



REPUBLIC OF KENYA
 IN THE HIGH COURT OF KENYA
 AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E059 OF 2021

BETWEEN

DR. MAGARE GIKENYI J. BENJAMIN.....PETITIONER

VERSUS

- SALARIES AND REMUNERATION COMMISSION (SRC).....1ST RESPONDENT
- COUNCIL OF GOVERNORS (COG).....2ND RESPONDENT
- MOMBASA COUNTY ASSEMBLY3 RD RESPONDENT
- KWALE COUNTY ASSEMBLY4TH RESPONDENT
- KILIFI COUNTY ASSEMBLY5TH RESPONDENT
- TANA COUNTY ASSEMBLY6TH RESPONDENT
- LAMU COUNTY ASSEMBLY.....7TH RESPONDENT
- TAITA/TAVETA COUNTY ASSEMBLY.....8TH RESPONDENT
- GARISSA COUNTY ASSEMBLY9TH RESPONDENT
- WAJIR COUNTY ASSEMBLY.....10TH RESPONDENT
- MANDERA COUNTY ASSEMBLY11TH RESPONDENT
- MARSABIT COUNTY ASSEMBLY12TH RESPONDENT
- ISIOLO COUNTY ASSEMBLY13TH RESPONDENT
- MERU COUNTY ASSEMBLY14TH RESPONDENT
- THARAKA-NITHI COUNTY ASSEMBLY15TH RESPONDENT
- EMBU COUNTY ASSEMBLY.....16TH RESPONDENT
- KITUI COUNTY ASSEMBLY17TH RESPONDENT
- MACHAKOS COUNTY ASSEMBLY18TH RESPONDENT

MAKUENI COUNTY ASSEMBLY	19TH RESPONDENT
NYANDARUA COUNTY ASSEMBLY.....	20TH RESPONDENT
NYERI COUNTY ASSEMBLY	21ST RESPONDENT
KIRINYAGA COUNTY ASSEMBLY	22ND RESPONDENT
MURANG'A COUNTY ASSEMBLY	23RD RESPONDENT
KIAMBU COUNTY ASSEMBLY.....	24TH RESPONDENT
TURKANA COUNTY ASSEMBLY	25TH RESPONDENT
WEST POKOT COUNTY ASSEMBLY.....	26TH RESPONDENT
SAMBURU COUNTY ASSEMBLY.....	27TH RESPONDENT
TRANS NZOIA COUNTY ASSEMBLY.....	28TH RESPONDENT
UASIN GISHU COUNTY ASSEMBLY.....	29TH RESPONDENT
ELGEYO/MARAKWET OF COUNTY ASSEMBLY	30TH RESPONDENT
NANDI COUNTY ASSEMBLY.....	31ST RESPONDENT
BARINGO COUNTY ASSEMBLY.....	32ND RESPONDENT
LAIKIPIA COUNTY ASSEMBLY	33TH RESPONDENT
NAKURU COUNTY ASSEMBLY	34TH RESPONDENT
NAROK COUNTY ASSEMBLY.....	35TH RESPONDENT
KAJIADO COUNTY ASSEMBLY.....	36TH RESPONDENT
KERICHO COUNTY ASSEMBLY	37TH RESPONDENT
BOMET COUNTY ASSEMBLY.....	38TH RESPONDENT
KAKAMEGA COUNTY ASSEMBLY.....	39TH RESPONDENT
VIHIGA COUNTY ASSEMBLY	40TH RESPONDENT
BUNGOMA COUNTY ASSEMBLY	41ST RESPONDENT
BUSIA COUNTY ASSEMBLY	42ND RESPONDENT
SIAYA COUNTY ASSEMBLY	43RD RESPONDENT
KISUMU COUNTY ASSEMBLY	44TH RESPONDENT
HOMA BAY COUNTY ASSEMBLY.....	45TH RESPONDENT
MIGORI COUNTY ASSEMBLY.....	46TH RESPONDENT
KISII COUNTY ASSEMBLY	47TH RESPONDENT
NYAMIRA COUNTY ASSEMBLY.....	48TH RESPONDENT
NAIROBI CITY COUNTY ASSEMBLY	49TH RESPONDENT
MOMBASA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	50TH RESPONDENT

KWALE COUNTY SPEAKER OF COUNTY ASSEMBLY	51ST RESPONDENT
KILIFI COUNTY SPEAKER OF COUNTY ASSEMBLY.....	52ND RESPONDENT
TANA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	53RD RESPONDENT
LAMU COUNTY SPEAKER OF COUNTY ASSEMBLY	54TH RESPONDENT
TAITA/TAVETA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	55TH RESPONDENT
GARISSA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	56TH RESPONDENT
WAJIR COUNTY SPEAKER OF COUNTY ASSEMBLY.....	57TH RESPONDENT
MANDERA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	58TH RESPONDENT
MARSABIT COUNTY SPEAKER OF COUNTY ASSEMBLY	59TH RESPONDENT
ISIOLO COUNTY SPEAKER OF COUNTY ASSEMBLY	60TH RESPONDENT
MERU COUNTY SPEAKER OF COUNTY ASSEMBLY.....	61ST RESPONDENT
THARAKA-NITHI COUNTY SPEAKER OF COUNTY ASSEMBLY.....	62ND RESPONDENT
EMBU COUNTY SPEAKER OF COUNTY ASSEMBLY.....	63RD RESPONDENT
KITUI COUNTY SPEAKER OF COUNTY ASSEMBLY.....	64TH RESPONDENT
MACHAKOS COUNTY SPEAKER OF COUNTY ASSEMBLY	65TH RESPONDENT
MAKUENI COUNTY SPEAKER OF COUNTY ASSEMBLY.....	66TH RESPONDENT
NYANDARUA COUNTY SPEAKER OF COUNTY ASSEMBLY	67TH RESPONDENT
NYERI COUNTY SPEAKER OF COUNTY ASSEMBLY.....	68TH RESPONDENT
KIRINYAGA COUNTY SPEAKER OF COUNTY ASSEMBLY	69TH RESPONDENT
MURANG'A COUNTY SPEAKER OF COUNTY ASSEMBLY.....	70TH RESPONDENT
KIAMBU COUNTY SPEAKER OF COUNTY ASSEMBLY.....	71ST RESPONDENT
TURKANA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	72ND RESPONDENT
WEST POKOT COUNTY SPEAKER OF COUNTY ASSEMBLY.....	73TH RESPONDENT
SAMBURU COUNTY SPEAKER OF COUNTY ASSEMBLY	74TH RESPONDENT
TRANS NZOIA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	75TH RESPONDENT
UASIN GISHU COUNTY SPEAKER OF COUNTY ASSEMBLY	76TH RESPONDENT
ELGEYO/MARAKWET COUNTY SPEAKER OF COUNTY ASSEMBLY.....	77TH
	RESPONDENT
NANDI COUNTY SPEAKER OF COUNTY ASSEMBLY.....	78TH RESPONDENT
BARINGO COUNTY SPEAKER OF COUNTY ASSEMBLY	79TH RESPONDENT
LAIKIPIA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	80TH RESPONDENT
NAKURU COUNTY SPEAKER OF COUNTY ASSEMBLY.....	81ST RESPONDENT

NAROK COUNTY SPEAKER OF COUNTY ASSEMBLY	82ND RESPONDENT
KAJIADO COUNTY SPEAKER OF COUNTY ASSEMBLY.....	83RD RESPONDENT
KERICHO COUNTY SPEAKER OF COUNTY ASSEMBLY	84TH RESPONDENT
BOMET COUNTY SPEAKER OF COUNTY ASSEMBLY	85TH RESPONDENT
KAKAMEGA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	86TH RESPONDENT
VIHIGA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	87TH RESPONDENT
BUNGOMA COUNTY SPEAKER OF COUNTY ASSEMBLY	88TH RESPONDENT
BUSIA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	89TH RESPONDENT
SIAYA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	90TH RESPONDENT
KISUMU COUNTY SPEAKER OF COUNTY ASSEMBLY.....	91ST RESPONDENT
HOMA BAY COUNTY SPEAKER OF COUNTY ASSEMBLY.....	92ND RESPONDENT
MIGORI COUNTY SPEAKER OF COUNTY ASSEMBLY.....	93RD RESPONDENT
KISII COUNTY SPEAKER OF COUNTY ASSEMBLY	94TH RESPONDENT
NYAMIRA COUNTY SPEAKER OF COUNTY ASSEMBLY.....	95TH RESPONDENT
NAIROBI CITY COUNTY SPEAKER OF COUNTY ASSEMBLY.....	96TH RESPONDENT
MOMBASA COUNTY ASSEMBLY SERVICE BOARD.....	97TH RESPONDENT
KWALE COUNTY ASSEMBLY SERVICE BOARD.....	98TH RESPONDENT
KILIFI COUNTY ASSEMBLY SERVICE BOARD.....	99TH RESPONDENT
TANA COUNTY ASSEMBLY SERVICE BOARD.....	100TH RESPONDENT
LAMU COUNTY ASSEMBLY SERVICE BOARD.....	101TH RESPONDENT
TAITA/TAVETA COUNTY ASSEMBLY SERVICE BOARD.....	102TH RESPONDENT
GARISSA COUNTY ASSEMBLY SERVICE BOARD.....	103TH RESPONDENT
WAJIR COUNTY ASSEMBLY SERVICE BOARD.....	104TH RESPONDENT
MANDERA COUNTY ASSEMBLY SERVICE BOARD.....	105TH RESPONDENT
MARSABIT COUNTY ASSEMBLY SERVICE BOARD	106TH RESPONDENT
ISIOLO COUNTY ASSEMBLY SERVICE BOARD.....	107TH RESPONDENT
MERU COUNTY ASSEMBLY SERVICE BOARD	108TH RESPONDENT
THARAKA-NITHI COUNTY ASSEMBLY SERVICE BOARD.....	109TH RESPONDENT
EMBU COUNTY ASSEMBLY SERVICE BOARD	110TH RESPONDENT
KITUI COUNTY ASSEMBLY SERVICE BOARD.....	111TH RESPONDENT
MACHAKOS COUNTY ASSEMBLY SERVICE BOARD	112TH RESPONDENT
MAKUENI COUNTY ASSEMBLY SERVICE BOARD.....	113TH RESPONDENT

NYANDARUA COUNTY ASSEMBLY SERVICE BOARD.....	114TH RESPONDENT
NYERI COUNTY ASSEMBLY SERVICE BOARD.....	115TH RESPONDENT
KIRINYAGA COUNTY ASSEMBLY SERVICE BOARD.....	116TH RESPONDENT
MURANG'A COUNTY ASSEMBLY SERVICE BOARD.....	117TH RESPONDENT
KIAMBU COUNTY ASSEMBLY SERVICE BOARD.....	118TH RESPONDENT
TURKANA COUNTY ASSEMBLY SERVICE BOARD.....	119TH RESPONDENT
WEST POKOT COUNTY ASSEMBLY SERVICE BOARD.....	120TH RESPONDENT
SAMBURU COUNTY ASSEMBLY SERVICE BOARD.....	121ST RESPONDENT
TRANS NZOIA COUNTY ASSEMBLY SERVICE BOARD.....	122ND RESPONDENT
UASIN GISHU COUNTY ASSEMBLY SERVICE BOARD.....	123RD RESPONDENT
ELGEYO/MARAKWET COUNTY ASSEMBLY SERVICE BOARD.....	124TH
	RESPONDENT
NANDI COUNTY ASSEMBLY SERVICE BOARD.....	125TH RESPONDENT
BARINGO COUNTY ASSEMBLY SERVICE BOARD.....	126TH RESPONDENT
LAIKIPIA COUNTY ASSEMBLY SERVICE BOARD.....	127TH RESPONDENT
NAKURU COUNTY ASSEMBLY SERVICE BOARD	128TH RESPONDENT
NAROK COUNTY ASSEMBLY SERVICE BOARD.....	129TH RESPONDENT
KAJIADO COUNTY ASSEMBLY SERVICE BOARD.....	130TH RESPONDENT
KERICHO COUNTY ASSEMBLY SERVICE BOARD.....	131ST RESPONDENT
BOMET COUNTY ASSEMBLY SERVICE BOARD.....	132ND RESPONDENT
KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD	133RD RESPONDENT
VIHIGA COUNTY ASSEMBLY SERVICE BOARD.....	134TH RESPONDENT
BUNGOMA COUNTY ASSEMBLY SERVICE BOARD.....	135TH RESPONDENT
BUSIA COUNTY ASSEMBLY SERVICE BOARD.....	136TH RESPONDENT
SIAYA COUNTY ASSEMBLY SERVICE BOARD.....	137TH RESPONDENT
KISUMU COUNTY ASSEMBLY SERVICE BOARD.....	138TH RESPONDENT
HOMA BAY COUNTY ASSEMBLY SERVICE BOARD.....	139TH RESPONDENT
MIGORI COUNTY ASSEMBLY SERVICE BOARD.....	140TH RESPONDENT
KISII COUNTY ASSEMBLY SERVICE BOARD	141ST RESPONDENT
NYAMIRA COUNTY ASSEMBLY SERVICE BOARD.....	142ND RESPONDENT
NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD	143RD RESPONDENT
NATIONAL TREASURY.....	144TH RESPONDENT

