sup> *Miguna Miguna v Director of Public Prosecutions & 2 others* (2018) eKLR, para. 4.

<sup>211</sup> *Miguna Miguna vs Cabinet secretary, ministry of interior and coordination of national government and 6 others* (2018) eKLR, para. 26.

<sup>212</sup> *Miguna Miguna vs Cabinet secretary, ministry of interior and coordination of national government and 6 others* (2018) eKLR, para. 26.

<sup>213</sup> Section 40, *Penal Code* (Act no. 18 of 1948).

<sup>214</sup> Oruko I, 'Senate halts debate on revenue after 3 senators arrested' *The Nation*, 18 August 2020 -< <https://nation.africa/kenya/news/politics/senate-adjourns-after-mps-arrests-1920242> >- on 21 September 2020.

<sup>215</sup> Oruko I, 'Senate halts debate on revenue after 3 senators arrested' *The Nation*, 18 August 2020 -< <https://nation.africa/kenya/news/politics/senate-adjourns-after-mps-arrests-1920242> >- on 21 September 2020.

Their arrest was controversial as it happened at a time when the senate was debating the contentious revenue allocation bill, which had proved to be very divisive.<sup>216</sup> As the senate had been divided into two factions, which supported different revenue allocation formulas.<sup>217</sup> The three senators belonged to a faction that was opposed to the revenue allocation formula supported by the executive.<sup>218</sup> Consequently, it was argued that the executive orchestrated their arrests so as to prevent them from voting against the executive supported revenue allocation formula.<sup>219</sup>

One of the senators was arrested based on charges drafted by the DPP, which alleged that he had flouted the rules established by the government to curb the coronavirus pandemic.<sup>220</sup> Due to public uproar on the controversial arrests of the three senators, the DPP dropped the charges against the senator.<sup>221</sup> If the DPP was operating independently and had a genuine case to make against the senator, he would have proceeded with the case against him, if he indeed breached the rules established by the government to curb the coronavirus pandemic.

Consequently, it can be argued that the conduct of the DPP in the controversial arrest of the three senators, implies that the DPP was operating under the control of the executive rather than independently. As the DPP's actions were aligned with executive interests and not the DPP's constitutional mandate of investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

Aside from the controversial arrest of the three senators and the Miguna Miguna saga, another incident that casts doubts on the independence of the office of the DPP is the controversial arrest of the Kiharu Member of Parliament Ndindi Nyoro. The Kiharu Member of Parliament was arrested at a time when he was a strong critic of the executive and belonged

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<sup>216</sup> Oruko I, 'Senate halts debate on revenue after 3 senators arrested' The Nation, 18 August 2020 << <https://nation.africa/kenya/news/politics/senate-adjourns-after-mps-arrests-1920242> >- on 21 August 2020.

<sup>217</sup> Oruko I, 'Senate halts debate on revenue after 3 senators arrested' The Nation, 18 August 2020 << <https://nation.africa/kenya/news/politics/senate-adjourns-after-mps-arrests-1920242> >- on 21 August 2020.

<sup>218</sup> Oruko I, 'Senate halts debate on revenue after 3 senators arrested' The Nation, 18 August 2020 << <https://nation.africa/kenya/news/politics/senate-adjourns-after-mps-arrests-1920242> >- on 21 August 2020.

<sup>219</sup> Nation team, 'Secret plot in senators Malala, Lang'at and Lelegwe arrest' The Nation, 18 August 2020 << <https://nation.africa/kenya/counties/taita-taveta/secret-plot-in-senators-malala-lang-at-and-lelegwe-arrest-1920470> >- 21 September 2020.

<sup>220</sup> Ndungu T, 'Senator Malala freed as DPP drops charges against him' Citizen Digital, 18 August 2020 << <https://citizentv.co.ke/news/senator-malala-freed-as-dpp-drops-charges-against-him-342251/> >- 21 September 2020.

<sup>221</sup> Ndungu T, 'Senator Malala freed as DPP drops charges against him' Citizen Digital, 18 August 2020 << <https://citizentv.co.ke/news/senator-malala-freed-as-dpp-drops-charges-against-him-342251/> >- 21 September 2020.

to a political faction within the ruling party, which was at loggerheads with the executive.<sup>222</sup> His arrest was based on a charge drafted by the DPP but it was later on dropped due to reasons unknown to the public.<sup>223</sup>

There are two common trends in the arrests discussed above. The first one is that all the people arrested and charged were at loggerheads with the executive. The second one is that the charges were dropped before actual prosecution in court. Both trends can be attributed to the claim that such arrests and charges are usually intended to intimidate and harass people who go against executive interests.<sup>224</sup> Consequently, there are concerns that the executive can use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution. When the DPP process is initiated first before the JSC process when handling cases of judges criminal misconduct.

