REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(CORAM: ODUNGA, J)

CONSTITUTIONAL PETITION NO. 18 OF 2018

IN THE MATTER OF: ARTICLES1, 2, 10, 19, 20, 21, 22, 23, 24, 27, 28, 35, 41, 47, 50, 165, 171, 172, 230, 232, 253, 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF INTERPRETATION AND ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010 RELATING TO THE SALARIES AND REMUNERATION OF JUDGES OF THE HIGH COURT OF KENYA

AND

IN THE MATTER OF THE JUDICIAL SERVICE COMMISSION, A CONSTITUTIONAL COMMISSION ESTABLISHED PURSUANT TO ARTICLE 171 & 253 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE SALARIES AND REMUNERATION COMMISSION, A CONSTITUTIONAL COMMISSION ESTABLISHED PURSUANT TO ARTICLES 230 & 253 OF THE CONSTITUTION OF KENYA

BETWEEN

SOLLO NZUKI.....PETITIONER

=VERSUS=

SALARIES AND REMUNERATION COMMISSION.....1ST RESPONDENT

JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. This petition, according to the petitioner, has been triggered by the decision by the 1st and 2nd Respondents in disregard of their constitutional mandate to categorise judges of the High Court on the basis of whether they were appointed from “outside the judiciary” or “were serving in the judiciary” and that the said respondents have discriminated, differentiated and oppressed and continue to oppress some High Court judges and judges of courts of equal status classified as appointed from “outside the judiciary.”

2. It was the petitioners case that the said decision went contrary to the legitimate expectation of the said judges by being offered a starting salary much lower than their predecessors appointed before them.

3. It was the petitioner's view that the disparity between the starting salaries of judges appointed from "outside the judiciary" or those who "were serving in the judiciary" is oppressive, unjust, unwarranted, ill-advised and discriminatory hence unconstitutional.

4. It was pleaded that as a result of the said discrimination and unfair treatment, the affected judges cannot access or enjoy some of their entitlements and or benefits such as full mortgage scheme because their low pay cannot sustain their full mortgage entitlement and that this amounts to indirectly or directly varying the benefits payable to a judge in total violation of Article 160(4) of the Constitution.

5. It was contended that to entrench and perpetuate the above inequality, unfair differentiation and or discrimination, the 1st respondent issued a circular dated 18th August, 2017 addressed to the 2nd Respondent purporting to set remuneration and benefits of state officers in the judiciary in which a judge appointed from outside the judiciary would join at the minimum remuneration set while those whose remuneration were set earlier would retain such remuneration package. Apart from entrenching inequality, oppression and unfair differential treatment, it was pleaded that the said action has resulted in grave absurdity where some judges are earning more than judges who were appointed earlier than them.

6. Accordingly, the petition sought the following orders:

> ***a.*** **A Declaration that paying Judges of the High Court of Kenya and judges of equal status a starting rate that is lower than the starting Remuneration of other Judges of the High Court of Kenya and courts of equal status appointed to the same office on the same day is a violation of the affected Judge's rights not to be discriminated against as guaranteed by Article 27 of the Constitution of Kenya, 2010 and a violation of their rights as guaranteed by Articles 41 (2) of the Constitution.**
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> ***b.*** **A declaration that the Appointment to the office of Judge of the High Court of Kenya and or a judge of courts of equal status is a substantive appointment and not a promotion from a position of Magistrate or any other office and as such all persons appointed to office of Judge of the High Court of Kenya and courts of equal status are entitled to similar starting remuneration and benefits.**
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> ***c.*** **A declaration that the 1st Respondent's failure to set and publish in the Kenya Gazette the Remuneration of a Judge of the High Court of Kenya and courts of equal status is in violation of Article 238 of the Constitution,2010 and also amounts to discrimination against all [persons serving as Judges of the High Court of Kenya and courts of equal status contrary to Article 27 of the Constitution, 2010.**
>
> ***d.*** **A declaration that the purported categorization by the 1st and 2nd Respondents of the High Court Judges and Judges of courts of equal status based on whether they were appointed from outside or within the judiciary is unconstitutional.**
>
> ***e.*** **A declaration that the 1st Respondent's communication on the remuneration of Judges and Magistrates contained in its letter Ref No.SRC/TS/HRCOH/3/25 dated 10th June 2013 is discriminatory to the extent that it subjects judges appointed in 2014, 2015 and 2016 to a lesser starting salary than the starting salary of those appointed prior to the said period.**
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> ***f.*** **A declaration that the 1st Respondent's proposal contained in their letter dated 18th August 2018 addressed to the Secretary, Judicial Service Commission, stating that the remuneration and benefits contained therein will be payable to Judges and Magistrates with effect 1st July 2017 is illegal on grounds of unfair discrimination to the extent that it does not benefit judges appointed in 2014, 2015 and 2016.**
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> ***g.*** **A declaration that the 1st and 2nd Respondents have jointly and severally acted in a manner that is inconsistent and or in total violation of the Constitution and in particular, it has breached Articles 2(4), 10 (2) (b) (c), 19, 27,28, 41, 47,23 (5)(b)(c) & (d), 249 (2) (a), 160 and 172 (1)(b) of the Constitution.**
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> ***h.*** **A declaration that the 3rd Respondent has failed, refused and or neglected its constitutional mandate of advising the 1st and 2nd Respondents.**
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> ***i.*** **A declaration compelling the 1st and 2nd Respondents to pay all the affected judges the starting salary equal to the starting salary paid to the judges appointed with them on their respective dates of appointment and/or the starting salary paid to the judges appointed in or about 2011/2012 or thereabouts (whichever is higher), and, that the said amount(s) plus benefits be backdated to their respective dates of appointment and paid promptly.**
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> ***j.*** **Any other relief that this court may deem just and expedient in the circumstances.**