CONTROLLER OF BUDGET.....145TH RESPONDENT

COMMISSION ON ADMINISTRATION OF JUSTICE (CAJ).....146TH
RESPONDENT

ATTORNEY GENERAL (AG).....147TH RESPONDENT

AND

THE SENATE.....1ST INTERESTED PARTY

THE NATIONAL ASSEMBLY (NA)..... 2ND INTERESTED PARTY

TRANSPARENCY INTERNATIONAL KENYA3RD INTERESTED PARTY

KENYA NATIONAL COMMISSION OF JURISTS-KENYA (ICJ-KENYA).....4TH
INTERESTED PARTY

LAW SOCIETY OF KENYA (LSK).....5TH INTERESTED PARTY

EAST AFRICAN CENTRE FOR HUMAN RIGHTS (EACH RIGHTS).....6TH
INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR).....7TH
INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION (KHRC)8TH INTERESTED PARTY

KATIBA INSTITUTE.....9TH INTERESTED PARTY

KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS UNION(KMPDU)10TH
INTERESTED PARTY

JUDGMENT

Introduction:

1. One of the landmark shifts in governance in Kenya courtesy of the 2010 Constitution is devolution.
2. As a result of devolution, the Legislature, as an arm of Government, underwent two major changes. The first transformation was the introduction of the Senate as part of Parliament at the national level. The second revolution was the introduction of the County Assemblies at the County level.
3. The new Legislature in Kenya post the 2010 Constitution is, therefore, made up of a bi-cameral house at the national level, being the Parliament which is comprised of the National Assembly and the Senate and the County Assemblies at the county level.
4. In the Petition subject of this judgment, *Dr. Magare Gikenyi J. Benjamin*, the Petitioner herein, variously challenges the constitutionality of the decision made by the Salaries and Remuneration Commission (hereinafter referred to as '*the SRC*') to convert the then existing Car loan facility for Speakers and Members of County Assembly to a Car Grant as a transport benefit. I will hereinafter refer to the said decision as '*the impugned decision*' or '*the conversion*').
5. The Petition is opposed.

The Petition:

6. The Petitioner filed a Petition and a Notice of Motion together with a supporting affidavit all evenly dated 18th February, 2021. A Further Affidavit sworn on 30th September, 2021 was also sworn and filed by the Petitioner.
7. In support of the Petition and the application, skeleton submissions dated 23rd March, 2021 were filed. Submissions dated 26th April, 2021 were also filed in support of the Notice of Motion.
8. The application sought some conservatory orders pending the outcome of the Petition.

9. Additionally, in advancing the Petition, the Petitioner filed submissions dated 24th November 2021 and further submissions headed 'Final Submissions' dated 30th September, 2021.

10. In the main, the Petition sought the following orders: -

a) A declaration that contents of 1st **Respondent's circular dated 9th February 2021** with Ref .NO, SRC/TS/COG/3/61/48 VOL.II (113) addressed to Hon. Governor Martin Wambora the chairman of 2nd Respondent herein-council of governors(COG) the subject being **Review of Car Loan For Speaker And Member of County Assembly** which inter alia had an effect of approving the conversion of car loans into car grants benefiting the 3rd – 96th Respondents is unconstitutional and therefore, invalid, null and void ab initio.

b) An order of judicial review by way of mandamus, compelling the 2nd Respondent (COG), 97th – 143rd Respondents, National Treasury, The Controller of Budget and the Hon. Attorney General to recover any benefits the 3rd.- 96th Respondents might have accrued due to the 1st **Respondent's circular on letter/circular dated 9th February 2021** on this issue.

c) A declaration that the conversion of car loans into car grants and rejecting of health workers risk allowances is discriminatory contrary to article 27 of the constitution.

d) The high court to be pleased to give an order of certiorari to bring to the high court of Kenya the 1st **Respondent's letter/circular dated 9th February 2021** which has an effect of inter alia converting the 3rd.- 96th **Respondents' car loans into car loans** for purposes of being quashed.

e) The high court be pleased to give order of mandamus to the 1st Respondent to re-look the risk allowance of the 10th interested party and other health workers.

f) That any other order or/and modification of Petitioner's prayer(s) which this honorable court may deem fit to give to achieve objects of justice for majority of Kenyans.

g) Cost of this Petition to be borne by the Respondent.

The Responses:

11. The Respondents in opposing the Petition filed their Replying Affidavits, written submissions and Ground of opposition.

The Petitioner's case:

12. The Petitioner herein, *Dr. Magare Gikenyi J. Benjamin*, prosecuted the Petition on the backing of Article 3(1), 22(1), 22(2)(c) and Article 23(1) of the Constitution.

13. As presented, this Petition stemmed from the actions of the SRC in coming up with the impugned decision. The decision was communicated through a letter whose subject was **Review of Car Loan for Speaker and Member of County Assembly** addressed to *Hon. Governor Martin Wambora*, the Chairman of 2nd Respondent herein, the Council of Governors. The letter was dated 9th February, 2012.

14 Concurrently, the Petitioner averred that the President of the Republic of Kenya had, prior to the impugned decision, had promised the Members of the County Assemblies the said Car Grant of Kshs. 2,000,000/= amounting to Kshs. 4.5 Billion.

15. The promise was allegedly made on 29th January, 2021 while promoting the BBI Constitutional Amendment Bill.

16. Notably, the Petitioner conceded that the said promise was not reduced into writing as demanded by Article 135 of the Constitution. However, the Petitioner was of the view that there was a nexus between the President's promise, the Council of Governors' request, and the SRC's impugned decision especially given the timing, sequence and speed of the happenings.

17. The Petitioner also contended that the conversion was an incentive for the County legislature to support the BBI Amendment Bill. To that end, the Petitioner contended further that while dealing with the issue raised by the health workers on their risk allowance, in light of the Covid-19 pandemic, the SRC had warned the Council of Governors against such payment, but in a surprise turn of events it made the impugned decision.

18. The Petitioner maintained that SRC applied their discretionary powers in determining the remuneration of State officers to discriminate against the health workers while favouring the County Assembly Members and Speakers based on their political status and on the State's quest to advance the change of the Kenyan Constitution and BBI Amendment Bill.

19. While making reference to the functions of the SRC as stipulated under Section 11 of the *Salaries and Remuneration Commission Act, 2011*, the Petitioner posited that SRC's actions were irrational, irregular and illegal as it used a public office for personal enrichment instead of serving the people of Kenya.

20. The Petitioner further posited that the profound discrimination and favouritism were made outside the approved National budget and

contravened Articles 10, 118 and 249(2) of the Constitution.

21. The Petitioner also pointed out that the SRC's mandate as espoused by Articles 230(4) and 201 of the Constitution on prudent utilization of financial resources was unreasonably flouted. He averred that the impugned decision was against the Constitution and as particularly demonstrated by the haste in the adoption of the conversion while still undertaking a review on remuneration in the financial year.

22. Reference was also made by the Petitioner to Section 107 of the Public Finance Management Act, 2021, where a County is required to manage its public finances in accordance with the principles of fiscal responsibility.

23. To demonstrate how the conversion was against the prudent use of financial resources, the Petitioner cited a World Bank Report on Kenyan Economy of 25th November, 2020 Reference: 2021/064/AFR entitled *Kenya's GDP Contracts Under Weight of COVID-19, Impacting Lives and Livelihoods*, that showed the shrinking of the Kenyan economy and the World Bank Report titled "*Kenya Economic Update: COVID-19 Erodes Progress in Poverty Reduction in Kenya, Increases Number of Poor Citizens*", which showed that COVID-19 had increased the number of poor Kenyans.

24. The Petitioner further took issue with the conversion and argued that there was no fiscal, scientific, moral or legal basis that would justify affordability of such conversion, as envisaged by Section 11(d) of the *Salaries and Remuneration Commission Act, 2011*.

25. The Petitioner posited that it was against the law to convert an already executed contract into a grant, where no such condition was placed in the contract thereby transforming it to a private property and that taxpayers should not bear the cost.

26. In the circumstances, the Petitioner maintained that the impugned decision and the process leading to the said decision were unconstitutional.

27. The Petition was founded on the alleged Respondents' contravention and violation of *inter alia* Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 33, 35, 73, 129, 135, 159, 174, 176, 178, 201, 230, 249 and 259 of the Constitution.

28. The Petitioner identified the issue for determination as *Whether the Petitioner based on material placed before this honourable court, is entitled to the orders/reliefs sought using well-established/settled doctrines of constitutionalism, rule of law without fear or favour*.

29. The Petitioner submitted on the sovereignty of the people under Article 1 of the Constitution, affirmed the judicial authority in determining constitutionality of decisions made by the Executive and the guarantee of the Bill of Rights as a benefit to every individual.

30. The Petitioner relied on *Institute of Social Accountability & Another v National Assembly & 4 Others* High Court, (2015) eKLR and contended that the rule of law should be maintained and that while interpreting the Constitution, the interpretation should promote its purposes, values and principles, advances the rule of law, human rights, and fundamental freedoms in the Bill of Rights.

31. It was submitted that the Respondents acted in contravention of common law principle providing that the State or State agencies can only do that which is permitted by the law. He cited *Entick vs. Carrington (1965) 2 Wills, Hardware & Ironmongery vs. Attorney General (E.A) 1972* and *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) [2020] eKLR*.

32. In his submissions, the Petitioner sought remedies as to protect the current and future generations from losing the taxpayers monies. In defining appropriate relief, he cited *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* (supra) where in the case, reference was made to a South African Constitutional court in *Minister of Health & Others Vs Treatment Action Campaign & Others 142*. Further reference was made to a Supreme Court of Canada case of *Doucette-Boudreau v Nova Scotia (Minister of Education)*.

33. It was argued that whereas SRC has a constitutional mandate, amongst other duties, in setting State officers' benefits, such mandate should be executed in compliance to good governance principles and integrity. In this case, it was submitted that the conversion was irrational, irregular, illegal and an abuse of power for political advantage.

34. In illustrating illegality and irrationality in the conversion, reliance was made in *Republic v Vice Chancellor Moi University & 2 others Ex parte Benjamin J. Gikenyi Magare [2019] eKLR* quoting *Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300* and to the Court of Appeal in *Council of Civil Unions v. Minister for the Civil Service [1985] AC 1* and *Re Application by Bukoba Gymkhana Club (1963) EA 478 at 479*.

35. While casting doubt as to the SRC's source of powers in authorizing the conversion, the Petitioner cited the South African case of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*, where it was stated that the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised; and that public power can be validly exercised only if it is clearly sourced in law.

36. Further, Petitioner contended that SRC made errors involving *inter alia*, fettering of discretion, taking into account irrelevant considerations like pleasing of the County legislature in order to attain a favourable political gain in passing BBI Constitutional Amendment Bill 2020.