#### **4.6 Case backlog in Kenya`s criminal justice system**

Aside from executive interference, another challenge that arises when the DPP process is initiated first when prosecuting judges is case backlog. Case backlog is one of the challenges facing the criminal justice system in Kenya.<sup>225</sup> Due to case backlog, a criminal case can take several years before completion.<sup>226</sup> This means that if a judge is to be criminally prosecuted first then it may take a number of years before the criminal trial is completed and the JSC process is initiated.

This is problematic within the context of judges as a judge can only be suspended when the process of removing the judge from office has been initiated by the JSC.<sup>227</sup> Therefore, if a judge is being criminally prosecuted and the process of removing the judge from office has not been initiated. The judge can continue performing his or her judicial duties unless he or she wilfully resigns. Consequently, public confidence in the integrity and impartiality of

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<sup>222</sup> Ndungu G, 'Kanga`ata secures MP Nyoro`s release after deal with state' The Nation, 10 September 2019 -< <https://nation.africa/counties/muranga/No-charges-for-Kiharu-MP-Ndindi-Nyoro/1183310-5266944-ts0i5s/index.html> >- 21 September 2019.

<sup>223</sup> Ndungu G, 'Kanga`ata secures MP Nyoro`s release after deal with state' The Nation, 10 September 2019 -< <https://nation.africa/counties/muranga/No-charges-for-Kiharu-MP-Ndindi-Nyoro/1183310-5266944-ts0i5s/index.html> >- 21 September 2019.

<sup>224</sup> Havi N, 'An overzealous DPP is a peril to the rule of law' -< <https://haviandcompany.co.ke/an-overzealous-dpp-is-a-peril-to-the-rule-of-law-2/> >- on 9 October 2020.

<sup>225</sup> The Judiciary of Kenya, *Sustaining judiciary transformation: A service delivery agenda 2017-2021*, 18-22.

<sup>226</sup> The Judiciary of Kenya, *Sustaining judiciary transformation: A service delivery agenda 2017-2021*, 18-22.

<sup>227</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

the judiciary will be dampened. As a judge who has been accused of engaging in criminal behaviour will still be performing judicial functions yet their integrity and impartiality is questionable.

#### **4.7 How other jurisdictions with similar constitutional and legal frameworks as Kenya deal with judges' criminal misconduct**

Nigeria's constitutional and legal framework for judicial misconduct is similar to Kenya's but with a few differences. The National Judicial Council (NJC) is an independent constitutional council established under Article 153 of the 1999 Nigerian Constitution.<sup>228</sup> It is constitutionally mandated to perform the following functions: recommending to the president and state governors persons for appointment as judges at the national and state levels respectively; disciplining and recommending the removal from office of judges found culpable for engaging in misconduct; advising the president and state governors on any matter concerning the judiciary; collecting, controlling and disbursing judiciary funds; dealing with all policy and administrative matters involving the judiciary.<sup>229</sup> Similarly, the JSC's constitutionally mandated functions in Kenya include; recommending to the president persons for appointment as judges; initiating the process of removing judges accused of engaging in misconduct from office; appointing, disciplining and removing from office registrars, magistrates and other judiciary staff; advising the national government on how it can improve on the administration of justice.<sup>230</sup>

The National Judicial Council has powers to discipline judges and recommend their removal from office.<sup>231</sup> Section 15 of the Nigerian Judicial Discipline Regulations provides that any person may lodge a judicial misconduct complaint against any judge to the council.<sup>232</sup> After receiving the complaint, the council sets up a preliminary assessment committee to establish whether a prima facie case has been established.<sup>233</sup> If a prima facie case has not been established, the complaint is dismissed.<sup>234</sup> If a prima facie case is established, the complaint is forwarded to the investigation committee for hearing and determination.<sup>235</sup>

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<sup>228</sup> Article 153, *Constitution of Nigeria* (1999).

<sup>229</sup> Third schedule, *Constitution of Nigeria* (1999).

<sup>230</sup> Article 172, *Constitution of Kenya* (2010).

<sup>231</sup> Third schedule, *Constitution of Nigeria* (1999).

<sup>232</sup> Section 15, *Judicial Discipline Regulations* (2017).

<sup>233</sup> Section 17, *Judicial Discipline Regulations* (2017).

<sup>234</sup> Section 17, *Judicial Discipline Regulations* (2017).

<sup>235</sup> Section 19, *Judicial Discipline Regulations* (2017).