7. According to the Petitioner, the Petition is premised on the following salient foundations of the Law and in Particular, the Constitution of Kenya, 2010. Judges of the High Court of Kenya and courts of equal status are appointed as provided for under Article 166 (2) and 166 (5) of the Constitution. Judges of the High Court of Kenya and courts of equal status being citizens of the Republic of Kenya are entitled to the rights and privileges of citizenship as provided under Article 12 of the Constitution of Kenya.

Judges of the High Court of Kenya being persons within the meaning of Article 20 (2) of the Constitution are entitled to the fundamental rights and freedoms expressed and/or implied in the said Constitution. Judges of the High Court of Kenya and courts of equal status are State Officers holding State Offices within the meaning of Article 260 of the Constitution. Article 2, (1) and 2(2) of the Constitution of Kenya, 2010 declares the supremacy of the Constitution and obliges every person to exercise state authority only as provided in the Constitution.

Consistent with this declaration, any act or omission in contravention thereof is invalid. Article 3 (1) of the Constitution obliges every person to respect, uphold and defend the Constitution. The obligation extends to all state organs including the Respondents herein to equally respect, uphold and defend the Constitution. Article 10 of the Constitution of Kenya provides core national values and principles of governance which bind all state organs, state officers, public officers, and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law or make or implement Public Policy decisions. Some of the national values and principles mentioned include good governance, integrity, transparency, accountability, rule of law, sharing and devolution of power, democracy and participation of the people and non-discrimination.

Article 19 of the Constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and it is the framework for social, economic and cultural policies.

The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Further, the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state. Article 20 of the Constitution provides that the Bill of Rights applies to all law and binds all state organs and persons.Article 21 of the Constitution provides that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.Article 22 of the Constitution entitles any Kenyan to move this Court whenever the rights or fundamental freedoms in the Bill of rights is denied, violated, infringed or threatened. Article 258 (1) of the Constitution provides that every person has the right to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention Article 258 (2) provides that in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by *inter alia* a person acting in public interest Article 27 (1), 27 (4) and 27 (5) of the Constitution entitles Judges of the High Court of Kenya to the right to equal protection and benefit of the law and obliges the Respondents not to discriminate against the Judges of the High Court of Kenya, either directly or indirectly on any ground including race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience belief, culture, dress language or birth. Article 41 of the Constitution guarantees the Judges of the High Court of Kenya the right to fair labour practices which includes the right to fair remuneration.Article 47 (1) and 47 (2) of the Constitution entitles Judges of the High Court of Kenya and courts of equal status (in common with other persons) to a fundamental and inalienable right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Further, if a right or fundamental freedom is likely to be adversely affected by administrative action, the affected Judges of the High Court of Kenya have a right to be given written reasons for that action.Article 230 (4) of the Constitution of Kenya confers upon the 1st Respondent the function of setting and regularly reviewing the remuneration of all state officers (including Judges of the High Court of Kenya and courts of equal status). In carrying out its functions, the 1st Respondent is required by the Constitution to take into account *inter alia* transparency and fairness.Article 165 of the Constitution of Kenya provides that the High Court shall have jurisdiction to interpret the Constitution to determine the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution Article 160 of the Constitution provides for the Independence of the Judiciary which is a critical prerequisite for theRule of Law which is one of the values enshrined in Article 10 of the Constitution and expressly provides that in exercising the said function, courts are only subject to the ConstitutioArticle 259 (1) of the Constitution provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles, advances the Rule of Law and Human Rights and Fundamental freedoms in the Bill of Rights, permits the development of the Law and contributes to good governance.