37. On illegality in fettering of discretion, he cited *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR*.

38. It was the Petitioner's submission that the conversion was indeed an act of bribing the County legislature through the SRC, so as to gain support for BBI. That priority ought to have been on fighting *Covid-19* and not promoting BBI. He urged the Court to take judicial notice of Section 59 of the Evidence Act. He referred to *Independent Electoral and Boundaries Commission & 4 others v David Ndi & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae)* [2021] eKLR, 1089 Court of appeal judgement at paragraph 340.
39. The Petitioner further submitted on the rights to equality and freedom from discrimination as guarantee by Article 27 of the Constitution. He argued that the conversion, on one hand, and on the other hand, disapproving frontline healthcare workers risk allowances enhancement was unfair and discriminatory. He disagreed with SRC's position that the grants were meant to bring equity between national and county government and contended that the intention, process and timing were distinctively different with the latter being undertaken improperly.
40. In submitting as to the discriminatory actions of SRC, the Petitioner called for the application of the principle/test as established in the case of *Harksen -v- Lane NO* [1998] 1 SA 300.
41. In defining discrimination, and application of the grounds listed in Article 27(4) of the Constitution, he submitted that the list was intended to be of illustrative and permissive application rather than strict and exclusive application. He relied on *Masai Mara (SOPA) Limited v Narok County Government* [2016] eKLR, *Andrews -v- Law Society of British Columbia* [1989] 1 SCR 143 and *Peter K. Waweru -v- Republic* [2006] eKLR.
42. The Petitioner submitted that there was no rational justification and that where the discrimination is found to be unfair then a determination is to be made as to whether there can be any rational justification under Article 24 of the Constitution.
43. The Petitioner maintained that by applying the *Harksen -v- Lane (supra)* test/principle, it is shown that SRC while basing its decision on political capital discriminated against the health workers in favouring the county legislatures. He also argued that the discrimination was directly based on the grounds as specified under Article 27(4) of the Constitution and as such no objective justification was provided thus amounting to unlawful differentiation.
44. The Petitioner in advancing his case, submitted on the principle of legitimate expectation. He averred that the health workers had legitimate expectation of not being discriminated against. That Kenyans had legitimate expectation of prudent use of financial resources that would elevate their lives and not just benefit the political class. That Kenya being governed by rule of law, the legitimate expectation was that all citizens, state officers, state organs, and independent offices have to abide by the law and the Constitution. On the contrary, that the expectation of the County legislatures on the conversion can only be illegitimate due to its illegal nature.
45. He relied on *Republic v. Nairobi City County & Another ex parte Wainaina Kigathi Mungai*, High Court Judicial Review Misc. Case No. 356 of 2013; [2014] eKLR, *Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited* [2004] 2 eKLR 530, *Oindi Zaippeline & 39 others v Karatina University & another* [2015] eKLR that cited *Re Westminster City Council*, [1986] A.C. 668 at 692. Further reliance was made on Wade and Forsyth on *Administrative Law*, 10th Edition.
46. The Petitioner submitted further that the law does not protect every expectation but only those which are "legitimate", citing the case of *South African Veterinary Council v. Szymanski 2003 (4) S.A. 42 (SCA)* at [paragraph 28], which further enumerated the requirement for legitimate expectation. In Kenya, the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others*, Petition No. 14 of 2014 set out the principles on legitimate expectation.
47. On justifiable reasons, the Petitioner put forward the argument that there was no legal or justifiable reason provided by the SRC in backing the President/Executive in undertaking the conversion, as a reward to the County legislatures. Reliance was made on *Republic vs Chief Licensing Officer & Another ex parte Tom Mboya Onyango* (2017) eKLR.
48. The Petitioner further submitted that an entity entrusted with authority must properly exercise its discretion as provided in the law. He cited *Republic v Vice Chancellor Moi University & 2 others ex parte Benjamin J. Gikenyi Magare* [2019] eKLR, where the Court made reference to *Republic v Institute of certified Public Accountants of Kenya (ICPAK) ex-parte Vipichandria Bhatt t/a JV Bhatt & Company Nairobi HCC Miscellaneous Application 285/2006 (UR)* in support of the argument.
49. Resultantly, the Petitioner sought for an order of Mandamus to have the matter of risk allowance for health workers revisited and for the recovery of Car Grant from County legislatures. He cited *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR, *Kenya National Examination Council V Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996*, and *Republic vs Chief Licensing Officer & another Ex Parte Tom Mboya Onyango* (2017) eKLR.
50. Regarding public interest & law of proportionality, the Petitioner contended that since the conversion had negative financial implications on the public funds and the rule of law, that qualified the case as that of public interest. He referred to *Pius Wanjala v Cleopa Mailu & 4 others* [2016] eKLR, *Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamani and 4 Others*, [2014] eKLR and *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.
51. It was the Petitioner's submissions that the Respondents ought to be estopped from indiscipline and financial irresponsibility that disregarded the Constitution and applicable laws. That of importance, the estoppel would serve to promote constitutionalism and the rule of law.
52. In the end, the Petitioner prayed for the Petition to be allowed with costs.

The Respondents' cases:

53. I will, hereunder, consider the various Respondents' cases in opposing the Petition.

The SRC's case:

54. It was the SRC's position that the transport benefit fell under its purview as a mandate provided for in the Constitution - in setting and reviewing such benefits. That a transport benefit may include, provision of car grants or provision of car loans.

55. SRC asserted that the conversion was made independently and objectively; purely guided by constitutional principles of affordability and fiscal sustainability, equity and fairness, and transparency.

56. According to SRC, the purpose of the conversion was to harmonize the category of benefits for the legislators at both the national and county levels. That, save for the transport benefit in form of car grant to the county legislatures, other benefits were similar. Further, the Council of Governors' confirmation of the availability of funds to implement the conversion informed its decision in awarding the benefit.

57. Regarding the matter of health workers risk allowance, SRC confirmed that what was sought was an enhancement of the same.

58. SRC further affirmed that while observing Article 240 (5) and (5) of the Constitution and Section 11 of the *SRC Act*, on 13th May, 2020 it duly approved the payment of a **COVID-19 Medical Emergency Allowance** to frontline healthcare workers.

59. The SRC conceded that, vide its letter dated 27th January, 2021 it advised County governments to retain the current rates of risk allowance owing to their confirmed unavailability of funds to meet the proposed enhancement of risk allowance.

60. According to the 1st Respondent, it did not in any way discriminate against healthcare workers with respect to their remuneration and benefits as alleged by the Petitioner.

61. The SRC formulated the following issues for determination: -

i. *What, if at all, is the bearing of the decision of the Court of Appeal in **Independent Electoral and Boundaries Commission & 4 others –vs- David Ndi & 82 others; Kenya Human Rights Commission & 4 Others (Amicus Curiae) (2021) eKLR** on these proceedings.*

ii. *Whether the conversion of car loan facility to a transport benefit in the form of a car grant, for the position of Speakers and Members of the County Assemblies, as reviewed and communicated by the 1st Respondent on 9th February, 2021 was legal and rational.*

iii. *Whether the 1st Respondent's actions were discriminatory against healthcare workers with respect to payment of Risk Allowance.*

62. On the first issue, SRC referred to the Petitioner's submissions, where reliance was made to the Court of Appeal in **Independent Electoral and Boundaries Commission & 4 others –vs- David Ndi & 82 others; Kenya Human Rights Commission & 4 Others (Amicus Curiae) (2021) eKLR** to enforce his position.

63. The SRC highlighted the legal history and happenings that culminated to the said Court of Appeal judgment.

64. It, SRC, submitted that the concerns on the conversion were neither the main issue in consideration in the proceedings before the High Court and the Court of Appeal nor was it the primary ground for declaring the entire BBI process as unconstitutional.

65. To the SRC, the observations by the Judges at paragraph 340, in the above cited case, were merely minority *orbiter dicta* made in passing and were neither binding nor of persuasive value on the instant proceedings. Reliance was placed on *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others* [2017] eKLR.

66. On the second issue, SRC submitted that as for the legality of public administrative decisions, public bodies may only do what the law empowered them to do. It relied on *Gibb Africa Limited v Kenya Revenue Authority* [2017] eKLR, *South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another (Supra)* and *Third way Alliance Kenya & another v Head of the Public Service - Joseph Kinyua & 2 others; Martin Kimani & 15 others (Interested Parties)* [2020] eKLR in buttressing the submission.

67. The SRC further maintained that it's dated 9th February, 2021 effecting the conversion was grounded in law. That, Article 230 (4)(a), (5) of the Constitution and Section 11 of *Salaries and Remuneration Act* empowered it to undertake such actions; while Section 12 (1) of the SRA Act set out the principles that it is required to take into account in the discharge of its mandate.

68. It was submitted that the aforementioned provisions were adhered to, while enabling the conversion; and the Petitioner's assertions were baseless and not founded on the law. That, particular considerations were taken into account, chiefly: the confirmation of availability funds by the 2nd Respondent and the similarity of the roles of national and county legislators with distinction in transport benefit in form of a car grant.

69. As regarding rationality or reasonableness of the conversion, SRC insisted that the decision was lawfully made and as such the argument on unreasonableness or irrationality cannot stand. The decision in *J. N. N. (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School* [2018] eKLR was relied upon.

70. Further submissions were that rationality, as a ground for the review of an administrative action, is addressed in Section 7(2)(i) of *Fair Administrative Action Act*. That the reasonable test, as the simple test used throughout, was whether the decision in question was one which a reasonable authority could reach. Reliance was placed on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004).

71. The SRC challenged the Petitioner to prove that it took into account irrelevant considerations in arriving at the impugned.

72. On public participation, the SRC tendered that before arriving at its decision it engaged the relevant stakeholders, being the National Treasury, Council of Governors and the Commission on Revenue Allocation. That public participation did not mean that everyone must give their views, which was impracticable. Rather there ought to be evidence of “*intentional exclusivity*” in the participation programme and which on the face of it, took into account the principle that those most affected by a policy, legislation or action must have a bigger say and their views more deliberately sought and put into account. Reliance was on *Mui Coal Basin Local Community & 17 others vs Permanent Secretary Ministry of Energy & 15 others* (2015) eKLR.

73. With regards to the independence of and abuse of discretion and on the allegation that the Executive and the President influenced the conversion, SRC submitted that such allegations were unproven and were merely speculative. SRC stated that its decision was made in absence of any external controls and directions.

74. On the third issue on discrimination, SRC made reference to *Black's Law Dictionary* Standard 10th Edition in definition of discrimination. Of particular importance was the definition that it is the differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.

75. The SRC, acknowledged the provisions of Article 27(3) providing against discrimination, and at the same time bringing to the attention of Article 25 of the Constitution which allows lawful limitations of such fundamental rights and freedom.

76. Further, it was submitted that *The Employment Act No. 11 of 2007* equally makes provision prohibiting discrimination at the work place, specifically, Section 5(3)(b) of the said Act. That however, as per Section 5(4) of the Act, it shall not be discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

77. That in applying equal protection clause under Article 27, SRC cited *Federation of Women Lawyers Kenya (Fida-K) & 5 Others –vs- Attorney General & Another* [2011] eKLR. On unequal or differential treatment, the case of *Kedar Nath –vs- State of W.B.* (1953) SCR 835 (843) was relied on. In determining the instant case, SRC submitted that this Court be guided by *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR.

78. It was further SRC's contention that the Petitioner failed to tender tangible evidence proving how the advice by SRC to disallow enhancement of risk allowance to health workers was arbitrary and unreasonable.

79. The SRC urged that its decision was partly based on the unavailability of funds to implement the requested allowance enhancement, thus retaining the current risk allowance rates. That on the other hand, the conversion was informed by the availability of funds as confirmed by the 2nd Respondent. SRC so submitted that the distinction brought out its decisions as justifiable and reasonable.

80. SRC prayed that the Petition be dismissed with costs.

The 2nd Respondent's case:

81. The 2nd Respondent supported the SRC's case and position.

82. The 2nd Respondent submitted the following as the issues that called for determination: -

- a) *Whether the 1st Respondent's decision was illegal and ultra vires.*
- b) *Whether the 1st Respondents action was subject to public participation.*
- c) *Whether the 1st Respondent violated the legitimate expectations of Kenyans.*
- d) *Whether the 1st Respondent's decision aimed to enhance equity between the legislators in line with **Article 27** of the constitution.*
- e) *Whether the application constitutes an attempt to negotiate for the terms and conditions of employment of the health workers*
- f) *Whether the applicant pleaded his case with the reasonable degree of precision as required in law.*

83. On the first issue, the 2nd Respondent submitted that the SRC followed the law and Constitution in undertaking its mandate. Particularly, it reiterated that Article 230(4) and (5) (d) of the Constitution and Section 12 and 13 (d) of the *Salaries and Remuneration Act*, were complied with.

84. The principle of legality which demands that powers should have a law as source, and be validly exercised on basis of a law, was averred by the 2nd Respondent, who further refuted the claim that the conversion was *ultra vires*, illegal, and abuse of discretion. To describe illegality, the 2nd Respondent relied on *Republic v. Vice chancellor Moi University & 2 others Ex parte Benjamin J. Gikenyi*, Judicial Review No. 1 of 2018 in the High Court at Eldoret.
85. On the second issue, the 2nd Respondent submitted that the impugned decision was not subject to public participation since it was an administrative function in nature, which fell under its statutory and constitutional mandate, thus no public participation was required. That, if public participation was a mandatory process, it would stifle the SRC's operations and stall its functions. Further they submit that there was sufficient consultation with the relevant affected stakeholders in making the decision.
86. The 2nd Respondent relied on the case of *William Odhiambo Ramogi & 2 Others V Attorney General, Cabinet Secretary, Ministry of Transport and Infrastructure and 4 others*, Constitutional Petition No. 159 of 2018 in the High Court at Mombasa, where the Honourable Court held that requiring a public entity to subject its internal operational and administrative decisions to public participation is irrational and unreasonable.
87. It was the 2nd Respondent's submission that between consultation and public participation, in public bodies, consultations are more effective in administrative decisions. That, this position was enumerated by the High Court in *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others*, consolidated constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014.
88. It was summed up by the 2nd Respondent that in arriving at the impugned decision, SRC was not mandated to engage in public participation but consultation with affected stakeholders since it was an administrative decision.
89. On the third issue, the 2nd Respondent submitted that the concept of legitimate expectation was discussed in the case of *Communication's Commission of Kenya and 5 others v Royal Media Services and 4 others* (supra).
90. The 2nd Respondent submitted that the 1st Respondent made a decision that was well within the powers granted to it by the law, and thus the people's legitimate expectation that all decisions must be lawful was met.
91. The 2nd Respondent further submitted that the Petitioner's representation underlying the expectation was ambiguous and devoid of specificity and precision. That in order for there to be valid legitimate expectation, the representation must be precise and specific. The representation must be clear, unambiguous and devoid of relevant qualification. That was the holding in the case of *Republic V Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum*, Miscellaneous Application No. 461 of 2016 in the High Court at Nairobi.
92. On the fourth issue, the 2nd Petitioner contended that the conversion was meant to promote equity and fairness between the national and county legislators, with regards to transport benefits accorded. That the prevailed differential treatment between the national and county legislators - in that the former receive car grants while the later get a car loan – was unfair, unreasonable, unjustifiable, and discriminatory, thus contrary to Article 27 of the Constitution.
93. That Article 230(5) (d) of the Constitution as read with Section 12 and 13 of the *SRC Act*, further provided for fairness and equity as one of the guiding principles of the SRC. Reliance was placed on *Council of Governors V Salaries Remuneration Commission, Constitutional Petition 328 of 2016* in the High Court at Nairobi.
94. On the fifth issue, the 2nd Respondent submitted that the Petition was seeking mandamus orders for review of risk allowance for health workers, and the same is a back door attempt to renegotiate the employment terms and conditions of health workers, which purview lies with the appropriate trade union.
95. That the definition of a trade union is given by Section 2 of the *Labour Relations Act of 2007*. For recognition of trade unions and their representatives, reference is made to Section 54 and Section 55, respectively of the Act. Therefore, that the prayer for such Mandamus Order is wrongly placed and null since the Petitioner lacks authority to represent or negotiate for health workers.
96. On the sixth issue, it was the 2nd Respondent's submissions that the Petitioner has not met the constitutional threshold in pleading, as his case was not pleaded to precision. That the Petitioner provided neither particulars of the alleged complaints nor the manner in which they were alleged to be infringed. According to the 2nd Respondent, that such an issue of misuse of public funds was a matter to be dealt with Anti-Corruption Court, as opposed to a Constitutional Court.
97. The 2nd Respondent further submitted that, it is a principle in constitutional litigation that a party seeking reliefs through a constitutional Petition on the basis of violation of the constitution, the Petitioner must plead with a higher degree of precision; show constitutional or fundamental freedoms violated and the manner of violation. The decisions in *Anarita Karimi Njeru v Republic*, Miscellaneous Criminal Application No. 4 of 1979 in the High Court at Nairobi and *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, Petition 14 of 2014 in the Supreme Court of Kenya.
98. Resultantly, the 2nd Respondent submitted that the Petition lacked merit and should be dismissed with costs.

The 3rd to 49th Respondents' case:

99. The Respondents also supported the SRC's case.

100. To the 3rd to 49th Respondents, the following were the issues for determination: -

a) *Whether the Petition raises issues of constitutional violations.*

b) *Whether the conversion of the Car Loan Facility into a Transport Benefit in the form of Car Grant payable to the Speaker and Member of County Assembly was lawful.*

c) *Whether the Petitioner has been discriminated against by the 1st Respondent.*

101. On the first issue, the Respondents submitted that the interpretation of the Constitution under Article 259(1) provided that the Constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and freedoms, permits the development of the law and contributes to good governance.

102. Buttressing the position, the Respondents relied upon *Ndyanabo v Attorney General* (2001) 2 E.A 485 at 493 the Court of Appeal of Tanzania; *Whiteman v Ats of Trinidad and Tobago* (1991) 1 L.R.C (Const.) 536 at page 551; *Joseph Mbalu Mutava vs Attorney General & Anor* (2014); *Marilyn Muthoni Kamuru & 2 Others v Attorney General & Anor* (2016) eKLR; *Supreme Court Advisory Opinion in the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR; *Speaker of the Senate & Anor v Attorney General & 4 Others* (2013) eKLR; *Supreme Court Reference in the Matter of Kenya National Commission on Human Rights* (2014) eKLR; and *Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others* Nairobi HCCC NO. 288 of 2004 [2006] 2 EA 117; [2006] 2 KLR 375.

103. On supremacy of the Constitution, reference was made to Article 2 of the Constitution. In support of the supreme status, the following cases were cited: *In Re the Matter of the Interim Independent Electoral Commission* (2011) eKLR; *Speaker of National Assembly V Attorney General & 3 Others* (2013) eKLR; and *Macharia vs Murathe & Anor* Nairobi HCEP No. 21 of 1998 (2008) eKLR(EP) 189 (HCK).

104. The 3rd to 49th Respondents maintained that not every public body decision can be challenged constitutionally, as a violation/infringement, for not engaging in public participation in its decision making. That, the position was supported in *County Government of Kakamega & 2 others v Salaries and Remuneration Commission; County Government of Mombasa (Interested Party)* (2020) eKLR; *Ngoge vs Kapara & 4 Others* [2007] 2 KLR 193, and *Supreme Court case of Peter Oduor Ngoge vs. Francis Ole Kaparo 5 others* Petition No. of 2012 [2012] eKLR.

105. It was contended by the 3rd to 49th Respondents that the Petition and issues therein comes out more as judicial review precincts, rather than on constitutional violation. That the matter challenged the impugned decision by SRC, an independent constitutional body, on an issue the Petitioner rightly conceded was within the former's mandate. That, save for the mere mention of discrimination in his pleadings, no substantial evidence was tendered to support that averment. The Respondents' view was that the aforementioned did not present any serious issue of constitutional interpretation as required by Article 165(3)(b)(d) of the Constitution.

106. The Respondents wondered the Petitioner's action in approaching the Court under Article 47 of the Constitution calling for reasons for the impugned decision whereas the Petitioner referred to the letter where SRC had already rendered its reasons for the impugned decision. That, despite that, the Petitioner had still approached the Court again seeking for written reasons.

107. It was also submitted that the Petitioner's Notice of Motion was overtaken by events on the Court's directions on disposal of the matter. For that reason, this Court was urged not to delve into submissions on the application.

108. The 3rd to 49th Respondents also contended that in the instant Petition the burden of proof was with the Petitioner, reliance was place on *Kiambu County Tenants Welfare Association V Attorney General & another* [2017] eKLR.

109. The Respondents equated the instant Petition to an election Petition, and posited that the Petitioner had not discharged the burden and standard of proof. They maintained that thus, the standard of proof should be as was stated by the Supreme Court in *Raila Odinga v. Independent Electoral Boundaries Commission & Others* (Supreme Court Election Petition No. 5 of 2013 (The Raila Odinga Case, at page 85).

110. The 3rd to 49th Respondents submitted that the documentary evidence attached to the Petitioner's affidavits, consist mostly of computer generated downloads. That the same is inadmissible evidence since no certificate was issued under Section 106B of the *Evidence Act (Cap 80 Laws of Kenya)* to confirm their authenticity. Thus, the sources are therefore not ascertained and remains inadmissible as evidence. Reliance is placed on *MNN -V- EK* (2017) eKLR, case.

111. On the *Court of Appeal in Civil Appeal No E291 of 2021* in the BBI judgment delivered on 20th August, 2021 the Respondents submitted that the paragraphs relied on were just *obiter dictum*, thus neither binding nor persuasive to this court. The case of *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others* [2017] eKLR, was relied on.

112. The Respondents further submitted that the alleged influence in the SRC decision by the President and the Executive was political. As such, political statements by themselves do not prove interference of any lawful process and that such statements have no probative evidentiary value; citing the case of *Joseph Mbalu Mutava v Attorney General & another* [2014] eKLR.

113. Regarding media publicity, it was submitted that newspaper articles were not covered under Section 35 of the *Evidence Act* and

William S.K. Ruto & Another v Attorney General, HC Civil Suit No. 1192 of 2005, Court of Appeal in *Monica Wangu Wamwere v Attorney General* [2019] eKLR which approved the case of *Gitobu Imanyara & 2 others v Attorney General (Supra)*, and *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others* [2017] eKLR were relied upon in support.

114. It was the 3rd to 49th Respondents' averment citing, *R (Wandsworth London Borough Council) v Secretary of State for Transport* [2006] I EGLR 91 at [58], that, on the burden of proof, on matters of political and economic judgment, a claimant for judicial review bears a heavy evidential onus to establish that a decision was irrational, absent bad faith or manifest absurdity.

115. The 3rd to 49th Respondents declared that the evidence relied upon by the Petitioner was hearsay and therefore inadmissible.

116. On the intention and purpose of judicial review, whether by way of Petition or Article 23(3) of the Constitution or by way of Order 53 of the *Civil Procedure Rules (Cap 21 Laws of Kenya)*, or *Law Reform Act (Cap 26, Laws of Kenya)*, the Respondents relied on *Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae)* [2021] eKLR, *Council for Civil Service Unions V Minister for Civil Service* (1985) AC 374 at 401 D; *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* (2021) PTSR 553, 559 at (6); *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* (1877) AC 1014, 1064 in asserting that the Petition before Court could not stand.

117. The 3rd to 49th Respondents maintained that the impugned decision was lawful. They argued that the Petitioner did not adduce substantial evidence to enable this Court take judicial notice of the disputed facts. That, the disputed facts were not matters of general or local notoriety, as envisaged by Section 60 (1)(o) of the Evidence Act.

118. Submissions are made on alleged bribery claims – as defined under *Bribery Act, 2016* and *Anti-Corruption and Economic Crimes Act, (No.3 of 2003)* – with the Respondents asserting that no formal criminal complaint has been made against them.

119. It was also submitted that in interpreting statutes, Courts must ensure that words are given a wide meaning in their ordinary sense in order to give life to a statute. The Respondents submitted that there was no sufficient evidence to prove that the impugned decision was an illegality, *ultra vires*, improper, and/or irrational, that such makes the Petitioners claim was veiled with speculations and unsubstantiated. The decisions in *Molline Traders Limited & another v Tourism Regulatory Authority & 4 others* [2020] eKLR, *Samuel Njoroge & 4 Others v Attorney General & another* [2017] eKLR, and Ugandan case of *Pastoli vs Kabale District Local Government Canal & Others* (2008) 2EA 300 at pages 300-304, and *R Somerset County Council ex parte Fewings* (1995) 1 WLR 1037.

120. The 3rd to 49th Respondents reiterated the position that there as adequate consultation in coming up with the impugned decision.

121. On discrimination, it was submitted that since the Petitioner conceded that Members of Parliament enjoyed a transport benefit, then a similar benefit should be accorded to the County legislators, and as such SRC had a precedent to justify such benefit.

122. The Respondents reiterated that Commissions and independent offices have to work in harmony with other organs in order to achieve commonality.

123. In refuting the position that the conversion was made on account of external and irrational considerations, other than the constitution and the law, the Respondents looked at the nature of irrationality as discussed in *R v North and East Devon Health Authority ex parte Coughlan* (2001) QB 213.

124. The Respondents submitted that where a decision-maker decides to take a factor into account, it is generally for them to decide how far to go into the matter or the manner and intensity of any inquiry into it and that such judgment may only be challenged on the grounds of unreasonability. The decisions in *R (Khatun) v Newham London Borough Council* (2005) QB 37 at (35); *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy* (2020) PTSR 1709 at (256) and *Tesco Stores Limited V Secretary of State for the Environment* (1995) IWL 759, 780) were referred to in support.

125. Submitting further on discrimination, the Respondents referred to the Supreme Court in *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (Civ) (22nd October 2021) on the burden called for in proving discrimination.

126. The Respondents also submitted on direct and indirect discrimination and that different treatment of people does not amount to discrimination as articulated in the Petition. The decisions in *Haki Na Sheria Initiative V Inspector General of Police & 3 others* [2020] eKLR; *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR, *Kedar Nath v State of W.B.* (1953) SCR 835 (843); *Nyarangi & Others v. Attorney General* [2008] KLR 688 were referred to.

127. The Respondents ultimately prayed that the Petition be dismissed with costs.

The 50th to 143rd Respondent's case:

128. Just like the rest of the Respondents, these Respondents also supported the SRC's case and position.

129. It was the 50th to 143rd Respondents' submission that there were two issues for determination namely whether this Honourable Court has jurisdiction to hear and determine this matter and secondly, whether the Petitioner had established any grounds to warrant grant of the reliefs sought.

130. On the first issue, the Respondents submitted that the High Court should not entertain this matter as the same does not fall under Article

165(3) of the Constitution.

131. The 50th to 143rd Respondent averred that the Petition did not demonstrate real constitutional issues for determination, no adequate particulars in support of cause of action and that it only merely cited the provisions of the Constitution. The Petition was described as an abuse of the Court process as it sought to impede a constitutional body from exercising its mandate within the law.

132. It was submitted that the Petition did not give rise to any infringement of constitutional rights and freedoms to warrant this Honourable Court issue the reliefs sought by the Petitioner. Reliance was placed on *Siaya County Public Service Board V County Assembly of Siaya & Another* [2020] eKLR.