The investigation committee after hearing and determining the matter, writes and forwards a report to the National Judicial Council for final determination and disciplinary action.<sup>236</sup> Likewise, the JSC in Kenya, receives complaints against judges for engaging in misconduct, investigates the complaints to determine whether a prima facie case has been established.<sup>237</sup> If a prima facie case has not been established, the JSC dismisses the complaint.<sup>238</sup> If a prima facie case has been established, the JSC initiates the process of removing the judge from office.<sup>239</sup>

With regards to matters involving criminal judicial misconduct, the NJC has developed two categories of judges` criminal misconduct. The first category of judges` criminal misconduct encompasses criminal offences committed within the scope of judicial office such as bribery while the second category encompasses criminal offences committed outside the scope of judicial office such as rape, murder or assault.<sup>240</sup> Where a judge commits a criminal offence within the scope of their judicial functions or office, such judicial misconduct complaints have to pass through the NJC disciplinary process before being subjected to the criminal court process.<sup>241</sup> However, where a judge commits a criminal offence outside the scope of their judicial functions or office, such judicial misconduct can be subjected to the criminal court process before being subjected to the NJC disciplinary process.<sup>242</sup> This framework was established in the Nigeria case of *Nganjiwa v FRN*.<sup>243</sup>

In *Nganjiwa v FRN*, Justice Hyeladzira Ajiya Nganjiwa, a Nigeria judge was accused of allegedly engaging in a series of criminal offences ranging from bribery to fraud.<sup>244</sup> When Justice Nganjiwa was charged in a criminal court, he challenged the trial court`s jurisdiction by arguing that the judicial disciplinary process had to be initiated first before he is criminally prosecuted in court.<sup>245</sup> The trial court dismissed his preliminary objection and he appealed to the Court of Appeal. The major issue before the Court of Appeal was whether the trial court could validly exercise criminal jurisdiction over a judge before the judge is

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<sup>236</sup> Section 25, *Judicial Discipline Regulations* (2017).

<sup>237</sup> Article 172 and 168, *Constitution of Kenya* (2010).

<sup>238</sup> Article 172 and 168, *Constitution of Kenya* (2010).

<sup>239</sup> Article 172 and 168, *Constitution of Kenya* (2010).

<sup>240</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>241</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>242</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>243</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>244</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>245</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

subjected to the judicial disciplinary process established by the Constitution to deal with judges' misconduct.<sup>246</sup>

The Court of Appeal while citing judicial independence and reiterating the importance of judges being able to operate impartially and independently without any external interference. Held that, if a judge within the scope of his or her judicial functions commits criminal offences such as bribery.<sup>247</sup> He or she may not be investigated, arrested and subsequently prosecuted by the relevant state agencies without being subjected to the judicial disciplinary process. As it will be a usurpation of the relevant judicial disciplinary body's constitutionally guaranteed mandate.<sup>248</sup> However, if a judge outside the scope of his or her judicial functions commits theft, fraud, murder, manslaughter, arson or other criminal offences of such a nature.<sup>249</sup> He or she may be arrested, interrogated and prosecuted by the relevant state agencies without reference to the judicial disciplinary process.<sup>250</sup>

In *Honourable Philomena Mbeti Mwilu vs DPP and 3 others*, the High Court of Kenya, applied the procedural framework used in *Nganjiwa v FRN*, when determining whether Justice Philomena Mwilu can be criminally prosecuted without being subjected to the JSC disciplinary process.<sup>251</sup> The court when ruling in favour of Justice Philomena Mwilu stated that the JSC's judicial disciplinary process should always be initiated first before criminal prosecution, where a judge has committed a criminal offence that is either proximately linked to his or her judicial functions or committed within the scope of his or her judicial functions.<sup>252</sup> The court further stated that where judges commit criminal offences outside the scope of their judicial office or functions.<sup>253</sup> They can be criminally prosecuted without necessarily being subjected to the JSC's judicial disciplinary process.<sup>254</sup>

The DPP was, however, unsatisfied with the decision and filed an appeal in the Court of Appeal.<sup>255</sup> The matter is currently being heard and determined before the Court of Appeal.<sup>256</sup> This means that the High Court's position in *Honourable Philomena Mbeti Mwilu*

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<sup>246</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>247</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>248</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>249</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>250</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>251</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 375 to 404.

<sup>252</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 375 to 404.

<sup>253</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 375 to 404.

<sup>254</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 375 to 404.

<sup>255</sup> Kamau M, 'DCJ Mwilu's battle with DPP heads to appeal court' *The Standard*, 4 June 2019, 4.

<sup>256</sup> Kamau M, 'DCJ Mwilu's battle with DPP heads to appeal court' *The Standard*, 4 June 2019, 4.

*vs DPP and 3 others* is not firmly established and depending on the arguments made by the parties and how the Court of Appeal analyses and determines the matter, it can either uphold the High Court decision or overturn it. Moreover, there is a possibility of a further appeal to the Supreme Court, if either the petitioner or DPP is not satisfied with the Court of Appeal decision.

#### **4.8 The appropriate legal procedural framework for handling cases of judges' criminal misconduct**

The foremost process of dealing with cases of judges' criminal misconduct entails the DPP process being initiated first before the JSC process. This process has been faulted because there are concerns that the executive can use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution.<sup>257</sup> Though the office of the DPP is established as an independent constitutional office in Kenya.<sup>258</sup> A series of recent events involving criminal cases handled by the office of the DPP casts doubts on the independence of the office.<sup>259</sup> The conduct of the DPP in the cases creates the impression that the DPP is operating under the control of the executive.<sup>260</sup> As the DPP's actions in the cases, seem to align with executive interests rather than the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.<sup>261</sup> An example of such a case is the Miguna Miguna saga.<sup>262</sup>

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<sup>257</sup> Shaman J, 'Judicial Immunity from Civil and Criminal Liability', 28.

<sup>258</sup> Article 157 (10), *CoK*(2010).

<sup>259</sup> Havi N, 'An overzealous DPP is a peril to the rule of law' *The Platform*, 2019.

<sup>260</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

<sup>261</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

<sup>262</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna

The subsequent process of dealing with cases of judges' criminal misconduct entails the DPP and JSC process being initiated simultaneously.<sup>263</sup> The first problem associated with this process is that it does not protect judges from executive interference as the executive can still use the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution. Another problem with this process is that it may end up dragging both the JSC and DPP process. As the judge will be expected to appear before the criminal court and tribunal investigating his or her conduct interchangeably, which may lead to the frequent postponement of proceedings in either the JSC or DPP process due to unavailability of witnesses or the judge in question. As they may be required to appear before the tribunal investigating the judge's conduct on the same date they are required to appear before the criminal court.

This process has also been faulted because it will result in a court and a tribunal hearing and determining the same matter simultaneously.<sup>264</sup> Which becomes problematic when the court and tribunal reach different conclusions on the same matter at the same time. For instance, the tribunal can acquit the judge while the criminal court convicts the judge. This creates a legal conundrum as if the tribunal acquits the judge he or she will have to be reinstated but at the same time he or she has been convicted of a criminal offence and may have to serve a jail term. Moreover, having a judge who has been convicted for engaging in a criminal offence hold office. Has the effect of dampening public confidence in the integrity and impartiality of the judiciary. As a judge whose integrity and impartiality is questionable will be performing judicial functions.

The third process of dealing with cases of judges' criminal misconduct, which entails the JSC process being initiated first before the DPP process, is the most appropriate process.<sup>265</sup> Firstly, because it can be completed within a shorter timeframe when compared to the DPP

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saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

<sup>263</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>264</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

<sup>265</sup> *Honourable Philomena Mbete Mwilu vs DPP and 3 others* (2018) eKLR, para. 166.

process, which can take years to complete due to case backlog.<sup>266</sup> The JSC process is usually fast because a tribunal is usually formed to specifically deal with a particular judge's misconduct.<sup>267</sup> This can be contrasted with a criminal court, which usually handles numerous criminal cases at a time.

Secondly, because it enhances judicial independence and safeguards the JSC's constitutional mandate to deal with judges' misconduct. By developing a legal procedural framework under which the executive cannot use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution. In *Judicial Service Commission v Mbalu Mutava and another*, Justice Ouko stated that in considering a complaint of judicial misconduct filed before it.<sup>268</sup> The JSC usually conducts preliminary investigations geared towards establishing that the complaint is not frivolous, lacking in substance, unfounded or hypothetical.<sup>269</sup> The preliminary investigations conducted by the JSC are further geared towards establishing that the complaint of judicial misconduct has at least some probative value or establishes a prima facie case against the judge.<sup>270</sup>

The preliminary investigations conducted by the JSC act as a barrier preventing the DPP from initiating unfounded criminal complaints against judges, which are only geared towards exerting undue influence or pressure on judges. As any unfounded or frivolous criminal complaints which lack probative value or do not establish a prima facie case will be thrown out by the JSC upon completing its preliminary investigations.

If the DPP process is initiated first, no preliminary investigations are conducted by the court. As the DPP directly charges and prosecutes the judge in court. The judge is usually arrested and arraigned in court where he or she is required to take a plea of innocence or guilt.<sup>271</sup> If the judge takes a plea of innocence, his or her criminal trial will begin.<sup>272</sup> In this process, the DPP can exert undue influence or pressure on judges through unwarranted threats of

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<sup>266</sup> The Judiciary of Kenya, *Sustaining judiciary transformation: A service delivery agenda 2017-2021*, 18-22.

<sup>267</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the Republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>268</sup> *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR.

<sup>269</sup> *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR.

<sup>270</sup> *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR.

<sup>271</sup> Kiage P, *Essential of criminal procedure in Kenya*, Law Africa, Nairobi, 2013, 89.

<sup>272</sup> Kiage P, *Essential of criminal procedure in Kenya*, Law Africa, 89.

arrest, investigation and prosecution. As the DPP only needs to draft a charge and get an arrest warrant to get a judge arrested and prosecuted in court. The court, on the other hand, does not conduct any preliminary investigations to determine the veracity of the charges.<sup>273</sup> The veracity of the charges are usually determined at a later stage of the criminal trial process.<sup>274</sup> However, by that time the objective of exerting undue influence or pressure on a judge might already have been achieved.

While there is a need to safeguard judicial independence and enable judges to discharge their judicial functions without any fear of reprisals. Judicial independence should not be used as a shield to shelter judges from criminal behaviour or misconduct that is harmful and prejudicial to society. Consequently, if the JSC process is to be initiated first. It should adopt the procedural framework used by the Nigerian Court of Appeal in *Nganjiwa v FRN*. This framework allows the DPP to directly prosecute a judge without initiating the JSC disciplinary process where a judge commits criminal offences outside the scope of his or her judicial functions or office. It, however, makes it mandatory for the JSC disciplinary process to be initiated first, where a judge commits a criminal offence within the scope of his or her judicial functions or office.

To prevent malicious prosecution by the DPP where he is allowed to prosecute a judge directly under the Nganjiwa approach. A safeguard that determines that the DPP has a prima facie case before actual prosecution in court needs to be established. So as to prevent the DPP from initiating malicious prosecution only geared towards exerting undue influence on judges. This can be achieved by requiring the DPP to file an application to a magistrate with more than 15 years of experience seeking approval to prosecute a judge. The purpose of the application should be to establish that the DPP has a prima facie case and is not initiating a malicious prosecution. The application can contain findings of the DPP's investigations or evidence gathered by him.

If the DPP is denied approval upon his first application, he should be allowed to make the application to a maximum of five other different magistrates with more than 15 years of experience. If the majority grant the DPP approval, he can proceed with the prosecution in court. If the majority do not grant the DPP approval, he cannot proceed with the prosecution.

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<sup>273</sup> Kiage P, *Essential of criminal procedure in Kenya, Law Africa*, 137-161.

<sup>274</sup> Kiage P, *Essential of criminal procedure in Kenya, Law Africa*, 137-161.

As the DPP's case, at that point will most probably lack probative value and may only be geared towards exerting undue influence on judges.

Considering the discussions and arguments made in this chapter and to create a stable and firmly established legal procedural framework governing judges' criminal misconduct. The JSC process being initiated first while adopting the Nganjiwa approach and the prosecution approval requirement should be firmly established in law through statute or a constitutional amendment.

## **4.9 Conclusion**

The appropriate legal procedural framework that should be used to handle cases of judges' criminal misconduct, is a framework that begins with the JSC process then initiates the DPP process thereafter, while adopting the Nganjiwa approach and the prosecution approval requirement. Such a framework is the most appropriate as it enhances judicial independence and safeguards the JSC's constitutional mandate to deal with judges misconduct by developing a framework under which the executive cannot use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution. Aside from enhancing judicial independence and safeguarding the JSC's constitutional mandate to deal with judges misconduct. The framework also creates a balance between the DPP's constitutional prosecutorial powers and the JSC's constitutional mandate to deal with judges' misconduct by allowing the DPP to directly prosecute judges where they commit criminal offences outside the scope of their judicial functions or office.

## CHAPTER 5

### 5.1 Introduction

This chapter presents the findings of the study as analysed in the previous chapters. It also presents some recommendations geared towards establishing an appropriate and robust legal procedural framework that can be used to handle cases of judges' criminal misconduct. The chapter finalizes with a conclusion to the study.

### 5.2 Findings

#### 5.2.1 What is the scope of the JSC in dealing with cases of judges' criminal misconduct?

Firstly, the research sought to answer the question, what is the scope of the JSC in dealing with cases of judges' criminal misconduct? The JSC's constitutional mandate to deal with cases of judges misconduct is established under Article 172 of the CoK and section 31 of the Judicial Service Act, which gives the JSC powers to initiate the process of removing a judge from office.<sup>275</sup> If a prima facie case of judicial misconduct is established against the judge.<sup>276</sup> The JSC has an unlimited scope when handling cases of judges' misconduct.<sup>277</sup> As an analysis of the cases of judges' misconduct that the JSC has handled indicates that the JSC has handled cases of judges' misconduct that are both professional and criminal in nature.<sup>278</sup> In cases of criminal misconduct, where the JSC has found merits on its investigations on a judge's alleged criminal misconduct.<sup>279</sup> The JSC has always initiated the process of removing the judge from office.<sup>280</sup>

In cases of professional and civil misconduct, where the JSC has found merits on its investigations on a judge's alleged professional or civil misconduct. The JSC has weighed

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<sup>275</sup> Article 172, *Constitution of Kenya* (2010) and section 31, *Judicial Service Act* (Act No. 1 of 2011).

<sup>276</sup> Article 172, *Constitution of Kenya* (2010) and section 31, *Judicial Service Act* (Act No. 1 of 2011).

<sup>277</sup> Ochieng W, 'The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective', 62.

<sup>278</sup> Ochieng W, 'The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective', 62.

<sup>279</sup> Ochieng W, 'The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective', 62 and Karanja S, 'Tribunal ends 200 million shilling bribery probe against Justice Tunoi' Daily Nation, 27 June 2016 -< <https://nation.africa/news/Tribunal-ends-Sh200m-bribery-probe-Tunoi/1056-3269652-f3eflaz/index.html> >- accessed on 30 August 2020.

<sup>280</sup> Ochieng W, 'The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective', 62 and Karanja S, 'Tribunal ends 200 million shilling bribery probe against Justice Tunoi' Daily Nation, 27 June 2016 -< <https://nation.africa/news/Tribunal-ends-Sh200m-bribery-probe-Tunoi/1056-3269652-f3eflaz/index.html> >- accessed on 30 August 2020.

whether the misconduct is ‘gross’ or severe enough to warrant the JSC to initiate the process of removing the judge from office.<sup>281</sup> Where the professional and civil misconduct has been deemed not to be ‘gross’ or severe enough the JSC has not initiated the process of removing the judge from office.<sup>282</sup> Where the professional and civil misconduct has been deemed to be ‘gross’ or severe, the JSC might initiate the process of removing the judge from office.

### ***5.2.2 How has the JSC previously handled cases of judges’ criminal misconduct?***

Secondly, the research sought to answer the question, how has the JSC previously handled cases of judges’ criminal misconduct? Since its inception under the 2010 constitutional dispensation, the JSC has handled three cases of judges’ criminal misconduct. The first case involved the assault and death threats allegations levelled against the former deputy chief justice, Nancy Baraza.<sup>283</sup> The second and third cases involved corruption allegations levelled against Justice Mbalu Mutava and Justice Philip Tunoi.<sup>284</sup>

The JSC’s mandate in dealing with cases of judges’ criminal misconduct is disciplinary in nature.<sup>285</sup> Consequently, the only sanction the JSC issues against a judge for engaging in criminal misconduct is removal from office.<sup>286</sup> In each of the cases mentioned above, the JSC investigated the claims levelled against the judges and found merits in each of them. The JSC thereafter initiated the process of removing the judges from office by sending a petition to the president, requesting the president to set up a tribunal to hear and determine the judges’ cases. In Justice Mbalu Mutava and Nancy Baraza’s case, the tribunal found the judges culpable and recommended their removal from office.<sup>287</sup> Justice Philip Tunoi,

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<sup>281</sup> Ochieng W, ‘The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective’, 62.

<sup>282</sup> Ochieng W, ‘The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective’, 62.

<sup>283</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15.

<sup>284</sup> Ochieng W, ‘The composition, functions, and accountability of the Judicial Service Commission from a comparative perspective’, 62 and Karanja S, ‘Tribunal ends 200 million shilling bribery probe against Justice Tunoi’ Daily Nation, 27 June 2016 -< <https://nation.africa/news/Tribunal-ends-Sh200m-bribery-probe-Tunoi/1056-3269652-f3eflaz/index.html> >- accessed on 30 August 2020.

<sup>285</sup> Article 172, *Constitution of Kenya* (2010) and section 31, *Judicial Service Act* (Act No. 1 of 2011).

<sup>286</sup> Article 172, *Constitution of Kenya* (2010) and section 31, *Judicial Service Act* (Act No. 1 of 2011).

<sup>287</sup> Tribunal to investigate the conduct of the deputy chief justice and vice president of the Supreme Court of the republic of Kenya, *Report and recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza*, 2012, 7 – 15 and Ochieng A, ‘Joseph Mutava loses bid to remain judge’ The Nation, 12 March 2019 -< <https://nation.africa/kenya/news/joseph-mutava-loses-bid-to-remain-judge-147426> >- accessed on 30 August 2020.

on the other hand, retired before the tribunal could determine his case.<sup>288</sup> Consequently, the tribunal was dissolved as its mandate of removing him from office was extinguished upon his retirement.<sup>289</sup>

### ***5.2.3 Why is the current legal procedural framework governing judges` criminal misconduct not elaborate?***

Thirdly, the research sought to answer the question, why is the current legal procedural framework governing judges` criminal misconduct not elaborate? The current legal procedural framework governing judges` criminal misconduct is not elaborate because it does not clearly establish a process that can be followed by the DPP and JSC when handling cases of judges` criminal misconduct. As a result, in ***Honourable Philomena Mwilu vs DPP and 3 others***, the JSC`s constitutional mandate to deal with judges` criminal misconduct clashed with the DPP`s constitutional prosecutorial powers.<sup>290</sup>

In the case, the petitioner (a judge) sought orders to stop the DPP from prosecuting her; arguing that the JSC disciplinary process had to be initiated and concluded first before the DPP could prosecute her in court.<sup>291</sup> The DPP in his response argued that the JSC and court processes are distinct and not interdependent, as the latter is penal and the former disciplinary.<sup>292</sup> The DPP consequently argued that he can initiate criminal proceedings against a judge without necessarily initiating the JSC process first.<sup>293</sup> The court, however, citing judicial independence ruled in favour of the petitioner.<sup>294</sup> The court argued that where a judge has committed a criminal offence that is either proximately linked to his or her judicial functions or committed within the scope of his or her judicial functions.<sup>295</sup> The JSC process must be initiated first before the DPP process.<sup>296</sup> As if the DPP process is initiated first, it will usurp the JSC`s constitutional mandate to deal with cases of judges` misconduct

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<sup>288</sup> Nzau M, 'Secrets of Justice Philip Tunoi report to president' The Standard, 4 December 2016 <<  
<https://www.standardmedia.co.ke/kenya/article/2000225681/secrets-of-justice-philip-tunoi-tribunal-report-to-president-uhuru> >> accessed on 30 August 2020.

