



JOINT MEMORANDUM ON THE ELECTION (AMENDMENT) SENATE BILLS NO. 42 of 2021, NO. 43 of 2021, No. 3 2021

Introduction

Article 99(1) (b) of the Constitution states that one qualifies as a Member of Parliament if he satisfies any educational, moral standards and ethical standards prescribed by this Constitution or any Act of Parliament. Consequently, Parliament enacted the Elections Act, No. 24 of 2011, which received Presidential Assent on 27th August 2011 and came into force on the 2nd of December 2011.

Sec. 22 of the Act states that, a person may be nominated as a candidate for an election under this act only if that person is qualified to be elected to that office under the constitution and this act, and holds, in the case of a member of parliament, a degree from a university recognized in Kenya or, in the case of a member of the county assembly, a degree from a university recognized in Kenya.

The degree requirement for legislators as tabled in parliament in 2011 was set to be implemented during the 2013 general elections. However, since the majority of MPs then did not have the qualifications, they managed to lobby for a five-year suspension of the passing of the bill. Fast-forwards in 2017, members of Parliament further amended the Section stating that, *“notwithstanding Subsection (1), this section shall come into force and shall apply to qualifications for candidates in the general election to be held after the 2017 general election,”*. By dint of this amendment, 10 years IEBC is yet to enforce educational standards and it was anticipated that this would be implemented in the upcoming elections in 2022.

The provision has been subject to a number of litigations since 2011. In Petition 198 of 2011, Johnstone Muthama filed a petition seeking among other to declare Section 22 of the Act unconstitutional. In her judgment, Justice Mumbi Ngugi agreed with the Petitioners that Section 22 of the Act offended Art. 27 of the Constitution and stated, *“By excluding everyone who does not have a ‘post-secondary qualification,’ a term which is not defined in the Act, from running for any elective office established under the Constitution,*

*the Act discriminates directly on the basis of status and social origin, for almost invariably, and as noted from the analysis of the socio-economic context above, it is the poor in society, those 18 million Kenyans living in poverty, who will not get an opportunity to acquire an education, let alone a post-secondary education*¹.

The case relied heavily among others statistics from National Coordinating Agency for Population and Development (NCPAD) to arrive at the decision that even on the basis of gender the Section discriminated on gender grounds considering the enrollment of girls in primary schools, the dropout rates and transition of girls to Kenyan secondary schools which was very low. Another Petition filed in 2012, relied on the precedence set by Justice Mumbi, it averred that the decision stands as it had not been perfected on appeal or review and therefore was still in force².

In 2013, Harun Mwau filed a petition seeking among other prayers a declaration that for a Presidential Candidate to qualify for nomination he/she is not required to satisfy any other educational, moral and ethical requirements apart from those required to be satisfied by person standing for election as a Member of Parliament. Justice Lenaola, as then was, held that on the issue of education standards, he differed with J. Mumbi and stated, *the nature of the duties and functions performed by the National Assembly and the Senate in my view require higher educational qualifications, skills and wide exposure which is gained through higher education. It is important that a representative to either of the House understands the proceedings, nature of business being carried out and most important be in a position to make his/her contribution to the various and many at times complex motions and debates in Parliament*³.

In his decision, J. Lenaola noted that the taxpayer spends millions of money on free primary and secondary education and that every Kenyan from all walks of life should be in a position to attain the past secondary education hence not unreasonable for parliament to demand it as threshold. He concluded by saying that holding Section 22 of the Act unconstitutional would be absurd 50 years after independence. This ruling was upheld by the Court of appeal in 2019 and remains the precedent.

Justice Mrima in a case filed by CAF and six others, declared Section 22 of the Elections Act unconstitutional in a Ruling delivered on 15th October 2021 citing discrimination and lack of public participation.

¹ Petition No. 198 of 2011 – Johnstone Muthama -Vs- Min of Justice and Constitutional Affairs

² Petition 16 of 2012, Ali Bakari Mohammed -Vs- IEBC & AG.

³ John Harun Mwau v Independent Electoral and Boundaries Commission & another [2013] eKLR

This house Senate has moved amendments to the Elections Act, 2011 with a view of amending Section 22 of the Act to proposing various standards while another amendment to the Act seeks to have legislators use their popular names in the elections. The table below is a summary of the bills.