133. On the second issue, it was submitted that the Petition fell short of attaining the threshold for grant of the reliefs sought. That, this is so as the impugned decision conformed to the principles as set out in the case of *Council of Governors vs. Salaries and Remuneration Commission* [2018] eKLR.

134. As to the right to equality and freedom from discrimination as guaranteed by Article 27 of the Constitution, it was submitted that the required threshold to prove it had not been met, for the following grounds as enumerated in the cases of *Salaries and Remuneration Commission & Another v Parliamentary Service Commission & 15 Others* [2020] eKLR and *EG v The Hon. Attorney General & 9 Others* [2019] eKLR.

135. The 49th - 143rd Respondents argued that it was misguided for the Petitioner to seek orders against them, while still maintaining that no wrongs were done by them. The Respondents anchored their position in the legislative authority of county assembly as stipulated by Article 185(1) of the Constitution, the roles of the county assembly as provided under Section 8 of the *County Governments Act*; the establishment of the Office of the Speaker of the County Assembly under Article 178 (1) of the Constitution and the County Assembly Service Boards as established under Section 12 of the *County Governments Act*.

136. The 50th – 143rd Respondents reiterated that the Petitioner had misapprehended the provisions of Section 25 of the *County Governments Act, No. 17 of 2012* as the postponement of any benefit whether financial or in kind to Members of a County Assembly is only applicable in legislations passed by the County Assembly and assented to by the Governor. That the impugned decision was not based on any such County legislation, but the Constitution.

137. The 50th – 143rd Respondents averred that they are wrongly enjoined in the proceedings. Resultantly, in the premises, the Respondents urged this Honourable Court to dismiss both the Petition and the application as against the 50th – 143rd Respondents with costs.

The 144th and 147th Respondent's case:

138. As for the rest, the 144th and 147th Respondents supported the SRC's case and position.

139. The 147th Respondent submitted, both on its own behalf and on behalf of the 144th Respondent.

140. They maintained that the impugned decision was in line with the role of determining, setting and regularly reviewing the remuneration and benefits of all state officers that lies with the SRC as provided in Article 230 of the Constitution and that Commissions and independent offices were independent as per Article 248(2)(h) of the Constitution.

141. They submitted that the Petitioner misunderstood the budgeting process and misapprehended the roles of the National Treasury and Attorney-General in the making of the impugned decision.

142. The 147th Respondent submitted that public officers and State officers are defined within the Constitution under, Article 260 while salary and remuneration is defined under Section 2 of the *Salaries & Remuneration Commission Act*. That therefore, the proper, and legally mandated body to deal with the issue on remuneration and specifically emoluments and benefits of state officers is the SRC. They referred to the case of *Civil Appeal No. 11 Of 2018, Pevans East Africa Limited & Another V Chairman, Betting Control and Licensing Board & 7 Others*.

143. It was submitted that the Courts ought not to indiscriminately take up all the matters that come before them but must exercise caution to avoid interfering with the operation of the other arms of Government save for what they are constitutionally mandated. Reliance was made on *Speaker of Senate v. Attorney-General* (2013) eKLR and *Commission for The Implementation of the Constitution Vs. National Assembly of Kenya, Senate & 2 Others* [2013] eKLR.

144. The Respondents also submitted that all organs created by the Constitution are of equal importance, citing the case of *Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others*.

145. The Respondents further submitted that the Petitioner having failed to demonstrate that the SRC has acted outside of its mandate or in excess of its powers ought not to have its decisions interfered with. They cited *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* [2020] eKLR at paragraph 160 to 169.

146. Referring to Section 107 of the *Law of Evidence Act, Cap 80*, it was submitted that the principle that he who alleges must prove was applicable in this case and since there was no proof that the Respondents have acted *ultra vires*, the Petition must fail. Further, that the Petitioner had failed to demonstrate the illegality or unconstitutionality of the SRC in carrying out its constitutional mandate.

147. It was also submitted that the Petitioners having failed to make any allegations against the 144th and 147th Respondents ought not to succeed against them and that this Honourable Court ought to decline to grant the orders sought by the Petitioner and to dismiss the Petition.

148. Notably, in responding the Petition, the 144th and 147th Respondents filed their **Grounds of Opposition** to the Petition and preferred the following grounds thus: -

i. The Petitioner has failed to recognize and appreciate the circumstances surrounding the conversion of the car loans to car grants vide the Salaries and Remuneration Commission (SRC) Circular of 9th February 2021.

ii. The Petitioner has not provided any cogent evidence to warrant the interference with the statutory duties and responsibilities of the SRC which is a constitutional commission.

iii. The Petitioner has failed to recognize that the 144th Respondent does not play a role in the approval of salaries and remuneration of state officers as the same is constitutionally placed on the SRC.

iv. This court ought not to interfere with the statutory mandate of constitutional organs which have the relevant expertise in their area of mandate, which the courts do not normally have.

v. The Petitioner has failed to demonstrate that the relevant state organs have acted outside of their mandate or in excess of their powers.

vi. The Petitioner has convoluted unrelated matters raising issues of allowances for health workers where such matters are unrelated to the question of car loans and grants for Members of County Assemblies.

vii. The Petitioner has failed to appreciate the nuances around budgeting and budget cycles and therefore misapprehended the manner in which allocation of funds is carried out.

The 145th Respondent's case:

149. Likewise, the Respondent supported the SRC's case and position.

150. In its submissions, the Respondent presented the main issue for determination as to whether the Controller of Budget had the mandate to recover any benefits accrued to the 3rd – 96th Respondents due to the SRC's letter on the impugned decision.

151. The 145th Respondent submitted on its establishment and functions as per Article 228 of the Constitution. That among its core functions was to oversee the implementation of the budgets of the national and county governments by authorizing withdrawals from public funds when satisfied that the withdrawal is authorized by law.

152. Based on the above, the 145th Respondent submitted that the Controller of Budget's mandate did not extend to recovering any monies that were disbursed to the spending units. The mandate of the Controller of Budget ceases upon granting the approval of funds once satisfied that the request for withdrawal complies with the law.

153. The 145th Respondent maintained that it has no power or duty to assist in the recovery of any benefits that may have accrued to the Speakers and Members of the County Assembly as a result of the Salaries and Remuneration Commission Circular SRC/TS/COG/3/61/48 VOL.II(13) dated 9 February, 2021.

154. It then follows, the 145th Respondent contended, that the Petitioner failed to demonstrate any wrong doing or infringement on the part of the 145th Respondent. Thus, it was prayed that the Petition as against the 145th Respondent be dismissed for failing to disclose any cause of action against the Controller of Budget.

The 146th Respondent's case:

155. The 146th Respondent was the last to echo the SRC's case and position.

156. The 146th Respondent presented the main issue for determination as whether the 146th Respondent was mandated to deal with issues and matters of benefits allocated to state officers in particular the Members of County Assembly such as car loans and car grants as raised in this Petition.

157. The 146th Respondent described itself as a body established under Article 59(4) of the Constitution and Section 3 of the *Commission on Administrative Justice Act, 2011*. That its functions are stipulated under Section 8 of the Act and that its mandate and functions do not include the mandate of reviewing, setting and regulating the salaries and remuneration of state officers as envisaged in the Constitution and relevant law. Specifically, it was submitted that Section 30 of the Act limits the powers and jurisdiction of the 146th Respondent.

158. The Respondent submitted the issues raised in this Petition are issues that are placed under another constitutional body – in this case, the SRC as established under Article 230 of the Constitution and Section 11 of the *Salaries and Remuneration Act, 2011*. The case of

Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR was relied upon.

159. Further submissions were made as to definition of a State officer as stipulated under Section 2 of the *Salaries and Remuneration Act, 2011* and Article 260 of the Constitution to include member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government. That such any benefits they receive shall be determined and reviewed by the SRC as among its powers and functions mandated by both the Constitution and the *Salaries and Remuneration Act, 2011*. *The case of Okiya Omtatah Okoiti & 3 Others v Attorney General & 5 others, 2014 eKLR* was referred to in support.

160. The Respondent also submitted that it cannot overstep its mandate by interfering with the other state agencies and/or organs established by the Constitution or legislatures. Reference was made to *Okiya Omtatah Okoiti* (supra), *Parliamentary Service Commission V Salaries Remuneration Commission; Attorney General & 3 others (Interested parties)* [2018] eKLR, *Republic v Commission on Administrative Justice & 2others Ex parte Michael Kamau Mubea* (2017) eKLR.

161. The 146th Respondent prayed that the Petition against it be dismissed with costs.

Issues for Determination:

162. Having carefully perused the documents filed in this matter, I hereby discern the following areas for discussion: -

(a) *Whether the Petition is drafted with precision so as to properly invoke the jurisdiction of this Court.*

(b) *If the answer to (a) above is in the affirmative, a look at the principles in constitutional interpretation.*

(c) *Whether the decision made by SRC to convert the car loan facility to a Car Grant transport benefit for the positions of the Speakers and Members of County Assemblies (hereinafter referred to as ‘the impugned decision’) was in contravention of Articles 230(5) and 249 of the Constitution in not conforming to the applicable principles, being irrational and unreasonable, lacking independence and in abuse of discretion.*

(d) *Whether the impugned decision was in contravention of Articles 10 and 201(a) of the Constitution for want of public participation.*

(e) *Whether the impugned decision was in contravention of Article 27 of the Constitution for being discriminatory against healthcare workers with respect to the enhancement of Covid-19 Risk Allowance.*

163. I will deal with each issue in *seriatim*.

Analysis and Determinations:

(a) Whether the Petition is drafted with precision so as to properly invoke the jurisdiction of this Court:

164. It has been contended that the jurisdiction of this Court is not properly invoked in that the Petition is not drafted with precision to as to bring forth substantive constitutional issues for determination.

165. Any challenge on the jurisdiction of a Court must be addressed as a matter of priority. Such is the settled legal position. Jurisdiction goes to the root of a dispute and any dispute resolution purportedly done without jurisdiction is a nullity *ab-initio*.

166. The various facets of the doctrine of jurisdiction have been the subject of many decisions. Jurisdiction of a Court or tribunal can be impugned on many fronts including the successful raising of the lack of precision *judicata*.

167. Recently, in Nairobi High Court Constitutional Petition No. E008 of 2022, ***Okiya Omtatah Okoiti v Attorney General & another*** [2022] eKLR, this Court briefly discussed the operational dimensions of the doctrine of *jurisdiction*. This Court rendered itself thus: -

22. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 spoke to the doctrine of jurisdiction in general as follows: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before

judgment is given.

37. *The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:*

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. *A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.*

39. *The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:*

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. *In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court’s jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:*

(68). A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

168. Due to the unique nature of Constitutional Petitions, Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as ‘**the Mutunga Rules**’) also provide for the contents of Petitions.

169. Rule 10 thereof provides seven key contents of a Petition as follows:

Form of petition.

10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner’s name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

170. Rule 10(3) and (4) of the Mutunga Rules also has a bearing on the form of Petitions. It provides as follows: -

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

171. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

172. The Supreme Court in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR** had the following in the manner in which constitutional Petitions ought to be presented before Court for adjudication: -

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

173. But what is a constitutional issue? In **Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81 (CC)**, the South Africa Constitutional Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

*The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of... Constitution, **constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the Constitution are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights.** If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...*

174. In the United States of America, a *constitutional issue* refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

175. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which *confronts the various protections laid out in a Constitution*. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate *the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement*. In the words of **Langa, J** in **Minister of Safety & Security vs. Luiters, (2007) 28 ILJ 133 (CC)**: -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...

176. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as **Lenaola, J** (as he then was) firmly stated in **Rapinder Kaur Atal vs. Manjit Singh Amrit case (supra)** ‘... Courts must interpret it with all liberation they can marshal...’

177. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in **Turkana County Government & 20 Others vs. Attorney General & Others (2016) eKLR** where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.

178. I have perused the Petition. It has six parts. They are the description of the parties, the Petitioner’s *locus standi*, the background of the Petition, the facts of the Petition, the legal foundation of the Petition and the violation of the constitution by the Respondents and the reliefs sought.

179. This Court affirms that indeed the Petition is clear on the alleged constitutional violations, how they are alleged to have been occasioned and by who and the reliefs sought as a result of the alleged violations.

180. It is this Court’s position that the Petition fully complied with Rule 10 of the Mutunga Rules as well as the requirements in **Communications Commission case (supra)**. I must therefore find and hold, which I hereby do, that the submission that the Petition is devoid of clarity that it fails to properly invoke the jurisdiction of this Court cannot be maintained. The same is for rejection.

181. As the first issue is answered in the affirmative this Court will now deal with the next issue.

(b) Principles in constitutional interpretations:

182. This issue is aimed at laying a solid basis for the consideration of the rest of the issues in this matter given that the Petition calls for the interpretation of the Constitution in light of the circumstances of this matter.

183. The Court of Appeal in **Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR) (Civ) (19 November 2021) (Judgment)** endeavoured a fabulous discussion in the manner a Court ought to approach the subject of constitutional interpretation. The Court yielded as follows: -

42. Our starting point in this regard is Article 259 of the Constitution, which obligates us to interpret the Constitution in a manner that: -

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and(d)contributes to good governance.”

43. It is notable in this respect that constitutional interpretation includes both interpretation and construction. As explained by Vincent Crabbe in his text *Legislative Drafting: Volume 1* at pages 231 to 233, interpretation entails discovering the meaning of words used in a statutory or other written document, and is of various types. Authentic interpretation is used when the meaning of a word is expressly provided for in the document; usual or customary interpretation when based on accepted usages of the word; doctrinal, when it is based on the grammatical arrangement of the words in a sentence; and logical, when based on the intention of Parliament. Crabbe also pointed out that logical interpretation can be liberal or strict.

44. Construction of a legal provision on the other hand is wider in scope than interpretation, and is directed at the legal effect or consequences of the provision in question. Interpretation must of necessity come before construction, and having ascertained the meaning of the words, one construes them to determine how they fit into the scheme of the law or legal document in question. Crabbe in this respect opines that a Constitution is in this respect different from an Act of Parliament, and describes it as a living organism capable of growth and development. In his words “a constitution is a mechanism under which laws are made, and not a mere Act which declares what the law should be”

45. We are persuaded by this explanation, and indeed the approach suggested therein has been adopted by the Kenyan Courts. A holistic and purposive interpretation of the Constitution that calls for the investigation of the historical, economic, social, cultural and political background of the provision in question has been consistently affirmed by the courts. The Supreme Court in this respect explained the approach in constitutional interpretation in [Council of Governors vs The Attorney General and 7 Others \[2019\] eKLR](#) as follows:

“[42] Under Article 2(1), the Constitution is the Supreme law of the land. Article 259 of the Constitution then gives the approach to be adopted in interpreting the Constitution, basically in a manner that promotes its purposes, values and principles. Suffice it to say that in interpreting the Constitution, the starting point is always to look at Article 259 for it provides the matrix, or guiding principles on how it is to be interpreted and then Article 260 where specific words and phrases are interpreted. It is imperative to note that while Article 259 deals with construing of the Constitution and outlines the principles that underpin that act; Article 260 deals with interpretation, that is, it is explicit in assigning meaning to the words and phrases it addresses. Hence the opening words in that Article are: “In this Constitution, unless the context requires otherwise-”.[43]Consequently, in search of the meaning assigned to some words and phrases as used in the Constitution, one needs to consult Article 260 to find out if that particular term or phrase has ALREADY been defined. It is only where the same has not been defined that the Court will embark on seeking a meaning by employing the various principles of constitutional interpretation....”

46. The various principles of constitutional interpretation have also been the subject of different decisions of this Court and the Supreme Court. [In Re the Matter of Kenya National Commission on Human Rights \[2014\] eKLR](#), the Supreme Court considered the meaning of a holistic interpretation of the Constitution, and stated:

“[26] But what is meant by a ‘holistic interpretation of the Constitution’? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

47. This view was also expressed by the Supreme Court in [Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others. \[2015\] eKLR](#), that “the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.”

48. A purposive interpretation on the other hand acknowledges that the meaning of language is imprecise, and measures words against contextual, schematic, and purposive considerations. Aharon Barak in the text

“Purposive Interpretation in Law” at page 111 explains that:

“According to purposive interpretation, the purpose of a text is a normative concept. It is a legal construction that helps the interpreter understand a legal text. The author of the text created the text. The purpose of the text is not part of the text itself. The judge formulates the purpose based on information about the intention of the text’s author (subjective purpose) and the “intention” of the legal system (objective purpose).”

49. As such, the purposive interpretation avoids the shortcomings of the literal approach, namely absurd interpretations or those that appear to run counter to the purpose and functioning of the legislative regime. The Supreme Court of Kenya in the case of [Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others. \[2014\] eKLR](#), confirmed that a purposive interpretation should be given to statutes so as to reveal their true intention. The Court observed as follows:

“In *Pepper vs. Hart* [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to

look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

‘The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted’.”

50. The persuasive decision of this Court in the case of [County Government of Nyeri & Another v Cecilia Wangechi Ndungu \[2015\] eKLR](#) is also illuminating, and it was held therein that:

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

51. The Constitution in this respect provides the purposes that should guide the Courts in interpreting it in Article 259, including the purpose of the specific provisions, and broader rule of law and good governance objectives.

52. It is with these principles in mind that we shall proceed to consider the issues raised in this appeal.

184. With such a profound basis on constitutional interpretation, the next issue follows.

(c) Whether the impugned decision was in contravention of Articles 230(5) and 249 of the Constitution in not conforming to the applicable principles, being irrational and unreasonable, lacking independence and in abuse of discretion:

185. The genesis of the impugned decision has already been well covered in the foregoing parts of this judgment. As stated, the impugned decision was made by the SRC. Going forward, I will first look at the nature of SRC.

The SRC:

186. Chapter 15 of the Constitution provides for Commissions and Independent offices. One of the Commissions therein is the SRC.

187. The objects of the Commissions and the independent offices are provided for in Article 249 of the Constitution. They are to protect the sovereignty of the people, to secure the observance by all State organs of democratic values and principles and to promote constitutionalism.

188. In order for the commissions and the holders of independent offices to appropriately discharge their mandates, the Constitution (*Article 249(2)*) provides that the commissions and the holders of independent offices are subject only to the Constitution and the law, are independent and are not subject to direction or control by any person or authority.

189. Article 251 of the Constitution provides for the removal from office of the commissioners and the holders of independent offices.

190. Article 230 of the Constitution establishes the SRC.

191. The powers and functions of SRC are provided for under Article 230(4) as follows: -

- (a) **set** and regularly **review** the remuneration and benefits of all **State officers**; and
- (b) advise the national and county governments on the remuneration and benefits of all other public officers.

192. In performing the above functions, SRC is commanded under Article 230(5) of the Constitution to consider four key **principles**.

193. The principles are: -

- a) The need to ensure that the total public compensation bill is fiscally sustainable;
- b) The need to ensure that the public services are able to attract and retain the skills required to execute their functions;
- c) The need to recognise productivity and performance;
- d) Transparency and fairness.

194. The affairs of SRC are further provided for in the Salaries and Remuneration Commission Act, No. 10 of 2011 (hereinafter referred to as '**the SRC Act**'). The SRC Act is an Act of Parliament to make further provision as to the functions and powers of the SRC, the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes.

195. Under Section 11 of the SRC Act, the SRC is conferred with additional functions to those set out under Article 230(4) of the Constitution. They are: -

- (a) inquire into and advise on the salaries and remuneration to be paid out of public funds;
- (b) keep under review all matters relating to the salaries and remuneration of public officers;
- (c) advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector;
- (d) conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;
- (e) determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;
- (f) **make recommendations on matters relating to the salary and remuneration of a particular State or public officer;**
- (g) make recommendations on the review of pensions payable to holders of public offices; and
- (h) perform such other functions as may be provided for by the Constitution or any other written law.

196. Section 12 of the SRC Act provides further two principles which guide the SRC in its mandate in addition to those set under Article 230(5) of the Constitution. The twin principles are that SRC shall also be guided by the principle of equal remuneration to persons for work of equal value and that SRC shall take into account the recommendations of previous commissions established to inquire into the matter of remuneration in the public service.

197. Further powers of SRC are provided for under Section 13 of the SRC Act as follows: -

(1) The Commission shall have all powers generally necessary for the execution of its functions under the Constitution and this Act, and without prejudice to the generality of the foregoing, the Commission shall have powers to—

- (a) gather, by any means appropriate, any information it considers relevant, including requisition of reports, records, documents or any information from any source, including governmental authorities;*
- (b) interview any individual, group or members of organizations or institutions and, at the Commission's discretion, conduct such interviews;*
- (c) hold inquiries for the purposes of performing its functions under this Act;*
- (d) take any measures it considers necessary to ensure that in the harmonization of salaries and remuneration, equity and fairness is achieved in the public sector.*

(2) In the performance of its functions, the Commission-

- (a) may inform itself in such manner as it thinks fit;*
- (b) may receive written or oral statements from any person, governmental or non-governmental agency; and*
- (c) shall not be bound by the strict rules of evidence.*

198. Having rendered the nature of SRC, a further discussion on the issue follows.

Whether the SRC was independent in arriving at the impugned decision:

199. The subject of the independence of constitutional commissions and independent offices has been dealt with by Superior Courts over time.

200. The Supreme Court in *Communication Commission of Kenya & 5 Others v Royal Media Services limited & 5 others* [2014] eKLR stated as follows with regard to the independence contemplated by the Constitution: -

[I]ndependence' is a shield against influence or interference from external forces. In this case, such forces are the

Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.

How is the shield of independence to be attained" In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain 'independence' in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these 'other safeguards' can singly guarantee 'independence'. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence.

201. In *Re The matter of Interim Independent Electoral Commission* [2011] eKLR the Supreme Court further rendered itself on the purpose of the independence clause in stating thus: -

[59] It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".

202. The High Court in *Judicial Service Commission v. Salaries and Remuneration Commission & another* [2018] eKLR spoke to the principle of independence in the following words: -

44. The import of Article 249(2) is to the effect that constitutional commissions are independent in the execution of their mandate and should not take directions from any person or authority. That is; they are neither under the control of any person or authority in the performance of their duties and discharge of their functions nor should they receive direction in the performance of their duties.

45. In that context, commissions and independent offices have operational, administrative, decisional and financial independence when discharging their constitutional mandate. They do not therefore seek direction or permission from any other person or authority on how they should perform their constitutional mandate. The people of Kenya, while adopting the Constitution, decided that commissions and independent offices act independently and perform their constitutional mandate to the exclusion of other organs of state, authorities or persons.

203. The South African Constitutional Court has had occasions to discuss the various attributes of the principle of independence. The Court in *New National Party vs. Government of Republic of South Africa & others* (CCT9/99) [1999] ZACC5 stated that:

[98] In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.

[99] The second factor, "administrative independence", implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The executive must provide the assistance that the Commission requires "to ensure [its] independence, impartiality, dignity and effectiveness". The department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary.

204. The analogy from the jurisprudence flowing from the above decisions is that commissions and independent offices are designed to function without intrusion on their mandate by any other state organ, authority or person.

205. In Kenya, therefore, the prevailing constitutional design is that commissions and independent offices are expected to deal with their mandates without improper influences, fear or favour.

206. Returning to the case at hand, SRC is, hence, expected to discharge its mandate in setting and reviewing the remuneration and benefits of State officers and to advise the national and county Governments on the remuneration and benefits of other public officers in strictly take into account the principles in Article 230(5) of the Constitution and as contained in the SRC Act.

207. The Petitioner alluded that SRC did not arrive at the impugned decision independently, but it was under the directive of the President. The Petitioner stated as follows in paragraphs 40 to 45 inclusive of the Petition: -

40. THAT it's also worth noting that previously on 29 January 2021, at Sagana State Lodge the President of the Republic of Kenya while popularizing the Building Bridges Initiative (BBI) Constitutional Amendments Bill, promised the 3rd-49 respondents a 2million car grant (4.5 billion in total).

(<https://www.capitalfm.co.ke/news/2021/01/uhuru-wins> the heart of mt-kenya-mcas-to-pass-bbi-bill/)

<https://www.standardmedia.co.ke/central/article/2001401772/inside> uhuru-sagana-meeting with mcas-mps

41. THAT petitioner has nothing against the BBL initiative, as the president has a constitutional right of freedom of expression and political choice. The petitioner is submitting in this petition that there is something with president popularizing the BBI initiative as that is a matter for another forum.

42. THAT although the above was said by the president who is the head of the executive, and the head of state the same was not officially communicated as expected in Article 135 of the constitution on Decisions of the President-where a decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal of the republic of Kenya and signature of the President.

43. THAT 5 days later on 3rd February, the 2nd Respondent wrote a letter addressed to 1st respondent requesting the latter for approval of conversion of car loan to car grant for the 3rd - 96th respondents.

44. THAT 5 days later the 1st respondent approved the above said request of converting the existing car loan into car grants.

45. THAT it's easy to conclude that there is a nexus between the president promising the 3rd - 49th respondent and the 1st respondent approving the said conversion for car loan to car grant.

208. From the foregoing paragraphs, the basis of the Petitioner's apprehension appears to be what was contained in the media reports and newspapers.

209. There is a disposition by the Chair of the County Speakers Forum who vehemently denied the said reports. He deposed that he attended the meeting in Sagana State Lodge and that the President did not speak of the issue of the car grants. As a consequence, the Petitioner was put to strict proof.

210. The issue of the admissibility and credibility of newspaper reports seems to have been settled, rightly so, by the Court of Appeal. In **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others** [2017] eKLR the Court held as follows: -

On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the Evidence Act which provides that newspapers are one of the documents whose genuineness is presumed by the Court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper. On a comparative basis, in the Indian case of **Laxmi Raj Shetty -v-State of Tamil Nadu**1988 AIR 1274, 1988 SCR (3) 706, the Supreme Court held that a newspaper is not admissible in evidence.