<sup>289</sup> Nzau M, 'Secrets of Justice Philip Tunoi report to president' The Standard, 4 December 2016 <<  
<https://www.standardmedia.co.ke/kenya/article/2000225681/secrets-of-justice-philip-tunoi-tribunal-report-to-president-uhuru> >> accessed on 30 August 2020.

<sup>290</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>291</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>292</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>293</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>294</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR.

<sup>295</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 375 to 404.

<sup>296</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 375 to 404.

while simultaneously eroding constitutional safeguards meant protect and enhance judicial independence.<sup>297</sup>

The DPP being unsatisfied with the High Court decision, filed an appeal which is currently being heard and determined before the Court of Appeal.<sup>298</sup> This means that the High Court's position in *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* is not firmly established and depending on the arguments made by the parties and how the Court of Appeal analyses and determines the matter, it can either uphold the High Court decision or overturn it.

The clash between the JSC's and DPP's mandate in handling cases of judges' criminal misconduct is with regards to which process should be initiated first. Is it the JSC process or the DPP process? Should the JSC and DPP process be initiated simultaneously? If the DPP process is initiated first, there are concerns that the executive can use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution.<sup>299</sup> Especially, in instances where judges issue court orders, rulings or judgements that go against executive interests. Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations.<sup>300</sup>

#### ***5.2.4 How do other jurisdictions with similar constitutional and legal frameworks as Kenya deal with judges' criminal misconduct?***

Fourthly, the research sought to answer the question, how do other jurisdictions with similar constitutional and legal frameworks as Kenya deal with cases of judges' criminal misconduct? Nigeria's constitutional and legal framework for dealing with judicial misconduct is similar to Kenya's. Nigeria has a judicial disciplinary body, the National Judicial Council,

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<sup>297</sup> *Honourable Philomena Mbeti Mwilu vs DPP and 3 others* (2018) eKLR, para. 375 to 404.

<sup>298</sup> Kamau M, 'DCJ Mwilu's battle with DPP heads to appeal court' *The Standard*, 4 June 2019, 4.

<sup>299</sup> Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive interference in its operations. One such event is the Miguna Miguna saga, which revolves around *Miguna Miguna v Director of Public Prosecutions & 2 others* and *Miguna Miguna v Cabinet secretary, ministry of interior and coordination of national government and 6 others*. The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP's actions in the Miguna Miguna saga aligned with executive interests and not the DPP's constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

<sup>300</sup> The events include: the Miguna Miguna saga, the controversial arrest of the three senators during the divisive revenue allocation stalemate and the controversial arrest of the Kiharu Member of Parliament Ndindi Nyoro.

which can be equated to the JSC in Kenya. As its composition, functions, procedure and model for dealing with judicial misconduct is similar to Kenya's JSC but with a few differences. The major difference is that the NJC has powers to discipline judges (reprimand and suspend them) while the JSC only has powers to initiate the process of removing a judge from office.

With regards to matters involving criminal judicial misconduct, the NJC has developed two categories of judges' criminal misconduct. The first category of judges' criminal misconduct encompasses criminal offences committed within the scope of judicial office such as bribery while the second category encompasses criminal offences committed outside the scope of judicial office such as rape, murder or assault.<sup>301</sup> Where a judge commits a criminal offence within the scope of his or her judicial functions or office, such judicial misconduct complaints have to pass through the NJC disciplinary process before being subjected to the criminal trial process.<sup>302</sup> However, where a judge commits a criminal offence outside the scope of his or her judicial functions or office, such judicial misconduct can be subjected to the criminal trial process before being subjected to the NJC disciplinary process.<sup>303</sup> This framework was established in the Nigeria case of **Nganjiwa v FRN**.<sup>304</sup>

#### ***5.2.5 What is the appropriate legal procedural framework that can be used by the JSC in dealing with judges' criminal misconduct?***

Lastly, the research sought to answer the question, what is the appropriate legal procedural framework that can be used by the JSC in dealing with judges' criminal misconduct? The appropriate legal procedural framework that can be used to handle cases of judges' criminal misconduct, is a framework that begins with the JSC process then initiates the DPP process thereafter, while adopting the Nganjiwa approach and the prosecution approval requirement. Such a legal procedural framework is the most appropriate as it enhances judicial independence and safeguards the JSC's constitutional mandate to deal with judges misconduct by developing a framework under which the executive cannot use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution.