8. It was contended by the petitioner that he reliably learnt that High Court Judges and Judges of equal status appointed in or about 2011 and 2012 or thereabout were offered a low starting salary which was subsequently adjusted upwards and they were all paid arrears backdated to their date of respective appointments. On the Contrary, and, in total violation of the principle of legitimate expectation and in clear acts of discrimination, High Court Judges and/or Judges of equal status appointed in 2014, 2015 and 2016 were offered a starting salary much lower than their predecessors.

9. Further, in total disregard of the fact that the Constitution does not differentiate whether a High Court Judge or a Judge of a court of equal status is appointed from outside the Judiciary or from within the Judiciary, the 1st and 2nd Respondents have entrenched and perfected a totally unconstitutional narrative whereby the starting salary of High Court Judges and or Judges of Courts of equal status once appointed is determined on the basis of whether they were appointed from outside the Judiciary or form within the Judiciary, irrespective of the fact that the two "categories" will have been appointed on the same day to the same job designation.

10. According to the petitioner, the categorization submitted hereinabove has ensured and perfected a substantial disparity in the salary paid to Judges appointed from outside and those appointed from within the Judiciary. This has subjected one category to preferential treatment in that some High Court Judges and or Judges of Courts of equal status earn more than their peers notwithstanding the fact that they were appointed on the same day and assumed the same job designations and engage in the same assignment contrary to all known principles of fairness and equal remuneration. This s oppressive, unjust, unwarranted, ill-advised and discriminatory hence unconstitutional.

11. As a consequence, thereof persons appointed from private sector who ordinarily earned more in their private practice and sacrificed their lucrative income to serve this great nation are disadvantaged, oppressed, ridiculed and discriminated. It was contended that the discrimination and or unfair treatment hereinabove submitted has led to the affected Judges being denied access or enjoyment of their entitlements and or benefits such as the full mortgage scheme because their low pay cannot sustain their full mortgage entitlement. This amounts to indirectly or directly varying the benefits payable to Judge in total violation of Article 160(4) of the Constitution.

12. To entrench and perpetuate the above inequality, unfair differentiation and or discrimination, the petitioner stated that the 1st Respondent issued a circular Ref. SRC/TS/JSC/3/35/8 Vol.111 (18) dated 18th August 2017 addressed to the 2nd Respondent purporting to set Remuneration and Benefits for State Officers in the Judiciary. The Circular clearly prescribes a lower starting pay for a Judge or a Magistrate appointed from outside the Judiciary as opposed to those appointed from within the Judiciary notwithstanding the fact that they are appointed to the same position and that the Constitution does not prescribe such differentiation.

13. Further, those appointed as Judges of the High Court of Kenya or as Judges of Courts of equal status in the year 2014, 2015 and 2016 remain exposed and disadvantaged and their position is further aggravated by Paragraph 4 of the same letter which provides that ***"the***

remuneration set herein will be payable to Judges and Magistrates with effect from 1st July 2017" clearly excluding them from the remuneration set in the said letter.

14. The Petitioner averred Judges appointed in 2014, 2015 and 2016 despite being aggrieved as hereinabove submitted will not benefit from the 'purported remuneration' which deliberately entrenches the inequality, oppression and unfair differential treatment submitted.

15. Further, owing to the skewed, irrational, discriminatory and unconstitutional categorization of judges based on their background, the entry points in terms of salary has resulted in grave absurdity where some judges are now earning more than Judges who were appointed earlier than them.

16. According to the Petitioner the following acts by the 1st Respondent breached and or violated the Constitution:

a. The 1st Respondent has acted in blatant and total disregard and abuse of the provisions of Article 230 (5)(b)(c) and (d). The 1st Respondent has failed to ensure that the office of the Judge of the High Court of Kenya and Judges of courts of equal status attracts and retains the skills required to execute the functions of the office. Further, the discrimination pleaded and submitted by the Petitioner has the potential and effect of discouraging qualified persons affected by the discrimination from applying for the post of a Judge of the High Court or Courts of equal status.

b. By prescribing unequal pay for the same job to persons appointed on the same day and who assume office on the same day, the 1st Respondent has violated the principle of transparency and fairness.

c. By creating a scenario whereby persons occupying a Constitutional Office of a Judge of the High Court and Courts of equal status earn less remuneration than persons serving in lower cadres of the same institution, the 1st Respondent has failed to recognize productivity and performance and/or has acted unreasonably and such a scenario is not only absurd but has the potential of demoralizing the affected Judges and is a threat to the independence of the Judiciary and can hamper the due administration of justice.

d. The 1st Respondent by its actions has openly encouraged and promoted unfair discrimination in total violation of Article 27 of the Constitution and in particular it has encouraged and promoted unequal treatment among persons serving in the same job designation.

e. The 1st Respondent has failed to treat the affected Judges with dignity and respect as guaranteed under Article 28 of the Constitution.

f. The 1st Respondent has violated the principles enumerated in Article 10 (2) of the Constitution and in particular it has wilfully and or deliberately failed to uphold human dignity, equity, social justice, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability.