Analysis of the Election Amendment Bills

Bill	Objects of the Bill	Proposals/ Recommendations
<p>The Election (Amendment) Bill (Senate Bills No. 42 of 2021.</p>	<p>Seeks to amend section 22 of the Elections Act to enable a person who is able to read and write to be nominated as a candidate for election as a MP or member of CAW.</p> <ul style="list-style-type: none"> • Currently, the law only allows the nomination of a candidate for election if such person holds a degree from a university recognized in Kenya. • This will allow for persons who may not have a degree but who may have other attributes of a leader to vie for election. <p>This Section, had been delayed by Sec 1(A) of the Act and such was not applicable in the last election but its operation was to take effect in the elections in 2022.</p>	<p>While we do not support any assertion that equates good leadership with academic qualifications, we support the letter and spirit of the Constitution and the Election Act of 2011 that provides for a basis/minimum academic qualification.</p> <p>While the object of this bill is to provide inclusivity by allowing anyone who is able to read and write to vie, if fails to appreciate the fact that Parliament and County Assembly three functions require some level of professional expertise which is a function of some basic academic qualifications.</p> <p>The Bill, postulates that the law as it is offends Art. 38 (3) of the Constitution that dictates that every adult has a right to be registered as a voter, vote and be candidate for public office, essentially seeking to achieve inclusivity, this could be far from the truth as the Country has made strides since the law was first enacted and consequent decisions earlier highlighted assert this fact.</p>
<p>The Election (Amendment) (No.2) Bill (Senate Bills No. 43 of 2021).</p>	<p>Seeks to amend Section 22 of the Elections Act by deleting: (1) and substituting therefore the following new subsection—</p> <ul style="list-style-type: none"> • A person may be nominated as a 	<p>We support these changes as it recognizes the nuisances of the local politics. In other words, no every 1,450 electoral wards have the same level of exposure to academic requirement.</p>

	<p>candidate for an election under this Act if that person is qualified to be elected to that office under the Constitution and this Act, and—</p> <p>(a) in the case of a Member of Parliament, holds a degree from a university recognized in Kenya; and</p> <p>(b) in the case of member of a county assembly— (i) holds a certificate of secondary education; or (ii) does not hold a certificate of secondary education but has served for two terms, one term as a member of a county assembly under the Constitution of Kenya 2010 and another term as a member of a local authority under the repealed Local Government Act.</p>	
<p>The Elections (Amendment) (No. 3) Bill, 2021</p>	<p>The Bill seeks to amend Sec. 32 of the Elections Act, No. 24 of 2011, to allow a candidate to be presented to the electorate on party primaries or election ballot papers in the way in which the candidate has chosen to familiarize himself or herself to the electorate.</p> <p>The Bill requires IEBC to develop a standardized form for candidates to notify it of the intended use of a popular name within 21 days to the nomination day and if an independent candidate as is required under Sec. 32 of the Act. IEBC shall thereafter on</p>	<p>We take the position that this is to be left to the candidate/aspirant to follow the laws regarding change of names as is.</p> <p>To enact this amendments would tantamount to over-legislating.</p>

	receipt of the Notice communicate in writing its decision to the candidate	
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After careful considerations of the proposed amendments to the Elections Act, 2011 and the court pronouncements on the issue, we wish to make the following positions;

- **THAT** the sovereign power belongs to the people of Kenya and that power ought to be exercised in accordance with the Constitution. The people may *inter alia* exercise their sovereign power through their democratically elected representatives.
- **THAT** under Art. 99(2) (b) the people of Kenya have envisaged that a person would not be eligible to run for certain offices if they did not meet the criteria set by Parliament.
- **THAT** the Committee of Experts on Constitutional Review noted that the people of Kenya had expressed the desire for there to be a statement on the educational qualifications of Members of Parliament⁴.
- **THAT** Section 22 of the Election Act was enacted by Parliament pursuant to the provisions of Article 99(1) (b) of the Constitution. This Article envisages a situation where Parliament prescribes an educational threshold for those who seek to be elected as Members of Parliament.
- **THAT** Kenya as a country has invested heavily in education both at Primary and Secondary levels. Statistics from UNESCO indicate that Kenya has an adult literacy rate of 81.53%, with the male literacy rate at 84.99% and females at 78.19%. This has been increasing over the years⁵.
- **THAT** while there may be different decisions on the subject, the doctrine of Stare decisis applies and as such the J. Lenaola decision remains as upheld in the Court of Appeal and the Attorney General should pursue the matter with a view of correcting anomalies in the various decisions.
- **THAT** the educational requirement cannot continue to be suspended in perpetuity as this goes against the will of the people.

Recommendations

Premised on the above, we recommend that;

⁴ Final Report of the Committee of Experts on Constitutional Review dated 11th October 2010, at paragraph 7.5.2

⁵ <https://countryeconomy.com/demography/literacy-rate/kenya>

- This committee upholds the status as contained in the Elections Act, 2011 Sec. 22 requiring that a person may be nominated as a candidate for an election under the act only if he/she is qualified to be elected to that office under the constitution and for the case of a member of parliament (MP) to have a degree from a university recognized in Kenya.
- This committee considers proposal suggested in the Election (Amendment) (Senate Bills No. 42 of 2021) for the case of a member of the county assembly, which requires a secondary school certificate, or in the absence, having served for two terms.
- The Election (Amendment) (Senate Bills No. 42 of 2021) and the Elections (Amendment) (No. 3) Bill, 2021 both be withdrawn for same reasons shown above.

We hope our recommendations will be factored in the deliberations on the referenced Bills.

Signed by

1. **Name: Sheila Masinde, Executive Director, Transparency International Kenya (TI-Kenya)**
Sign:
2. **Name: Mulle Musau, National Coordinator, Elections Observation Group (ELOG)**
Sign:
3. **Name: Caroline Gaita, Executive Director, Mzalendo Trust**
Sign:
4. **Name: Joshua Changwony, Executive Secretary, Constitution and Reform Education Consortium (CRECO)**
Sign: