

## **Statement of Kenya Christian Professionals On the JSC Judicial Nominations**

### ***Background***

1. On Friday 13th May 2011, the Judicial Service Commission (JSC) established under Article 171 of the Constitution recommended two individuals – Dr. Willy Mutunga and Ms. Nancy Baraza – to the President for nomination and consideration by the National Assembly for the positions of Chief Justice and Deputy Chief Justice of the Republic of Kenya respectively.
2. The JSC's recommendation was made after an application, vetting and interview process that commenced in early March this year.

3. There is no doubt that the JSC expended considerable time and effort in identifying the aforesaid two individuals out of ten (10) applicants for the post of Chief Justice and six (6) applicants for the post of Deputy Chief Justice. However, we want to air a number of concerns, as part of our democratic participation as citizens and Christian professionals, so that they will aid the continuing process of identifying Kenya's next Chief Justice and Deputy Chief Justice.

### ***Importance of the nominations for Chief Justice and the Deputy***

4. The Constitution of Kenya, 2010 is a document with various good provisions, but also with ambiguous provisions that will need to be interpreted properly and in accordance with the wishes of Kenyans as expressed on 4th August 2010. A proper philosophy of interpretation must take into account what Kenyans understood to be the meaning of the document during the August 4th referendum. The proper interpretation of the Constitution is a fundamental aspect of the process of implementation and application of the Constitution.

5. While it is the right and duty of all State organs, State officers, public officers and all persons to apply or interpret the Constitution (arts 1(1), 2(1), 3(1), 10(1)), the ultimate authority to interpret the Constitution rests in the Judiciary (art 22(1), 23(1)), particularly the High Court (art

165(3)(d)), with right of appeal to the Court of Appeal and final appeal to the Supreme Court (art 163(4)). The Chief Justice holds office for ten years, is the President of the Supreme Court and the chair of the Judicial Service Commission (arts 163(1), 171(2)). He is the head of the Judiciary (art 161(2)). The Deputy Chief Justice will deputise these roles.

6. The positions of Chief Justice and Deputy are very significant. The holders will, through exercise of their powers and functions, influence the judicial philosophy to be adopted in interpreting the Constitution. We cannot afford to get the nominations wrong, because these are not elective posts but enjoy security of tenure. Neither can we afford to experiment with such important positions, which should be filled by persons whose judicial philosophy reflects the culture and face of Kenya.

7. We have observed the JSC nomination process, and noted various concerns shared with a substantial number of Kenyans which should be aired so that a forthright and honest debate can take place about the propriety of the JSC process and its outcome, the suitability of the nominees, and the weight that should be given to judicial philosophy in assessing suitability.

### ***Issue 1: Judicial Service Commission constituting itself into “an appointing authority”***

8. By nominating a single individual to each of the two judicial positions, the JSC has presented a *fait accompli*. JSC claimed that it had no choice in the matter, but it ought to have dealt with its recommendation role the same way the Public Service Commission dealt with recommendation of Director of Public Prosecution. JSC should have recommended multiple individuals with rankings to the President for nomination. The current process abrogates the President’s constitutional duty to nominate by making a choice between qualified candidates.

9. The recommendation of single individuals to the positions poses a number of legal challenges:

#### **a)**

The Constitution in Article 166 (3) contemplates that the Chief Justice and other judges of the Supreme Court will be appointed (by the President) from among persons with stipulated qualifications. Clearly then, the appointment must be from amongst a number of individuals.

#### **b)**

Under paragraph 14 of the First Schedule to the Judicial Service Act, the JSC is supposed to

nominate the most qualified applicants. Once again, the need for multiple recommendations is demonstrated in this regulation.

10. There are also practical challenges with nominating single individuals to the respective justice positions:

**a)**  
This irregularly applies pressure to the President, the Principals and also Parliament to approve the nominees or else cause further delay.

**b)**  
If the nominees are rejected, the process may have to be restarted thus causing further delay to the appointment of a Chief Justice and the Deputy. This delay will have been caused by the Judicial Service Commission having chosen to nominate only one candidate for each position without giving any choice to the Principals or Parliament.

### ***Issue 2: Weaknesses of the vetting and interview process***

11. The interviews conducted over the past two weeks and the prior vetting did not embrace Article 166 of the Constitution which requires all judges (including the CJ and Deputy CJ) to be persons of “high moral character, integrity and impartiality”. This noble standard encompasses all aspects of an

individual’s life whether public, private, in community, in business or anywhere else. The JSC partly considered legal performance but largely failed to address other matters of equal importance – a glaring omission.

12. It is noteworthy that Chapter Six of the Constitution emphasizes the importance of propriety in both personal and public life. Indeed, Article 73 provides that selection to State Office is, among other things, to be made on the basis of personal integrity, competence and suitability.

### ***Issue 3: The Judicial Philosophy of the nominees in light of concerning indicators***

13. The nominee for Chief Justice, Dr Willy Mutunga, has a substantial record as a human

rights defender and in civil society. However, he has no judicial experience. His declared moral views on life, family and religion are of concern. His status as Program Representative of Ford Foundation

also needs to be scrutinised.

14. Ford Foundation is a big donor of anti-life organisations worldwide, including International Planned Parenthood Federation (IPPF), International Women's Health Coalition (IWHC), Planned Parenthood Federation of America (PPFA), Sexuality Information and Education Council of the United States (SIECUS), etc. Recent funding grants have focused on abortion advocacy and liberal sex education groups. Dr Mutunga is also on record as supporting gay rights.

15. Nancy Baraza also has a notable record in human rights and women's issues. She however also totally lacks any judicial track record from which her judicial philosophy can be determined. However her academic writings show support for liberal moral views like gay rights that are contrary to our legal and constitutional framework. She was not properly questioned on judicial philosophy, thus raising significant concern.

16. Our considered view as professionals is that the positions of Chief Justice and Deputy are too important to be risked on persons who have no established judicial philosophy or who may take the opportunity of joining the Bench to start engaging in judicial activism and legislation from the

Bench. This will harm the principle of judicial neutrality.

17. We are therefore not satisfied at the way the concerns raised about these issues during the interview process were responded to. Kenyans need more light and information on the assessment criteria used by the Judicial Service Commission. It is still premature to issue statements clearing the nominees for the job before even Presidential nomination and Parliamentary vetting.

### **Conclusion**

18. Kenyans need more information on the JSC nominees in the interests of transparency, as well as continued public participation. Both the Principals and the National Assembly should rise to the occasion, seize the moment and ensure that the approval process is wholesome in

approach and redresses the gaps in the JSC recommendation process.

19. We therefore urge the avoidance of haste or undue pressure during this process. And we encourage Kenyans to join us in asking the tough questions of JSC nominees, and to be ready to reverse the process if the JSC nominees are unable to survive this further public scrutiny.

Signed:

Name Profession/Organisation

1. Peter Waiyaki KCPF/ Advocate
2. Ogla Karani KCPF/ Psychologist
3. Edith Muriu Advocate
4. James Muthui Advocate
5. Dr Samuel Gathere Medical Doctor
6. Michael Wanyoike Human Resources Practitioner
7. Tom Kimani Catholic Families / Accountant
8. Henry Kamuti Catholic Families / Engineer
9. Anthony Maingi Catholic Families / Accountant
10. Dr Karanja S.K. Catholic Families/ Medical Doctor
11. Kimutai Kimosop KCPF Governance
12. Michael Mbogo Accountant
13. Clement Kitetu Project Manager/ Practitioner
14. Charles Kanjama Advocate