17. It was submitted that the violations and or breaches of the Constitution hereinabove submitted are not only unconstitutional, but are a threat to independence of the Judiciary and to the due administration of justice which is a core component of the rule of law which is one of the core values enumerated in Article 10 of the Constitution.

18. The Petitioner further submitted that the following acts by the 2nd Respondent breached and or violated the Constitution:

a. The 2nd Respondent has wilfully, deliberately and or neglected to up hold its Constitutional mandate under Article 172 of the Constitution. The 2nd Respondent has failed, refused and or neglected to promote and facilitate the independence of the Judiciary and the efficient and transparent administration of justice.

b. The 2nd Respondent has allowed a scenario whereby Judges appointed and sworn on the same day as High Court Judges and or Judges of courts of equal status earn different pay for the same work which amounts to unfair discrimination.

c. The 2nd Respondent has subjected High Court Judges and Judges of Courts of equal status appointed in 2014, 2015 and 2016 to a starting salary different from the salary of their predecessors appointed in 2011 and 2012.

d. The 2nd Respondent has perfected the discrimination by categorizing High Court Judges as 'Judges appointed from outside the Judiciary" and determining the starting salary based on the said categorization yet the Constitution does not prescribe such categorization.

e. The 2nd Respondent has abdicated from its Constitutional mandate including violating Article 10 of the Constitution by failing to uphold human dignity, equity, social justice, equality, human rights, non-discrimination, good governance, transparency and integrity.

f. The 2nd Respondent has violated the rights of the affected Judges under Articles 28 and 47 of the Constitution.

g. The 2nd Respondent has failed to uphold the objects enumerated in Article 249 of the Constitution.

19. According to the Petitioner, the Constitution requires the 2nd Respondent to take measures, to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and in particular to review and make recommendations on the conditions of service of Judges including remuneration and failure to do so is a threat to the independence and functioning of the Judiciary. It was his case that the 2nd Respondent has consistently engaged in totally unconstitutional actions which have the potential of bringing the entire Judiciary into disrepute.

20. It was the Petitioner's contention that by dint of Article 156 of the Constitution, the 3rd Respondent is the principle legal adviser to the Government of Kenya, represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings and performs any other functions conferred on the office by an Act of Parliament or by the President. Further, by dint of Article 171(1)(e) of the Constitution, the 3rd Respondent is a member of the 2nd Respondent.

21. The Petitioner however submitted that the 3rd respondent has failed, refused and or neglected to advise the 1st and 2nd Respondents to perform their functions in accordance with their respective constitutional mandates as a consequence whereof the actions and or omissions pleaded and submitted by the Petitioner have been committed and or perpetuated in total violation of the Constitution. This is a clear abdication by the 3rd Respondent of his constitutional mandate and a violation of the Constitution and a ground for this Court to intervene so as to defend, protect and uphold the Constitution.

22. To the extent that some Judges of the High Court of Kenya and courts of equal status are paid a starting salary that is lower than that of other Judges appointed with them on the same day to the same office and carrying out similar work, it was the Petitioner's contention that this is an infringement of those Judges rights against discrimination as guaranteed by Article 27 of the Constitution. In addition, to the extent that some Judges of the High Court of Kenya and Courts of equal status are paid a starting salary that is lower than other Judges appointed to the same office on the same day with them and carrying out similar duties and workload is an infringement of those Judges' right to Fair Labour Practice as guaranteed under Article 41 of the Constitution. Similarly, to the extent that the 1st Respondent has failed to respond to the Petitioner's demand that all Judges of the High Court of Kenya and Courts of equal status appointed on the same day be paid similar starting salaries is an infringement of the Judges right to fair Administrative action that is expeditious, efficient, lawful and reasonable as guaranteed by Article 47 of the Constitution. Further, to the extent that the 1st and 2nd Respondents have categorized judges on the basis of those appointed "from the judiciary" and those appointed "from outside the Judiciary" is a violation of Article 167 of the Constitution.