211. This Court, hence, finds that the reports as contained in the newspapers were mere heresay and did not amount to any credible evidence.

212. In a further attempt to drive the contention of lack of independence on the part of SRC, the Petitioner relied on the decisions of my Lordships **Musinga** and **Kiage**, JJA in **Independent Electoral and Boundaries Commission & 4 Others vs. David Ndi & 82 Others; Kenya Human Rights Commission & 4 Others (Amicus Curiae)** (2021) eKLR.

213. Musinga, JA stated as follows: -

340. It is also on record that Members of County Assemblies (MCAs) demanded and were given car grants of Kshs.2 million each shortly before an overwhelming majority of County Assemblies passed the Amendment Bill, paving way for it to be placed before Parliament under Article 257 (7). Whereas it is desirable that MCAs be facilitated in their performance of their legislative work in our county governments and therefore the car grants may have been lawful, its timing was said to have been deliberately intended to influence them to pass the Amendment Bill. The Salaries and Remuneration Commission had previously raised various objections to the car grants, but the Commission suddenly changed its position and gave a green light to the car Page 127 of 189 grants during the promotion of the impugned Bill, the 19th respondent asserted.

On his part Kiage, JA had the following to say: -

... spurred on no doubt by certain incentives beneficial to themselves, the most notorious of which was their demand for some ksh.2M car grant which was quickly granted by government. The usually slow and tight-fisted salaries and Remuneration Commission, despite well-known fiscal challenges and a raging global Pandemic, somehow managed to prioritize approve and find funding for that particular incentive for MCAs, which seems to have attained the status of a national emergency....”

214. This Court has had the advantage of reading the decision on the High Court in Petition No. E282, E397, E400, E402 & E426 of 2020 & Petition No. 2 of 2021 (Consolidated) *David Ndi & Others v. Attorney General & Others* (2021) eKLR and also the decision by the Court of Appeal in *Independent Electoral and Boundaries Commission & 4 Others vs. David Ndi & 82 Others; Kenya Human Rights Commission & 4 Others (Amicus Curiae)* case (supra).

215. A look at the issues which were framed and determined by the High Court and the Court of Appeal affirm the position that the constitutionality of the impugned decision was not among those issues.

216. The sentiments made by my Lordships Musinga and Kiage, JJA aforesaid were, therefore, *obiter dicta* as opposed to being the *ratio decidendi*. They did not transcend to binding precedent. I say so for two reasons. One of the reason is that the sentiments were not pivotal in the determination of the issues then in dispute and the second reason is that the findings were made by a minority of an expanded Bench of seven Judges of Appeal.

217. Apart from the two grounds in support of the allegation that SRC was not independent in reaching at the impugned decision, that is the media and newspaper reports and the reference to the decision by the Court of Appeal in *Independent Electoral and Boundaries Commission & 4 Others vs. David Ndi & 82 Others; Kenya Human Rights Commission & 4 Others (Amicus Curiae)* case (supra), there was no further evidence to support the Petitioner’s contention.

218. In conclusion, the Petitioner failed to discharge the burden which the law places on him to prove with appropriate specificity the claims of violation of the principle of independence as he made in the Petition.

219. Whereas the Petitioner succeeded in demonstrating that SRC and any other commission and independent offices must act independently in discharging their mandates, the Petitioner failed to present any relevant evidence probative of the claimed infringement of the principle of independence or presented evidence which was not only inadmissible, but also of no probative value in proving the allegation that the principle of independence was impugned in the manner SRC reached at the contested decision.

220. As I come to the end of this sub-issue, I recall the holding of a 5-Judge High Court bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others* (2020) eKLR where the Court buttressed the foregoing as follows: -

220. We must emphasize the importance of adherence to the rules of evidence – both in terms of presentation (authenticity and foundation) and quality of evidence (credibility and probative value) required to establish violations of fundamental rights and freedoms especially in Public Interest or Strategic Litigation. The rules of evidence apply with equal force to this species of litigation as they do in run-of-the-mill litigation.....

Whether the impugned decision was irrational, unreasonable and an abuse of discretion:

221. In order to deal with this sub-issue with precision, I will, in the first instance, take a legal tour of what irrationality and unreasonability entails.

222. The **Black’s Law Dictionary**, 10th Edition at page 957 defines ‘**irrational**’ as follows:

Not guided by reason or by fair consideration of the facts.

223. At page 1772 the word ‘**unreasonable**’ is defined as follows: -

Not guided by reason; irrational or capricious.

Not supported by a valid exception to the warrant requirement.

224. Lord Diplock in his classic dictum in *Council of Civil Service Unions versus Minister for the Civil Service* (1985) A.C. 374, 410 defined ‘**irrationality**’ as follows: -

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). **It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.** Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

(emphasis added)

225. In the Ugandan case of **Pastoli vs Kabale District Local Government Canal & Others** (2008) 2EA 300, the following was said of *irrationality* as a basis for judicial review: -

..... Irrationality is when there is such gross unreasonableness in the decision taken or acts done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards....

226. Irrationality can be equated to *arbitrariness*. The **Black's Law Dictionary**, 10th Edition, at page 125 defines 'arbitrary' as follows: -

1. *Depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures.*

2. *(Of a judicial decision) founded on prejudice or preference rather than on reason or fact.*

227. The Court of Appeal in Malindi Civil Appeal 56 of 2014 **Mtana Lewa v Kahindi Ngala Mwangandi** [2015] eKLR made reference to the Black's Law Dictionary 8th Edition that defined arbitrariness in the following manner: -

in it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.

228. The High Court in Civil Suit No. 3 of 2006 **Kasimu Sharifu Mohamed vs. Timbi Limited** [2011] eKLR referred to Oxford Advanced Learner's Dictionary, A. S. Horby, Sixth Edition Edited by Sally Wehmeiner which defines the term 'arbitrary' in the following way: -

the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.

229. The Supreme Court of China in **Sharma Transport vs. Government of A. Palso** (2002) 2 SCC 188 had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The Court observed as follows: -

The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

230. The term 'arbitrariness' had earlier on been defined by the Court (Supreme Court of China) in **Shrilekha Vidyarthi vs. State of U.P** (1991) 1 SCC 212 when it comprehensively observed as follows: -

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

231. Drawing from the above discussion, irrationality, unreasonableness and arbitrariness have a commonality. They all refer to the making of a decision without adequate consideration of the law, facts and circumstances as expected of a reasonable person. In Kenya, such a decision *inter alia* runs counter Article 10 of the Constitution.

232. This Court will now subject the foregoing to the matter at hand.

233. The Respondents gave a chronology of the events in the quest for conversion of the car loan facility to a transport benefit in the form of a car grant for Speakers and Members of County Assemblies.

234. The struggle began way back in 2013, soon after the advent of devolution. The engagements between the Respondents leading to the impugned decision were deposed to and were not contravened.

235. The record has it that the matter was then substantively discussed in the County Assembly's Inaugural Summit in 2014. The discussions remained alive and the Respondents, especially the 2nd to 96th Respondents, seized every opportunity and engaged with the SRC.

236. Sometimes in February 2021, the 2nd Respondent, as an umbrella body of all County Governors in Kenya, formally wrote to SRC on the justification of the impugned decision.

237. The 2nd Respondent gave two main reasons in support of the said position. The reasons were: -

(i) There is similarity in the representation and legislative role of the Speaker and Member of the County Assembly at the ward level with their counterparts at the National Assembly, who have transport benefit in the form of a Car Grant. In this regard, the 2nd Respondent asserted that it is only fair to extend the same benefit to the Speaker and Member of the County Assembly; and

(ii) The Car Loan facility for the Speaker and Member of County Assembly has already been budgeted in the current financial year. Further, the CoG indicated that conversion of the Car loan facility to a transport benefit in the form of Car Grant for the Speaker and the Member of County Assembly would not affect the expenditure ceiling as provided by the Commission on Revenue allocation (CRA).

238. The SRC further considered and deliberated on the matter in its subsequent meetings. In arriving at the impugned decision in its 121st Special meeting, SRC took into account the following issues: -

(i) The constitutional principle of affordability and sustainability. SRC confirmed the availability of Kshs. 4.5 Billion which amount had already been budgeted for and that no additional funds would be required and that the expenditure ceiling set by the Commission on Revenue Allocation would not be affected.

(ii) The constitutional and statutory principle of equity and fairness in cognizance of the similarity of the roles of the legislators at the County and national levels. It was noted that the category of benefits to the legislators at the county and national levels were similar save the transport benefit in the form of a Car Grant that was only provided to the legislators at the national level.

(iii) The Car Grant was a transport benefit payable to the Speakers and Members of County Assembly.

(iv) Upon conversion, the then existing Car loan facility would cease and the Speakers and the Members of County Assembly who had already benefitted from the existing car loan facility shall convert their Car loan facility to transport benefit in the form of a Car Grant.

(v) As the remuneration review process for 2021/22–2024/25 remuneration review cycle was ongoing, the conversion of the benefit would only be applicable to the current Speakers and Members of County Assembly.

(vi) The operationalization of the impugned decision would be undertaken administratively by the respective County Governments.

239. The impugned decision was, therefore, arrived at upon consideration of the guiding constitutional and statutory principles.

240. The Petitioner's contention that the country stood to suffer loss of funds since a Car loan facility was different from a Car grant benefit in that a loan, unlike a grant, is repayable with interest was as well taken into account by SRC in its deliberations. SRC noted that Car Grant was a transport benefit payable to the Speakers and Members of County Assembly, just like to the Members of Parliament, on the basis of the Constitution and the law.

241. Lastly, there were the reports by World Bank on the effect of the Covid-19 pandemic on the Kenya's economy. The Petitioner posited that SRC did not take such into account in arriving at the impugned decision.

242. The reports were computer generated as downloads. This Court finds difficulty in the said reports on two fronts. The first one is the lack of a Certificate under Section 106B of the Evidence Act, Cap 80 Laws of Kenya, to confirm their authenticity.

243. The second shortcoming is that the reports were not produced by the makers at least by way of dispositions. Nevertheless, this Court has perused the said reports. The reports seem not to establish a nexus between its contents and the impugned decision. Whereas the reports are on the effect of the Covid-19 pandemic on the economy, the Petition is on the constitutionality of a decision which decision, as per the SRC's position, did not have any impact on the already passed budgets. The reports are likely to be lacking any relevance on the litigated questions.

244. Further, the parameters of the reports are not known. It is not clear whether the reports considered the various items in the national and county budgets in arriving in their findings. It is also not clear whether they were prepared by experts. Even by giving the World Bank the benefit of doubt on its expertise in financial matters, still serious issues arise as will be discussed later.

245. The Petitioner has also failed to empirically demonstrate the effect of the conversion, at least on the amount of money likely to be lost in the process. There are no figures to back the allegation of the loss.

246. In **William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others** case (supra) the Court found itself in a precarious position in relation to expert evidence. It stated as follows: -

211. *While expert evidence forms an important part of litigation, and, under section 48 of the Evidence Act, the opinions of science or art are admissible if made by persons specially skilled in such science or art, there are rules as regards the admissibility of such evidence. A 4-Judge Bench of this Court considered the admissibility of expert evidence in **Mohamed Ali Baadi and others v Attorney General & 11 Others [2018] eKLR** and held as follows:*

59. *The first and foremost requirement of a party who calls an expert witness is to establish the credentials of the person as an expert, or one who is especially skilled in that branch of science, to the satisfaction of the Court. That, is, the witness should fall within the definition of 'specially skilled' as laid down under section 48 of the Evidence Act.*

60. The question whether a person is specially skilled within the above provision is a question of fact that has to be decided by the Court and the opinion of the expert is also a question of fact and if the Court is not satisfied that the witness possesses special skill in the relevant area, his or her opinion should be excluded. Failure to prove the competency of a person a party calls into the witness box as an expert presents a real risk of evidence of such a person being ruled out as irrelevant.

61. The expert witness, in our view, ought to explain the reasoning behind his opinion. In scientific evidence, the reasoning may be based on the following:- site inspection reports, analytical reports, evidence of other witnesses, and the evidence of the experts. Opinion expressed must be confined to those areas where the witness is specially skilled. The weight to be attached to such an opinion would depend on various factors. These include the circumstances of each case; the standing of the expert; his skill and experience; the amount and nature of materials available for comparison; the care and discrimination with which he approached the question on which he is expressing his or her opinion; and, where applicable, the extent to which he has called in aid the advances in modern sciences to demonstrate to the Court the soundness of his opinion. The opinion of the expert is relevant, but the decision must nevertheless be the judge's.

247. There seems to be another difficulty with the reports. The reports, as annexed, were copies which were neither certified, nor produced in accordance with the provisions of Section 68 of the Evidence Act as regards production of secondary evidence.