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<sup>301</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>302</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>303</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

<sup>304</sup> *Nganjiwa vs FRN* (2017), The Court of Appeal of Nigeria.

The preliminary investigations conducted by the JSC when a complaint of judicial misconduct is filed against a judge, act as a barrier that prevents the DPP from initiating malicious criminal complaints against judges, which are only geared towards exerting undue influence or pressure on judges. As any unfounded or frivolous criminal complaints which lack probative value or do not establish a prima facie case will be thrown out by the JSC upon completing its preliminary investigations.

To prevent malicious prosecution by the DPP where he is allowed to prosecute a judge directly under the Nganjiwa approach. A procedural framework that determines that the DPP has a prima facie case before actual court prosecution begins needs to be established. So as to prevent the DPP from initiating malicious prosecution only geared towards exerting undue influence or pressure on judges. This can be achieved by requiring the DPP to file an application to a magistrate with more than 15 years of experience seeking approval to prosecute a judge. The purpose of the application should be to establish that the DPP has a prima facie case and is not initiating a malicious prosecution. The application can contain findings of the DPP's investigations or evidence gathered by him.

If the DPP is denied approval, he should be allowed to make the application to a maximum of five other different magistrates with more than 15 years of experience seeking approval to prosecute a judge. If the majority grant the DPP approval, he can proceed with the prosecution in court. If the majority do not grant the DPP approval, he cannot proceed with the prosecution. As the DPP's case, at that point will most probably lack probative value and may only be geared towards exerting undue influence on judges.

### **5.3 Recommendations**

In designing an appropriate legal procedural framework to handle cases of judges' criminal misconduct in Kenya, which can be implemented either through a statute or a constitutional amendment, the study makes the following recommendations:

- 1) Complaints against judges for engaging in criminal misconduct that is committed within the scope of a judge's judicial functions or office should be lodged with the JSC and undergo the JSC process first before going through the court process initiated by the DPP.
- 2) Complaints against judges for engaging in criminal misconduct that is committed outside the scope of a judge's judicial functions or office can either be lodged with

the JSC and undergo the JSC process first or be directly initiated by the DPP in a criminal court.

- 3) At no instance should the JSC and DPP process be initiated simultaneously due to the risks associated with a court and a tribunal hearing and determining the same matter concurrently. If the JSC process is initiated first under the Nganjiwa approach, the DPP should await the culmination of the JSC process before initiating the court process. If the DPP process is initiated first under the Nganjiwa approach, the JSC should await the culmination of the DPP process before initiating its process.
- 4) Where the DPP process is initiated first, the JSC should be allowed to suspend the judge while awaiting determination of the criminal trial process.
- 5) To prevent malicious prosecution by the DPP where he is allowed to directly prosecute a judge under the Nganjiwa approach. The DPP should be required to file an application to a magistrate with more than 15 years of experience seeking approval to prosecute a judge. The purpose of the application should be to establish that the DPP has a prima facie case and is not initiating a malicious prosecution.
- 6) If the DPP is denied approval, he should be allowed to make the application to a maximum of five other different magistrates with more than 15 years of experience. If the majority grant the DPP approval, he can proceed with the prosecution. If the majority do not grant the DPP approval, he cannot proceed with the prosecution. As the DPP's case, at that point will most probably lack probative value and may only be geared towards exerting undue influence on judges.
- 7) Where the DPP process is initiated first and the criminal court convicts the judge. The JSC should be empowered to directly remove the judge from office without necessarily initiating the JSC process. Which entails the JSC's preliminary investigations and the formation of a tribunal to hear and determine the judge's case.

## **5.4 Conclusion**

The JSC has an unlimited scope when dealing with cases of judges' misconduct. This means that the JSC can handle cases of judges' misconduct that are both professional and criminal in nature. The JSC's constitutional mandate to deal with judges' criminal misconduct has, however, clashed with the DPP's prosecutorial powers. The clash has exposed gaps in the current legal procedural framework used to handle cases of judges' criminal

misconduct. The gaps are a threat to judicial independence and the rule of law. In the sense that they can enable the executive to use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution. Although the office of the DPP is an independent constitutional office, a series of recent events show that there has been some level of executive control in its operations.

Therefore, the appropriate legal procedural framework that can be used to handle cases of judges' criminal misconduct. Should be a framework that begins with the JSC process then initiates the DPP process thereafter, while adopting the Nganjiwa approach and the prosecution approval requirement. Such a framework is the most appropriate as it enhances judicial independence and safeguards the JSC's constitutional mandate to deal with judges misconduct by developing a framework under which the executive cannot use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution. Aside from enhancing judicial independence and safeguarding the JSC's constitutional mandate to deal with judges misconduct. The framework also creates a balance between the DPP's constitutional prosecutorial powers and the JSC's constitutional mandate to deal with judges misconduct by allowing the DPP to directly prosecute judges where they commit criminal offences outside the scope of their judicial functions or office.

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