248. The reports, therefore, failed to aid the Petitioner's case.

249. This Court has given a keen consideration to the manner in which the impugned decision was arrived at by SRC. The said decision was, no doubt, rendered after around 8 years of deliberations. SRC took a comprehensive account of the law, facts and circumstances of the matter in its deliberations. The impugned decision, therefore, had a sound and logical basis in the Constitution and the law.

250. It is glaring that the Petitioner fell short of demonstrating the manner, if any, in which the guiding principles in Article 230(5) of the Constitution and/or the SRC Act were infringed. The Petitioner has also failed to prove how the impugned decision was made in abuse of discretion.

251. As a result, this Court returns the verdict that there was neither irrationality, unreasonableness and/or arbitrariness neither was there abuse of discretion in the manner in which the impugned decision was arrived at.

(d) Whether the impugned decision was in contravention of Articles 10 and 201(a) of the Constitution for want of public participation:

252. As captured elsewhere above, it is the Petitioner's position that there was no public participation in the manner in which the impugned decision was made.

253. SRC contended that it adequately consulted the key stakeholders prior to arriving at the impugned decision.

254. The subject of public participation and stakeholders' engagement has, by now, been well settled by our Courts. The High Court in the **William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others** case (supra) comprehensively dealt with the issue of Article 10 of the Constitution. The Court stated as follows: -

116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.

117. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

118. Expounding on Article 10 of the Constitution, the Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR** held that:

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and

violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

255. On the meaning of public participation and stakeholders' engagement, the Court rendered itself as follows: -

119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR** while referring to the South African decision in **Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC)** adopted the following definition of public participation: -

According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The **Black's Law Dictionary 10th Edition** defines 'consultation' as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.

121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR** quoted with approval Ngcobo J in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)** as follows: -

.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....

122. In a Three-Judge bench the High Court in consolidated **Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR** the Court addressed the concept of consultation in the following manner: -

.... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

(emphasis added)

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

256. Speaking to the importance of public participation and stakeholders' engagement, the Court stated thus: -

124. The importance of public participation cannot be gainsaid. The Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra)** while dealing with the aspect of public participation in lawmaking process stated as followed: -

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

125. In **Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A)**, the South African Constitutional Court stated as follows: -

A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...

126. The South African Constitutional Court in **Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5** discussed the importance of public participation as follows: -

....engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

257. The Court also rendered itself on the facilitation of public participation and stakeholders' engagement. It stated as follows: -

127. *Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others** (supra) referred to **Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** stated as follows: -*

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.

128. *In **Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others** (supra) the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -*

a) *First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*

b) *Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*

c) *Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)**. In relevant portion, the Court stated:*

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

d) *Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.*

e) *Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

f) *Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*

258. A public body while discharging its duties may be called upon, time after time, to subject its processes to public participation or stakeholders' engagement. However, not all engagements by a public body ought to be subjected to public participation or stakeholders' engagement.

259. The instances in which processes and decisions of a public body need not to be subjected to public participation or stakeholders' engagement were discussed in the **William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others** case (supra). The Court defined the requisite threshold as follows: -

133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the 'internal operational decisions concept'. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.

134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.

135. The issue is not foreign to our Courts. In **Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party) [2020] eKLR**, the Petitioner claimed that public participation was ignored in the recruitment of the Managing Director of Kenya Ports Authority. In a rejoinder, the Respondents argued that Section 5(1) of the KPA Act mandated the Kenya Ports Authority to appoint the Managing Director. They further argued that Boards of Directors of State corporations are independent and that their decisions are only fettered by the law. It was also argued that public participation had been conducted through representation of board members who were involved in the recruitment process. **Rika, J.** expressed himself as follows: -

Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in **Robert N. Gakuru & Others v. Governor Kiambu County & 3 others [2014] eKLR**, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well - equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1st Respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General is part of the ad hoc committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st Respondent to ensure the process meets the demands of transparency and accountability to the public.

136. We agree with the Learned Judge. We further find that requiring an entity to subject its internal operational decisions to public participation is unreasonable. It is a tall order which shall definitely forestall the operations of such entity. That could not have, by any standard, been the constitutional desired-effect under Articles 10 and 47.

137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of the Constitution, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.

260. Turning back to the matter at hand, the impugned decision was on the conversion of an existing car loan facility to a car grant benefit. The SRC opted for stakeholders' engagement as opposed to public participation.

261. The record confirms engagements within the period of 8 years between SRC, on one hand, and the Speakers of County Assemblies, Members of County Assemblies, the Council of Governors, the County Governments and the Commission on Revenue Allocation.

262. There is no doubt the impugned decision had an impact on public finances. As such, under Articles 10 and 201(a) of the Constitution SRC had to subject the processes towards the impugned decision to public participation or stakeholders' engagement, as the case may be.

263. There is a reason why SRC settled for stakeholders' engagement and not on the larger public participation. SRC contended that the expenditure of Kshs. 4.5 Billion which was converted from the car loan facility to car grant benefit had already been factored and approved in the respective County Assembly budgets and that the conversion did not affect the budgetary ceilings set by the Commission on Revenue Allocation. Further, the implementation thereof was left upon each respective County Assembly and that the said expenditure was only pegged on the current financial year.

264. Given that the respective County Assemblies had already factored the amount of Kshs. 4.5 Billion in the budgets and that the budgets were duly approved and the expenditure was within the budget limits, the conversion did not necessarily call for a countrywide public participation. The impugned decision was one such decision which could be safely arrived at on stakeholders' engagement.

265. The SRC was, therefore, right in settling for stakeholders' engagement as opposed to countrywide public participation. I say so because a countrywide exercise would expend more taxpayers' resources and yet the Speakers and Members of County Assembly were entitled to the benefit within the meaning of the Constitution and the law.

266. The Petitioner neither contended that the engagement was insufficient nor pointed out any key stakeholder which was not involved.

267. This Court, hence, finds and hold that SRC undertook sufficient stakeholders' consultation in arriving at the impugned decision.

268. The issue is now answered in the negative.

(e) Whether the impugned decision was in contravention of Article 27 of the Constitution for being discriminatory against healthcare workers with respect to the enhancement of Covid-19 Risk Allowance:

269. It was the Petitioner's position that in approving the impugned decision, SRC discriminated against the health workers in rejecting to allow an enhancement to the Covid-19 risk allowance despite the worldwide ravaging pandemic. He posited that SRC had on several occasions refused to allow an enhancement of the risk allowance on the ground that there were no sufficient resources to sustain the allowance, but that was not the case with the Speakers and Members of County Assembly.

270. But, what is discrimination? Article 1(a) of the *Convention Concerning Discrimination in Respect of Employment and Occupation (1958)* defines *discrimination* as follows: -

Any distinction, exclusion or reference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

271. In *Peter K. Waweru v Republic* [2006] eKLR, the Court defined of *discrimination* as follows: -

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

272. The position in law that differential treatment does not necessarily lead to discrimination was discussed at length in a Multi-Judge bench in Petition 56, 58 & 59 of 2019 (Consolidated), *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR.

273. In the case, the Court considered whether differential treatment amounts to violation of the right to equality and non-discrimination as guaranteed under Article 27 of the Constitution.

274. The Learned Judges made reference to various decisions and finally observed as follows on what amounts to *discrimination*: -

983. *The precise meaning and implication of the right to equality and non-discrimination has been the subject of numerous judicial decisions in this and other jurisdictions. In its decision in Jacqueline Okeyo Manani & 5 Others v. Attorney General & Another (supra) the High Court stated as follows with respect to what amounts to discrimination:*

26. *Black's Law Dictionary, 9th Edition defines "discrimination" as (1) "the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship" (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".*

27. *In the case of Peter K Waweru v Republic [2006] eKLR, the court stated of discrimination thus: -*

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."(emphasis)

28. From the above definition, discrimination, simply put, **is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups.** Article 27 of the Constitution prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

275. On the permissible extents of discrimination, the Court continued under paragraph 983 as follows: -

29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. **It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination.** Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.

30. *In this regard, the Court stated in the case of Nyarangi & 3 Others V Attorney General [2008] KLR 688 referring to the repealed constitution; "discrimination that is forbidden by the constitution involves an element of unfavourable bias. Thus, firstly*

unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in the constitutional definition of the word “discriminatory” in section 82 of the Constitution.

276. The Court, then emphatically so, stated that: -

984. It is thus recognised that it is lawful to accord different treatment to different categories of persons if the circumstances so dictate. Such differentiation, however, does not amount to the discrimination that is prohibited by the Constitution. In John Harun Mwau v. Independent Electoral and Boundaries Commission & Another (supra), the court observed that:

[i] it must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.

985. When faced with a contention that there is a differentiation in legislation and that such differentiation is discriminatory, what the court has to consider is whether the law does indeed differentiate between different persons; if it does, whether such differentiation amounts to discrimination, and whether such discrimination is unfair. In EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Another: Petition 150 & 234 of 2016 (Consolidated) the court held that:

288. From the above definition, it is safe to state that the Constitution only prohibits unfair discrimination. In our view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

277. On the test for determining unfair discrimination, the Court rendered as under: -

986. In Harksen v Lane NO and Others (supra) the Court observed that the test for determining whether a claim based on unfair discrimination should succeed was as follows: -

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is no violation of the constitution. Even if it does not bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: -

(i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to ‘discrimination,’ does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

988. It must also be noted, as observed by Mativo J in Mohammed Abduba Dida v Debate Media Limited & another (supra) that:

It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination. (emphasis added).

278. As said, and if this Court understood the Petitioner well, the basis of the alleged discrimination was that health workers were treated differently from legislators despite that the fact that were all public servants and the health workers were exposed to risk working environment as compared to the legislators.

279. Deriving from the various decisions above, suffice to say that the Constitution only prohibits **unfair discrimination**. Unfair discrimination is demeaning. It occurs ‘...when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization...’

280. This Court will now apply the test in Harksen v Lane NO and Others case (supra) in determining whether the was unfair discrimination in the circumstances of this case.

281. The prime consideration is whether the impugned decision differentiated between people or categories of people and if so whether the differentiation bore a rational connection to a legitimate purpose.

282. There is no doubt the differentiation related to two different categories of persons. They are the legislators at the County Assemblies, on one hand, and health workers, on the other hand.

283. The alleged differentiation arose in the granting of a transport benefit in the form of a Car Grant to the legislators and the refusal to enhance the Covid-19 Risk Allowance to the health workers.

284. It is beyond peradventure that the legislators and the health workers fall in very different categories of the work they undertake. Their respective duties are different and that attracts different terms of service. As such, the alleged differentiation did not bear any rational connection to a legitimate purpose. It may not be reasonable to expect similar terms of service between health workers and legislators. For instance, whereas a health worker may be reasonably entitled to a risk allowance (depending on many other considerations), it will be foolhardy to grant a risk allowance to a legislator.

285. Having found that the alleged discrimination did not bear any rational connection to a legitimate purpose, the rule of the thumb is that there is no violation of the Constitution.

286. Nevertheless, the judicial guidance in *Harksen v Lane NO and Others* case (supra) calls for a Court to conduct a further interrogation. A Court is expected to ascertain whether there was unfair discrimination.

287. Going by the definition of what amounts to unfair discrimination and the circumstances of this case, I find that the issue of the enhanced risk allowance to the health workers has been under the consideration of the SRC and various directions and guidelines on the sustainability of the allowance have so far been issued. Further, from the record, the considerations on the enhancement of the risk allowances appears to be far away from those on the impugned decision.

288. It cannot, therefore, be said that SRC has never taken any steps to deal with the issue of the risk allowance as raised by the Petitioner. The SRC has allowed the said allowance. What the Petitioner is contending about is an enhancement of the said allowance.

289. As it has been demonstrated, it took around 8 years for the impugned decision to be made by SRC. On the part of the health workers, I believe their struggle for the enhancement has been under two years.

290. Having said so, this Court finds that the Petitioner has not proved any unfair discrimination on the part of the health workers by the SRC in coming up with the impugned decision. Therefore, the alleged discrimination under Article 27 of the Constitution has not been proved.

291. The issue is hereby answered in the negative.

The question of legitimate expectation:

292. The Petitioner raised the issue of legitimate expectation. He mainly contended that the people of Kenya had legitimate expectation that public resources will be properly expended under the Constitution and the law.

293. The Supreme Court delineated the principles in legitimate expectation in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. The Court held that: -

[269] The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. **there cannot be a legitimate expectation against clear provisions of the law or the Constitution.**

294. As the main contention in this Petition is the constitutionality of the impugned decision, therefore, the doctrine of legitimate expectation has no room.

295. The only question before Court is whether or not the Constitution and the law were complied with in reference to the conversion.

Disposition:

296. Flowing from the above discussion, it is clear that the Petition is unsuccessful.

297. The upshot is that the Petition is dismissed and since the matter is a public interest litigation, each party shall bear its own costs.

Those are the orders of this Court.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MARCH, 2022

A. C. MRIMA

JUDGE