23. The petitioner asserted that to the extent that some Judges are subjected to a lower pay than others appointed together with them on the same day making it impossible to access full benefits entitled to them such as mortgage facilities because their diminished pay cannot support the repayments is a gross violation of Article 160 (4) of the Constitution. It was contended that to the extent that the 1st and 2nd Respondents have perfected and permitted disparity in payment of remuneration by not upholding the principle of equal pay for equal work, they are acting in breach of the Constitution. It was submitted that to the extent that the 1st and 2nd Respondents have permitted differentiation by paying some judges lesser than their peers, their actions are a direct violation of Article 160 of the Constitution in that it is a threat to the independence of the Judiciary and that to the extent that the actions complained of are a threat to the financial independence of the affected Judges, the same is a violation of Article 160 (4) of the Constitution.

24. The petitioner therefore contended that the actions and or omissions of the 1st and 2nd Respondents is a breach to Articles 2 (2), 3 (1), 10 (2), 12(1), 27, 28, 47, 230 and 172 of the Constitution and all the enabling statutory provisions and that to the extent that the 1st Respondent has failed and/or neglected to set and publish the remuneration and benefits for the holder of the office of Judge of the High Court of Kenya is an infringement of Article 230 (4) of the Constitution of Kenya, 2010 and amounts to discrimination against all persons holding the office of Judge of the High Court of Kenya contrary to Article 27 of the Constitution.

25. The 3rd Respondent was accused of failure to advise the 1st and 2nd Respondents and therefore failing to perform his Constitutional mandate under Article 156 of the Constitution. In the Petitioner's view the foregoing amount to a gross violation of Article 3 (1) of the Constitution which are an affront to the Rule of Law, a core value of Kenya's constitutional dispensation, and a threat to the due administration of justice.

26. In support of his case the Petitioner relied on the decision in **Nairobi Petition No. 120 of 2017, - Josephat Musila Mutual & Another vs. The Attorney General & Others** and **Nairobi Petition No. 328 of 2016 - Council of Governors vs. Salaries and Remuneration Commission.**

27. From the above definition, it was submitted that discrimination is such conduct that subjects a person to unfair, unreasonable and unjustifiable differential treatment based on any of the prohibited considerations including position or class. In this regard the petitioner relied on the decision of the Constitutional Court of South Africa in the case of **Mbona v Shepstone and Wylie [2015] ZACC 11.**

28. In conclusion the Petitioner prayed that all judges appointed at the same time must enter equal salary band and all judges who were entered on a lower salary band be entered on the same scale and be paid all arrears from their date of appointment. According to him, any Salary review be done equally to all judges appointed at the same time in order to ensure parity in salary review of all Judges. He therefore urged the court to grant the prayers sought in the petition.

29. The 1st Respondent's position was that it is an independent commission established under Article 248 of the Constitution of Kenya. Relying on Articles 249 (1) and (2), 230(5) of the Constitution and the provisions of the ***Salaries and Remuneration Commission Act***, it was contended that the 1st Respondent can do no more and no less than that which is set out by the law. In its view, it is also bound by the principles in the Constitution with regard to Public Finance and these are set out in Article 201 of the Constitution.

30. According to the 1st Respondent, the petitioner has not proved that the respondent breached any of the constitutional principles that guide it since at all times the Respondent has acted within the confines of its constitutional mandate.

31. It was its case that the decision made on 18th December, 2018 which ensured that all Judges of the High Court are at par is not constitutionally fragile and is sustainable and relied on **JNN (a minor vs. Naisula Holding Ltd T/A N School (2018) eKLR.**

32. It was submitted that the 1st Respondent has the necessary expertise in matter of remuneration and absence proof of unconstitutionality i.e. illegality procedural, impropriety and irrationality the respondent's decision on the remuneration must be allowed to stand. Further, the petitioner has not proved his allegation of breaches of the Constitution by the respondent. In this regard the 1st Respondent relied on **Joseph Koli Nanok and another vs. Ethics and Anti-Corruption Commission (2018) eKLR**.

33. It was submitted that the principles of natural justice as set out in **Judicial Service vs. Mbalu Mutava** were upheld. Further, the courts have held that it is not necessary that personal representation, written representation also meet the standards of fair administrative action.

34. It was the 1st Respondent's contention that there has been no breach of Article 27 because discrimination has not been proved. Similarly, there has been no unfair labour practices by the Respondent. To the 1st Respondent, since there had been back and forth communication, this petition was filed prematurely before any conclusive report/decision has been made. Furthermore, the Petitioner has not shown any adverse effects from the Respondents actions since the disparities were addressed.

35. According to the 1st Respondent, since the disparity in remuneration of Judges appointed on the same day have been addressed, there is no discrimination since currently, all Judges of the High Court and Courts of equal status are paid a starting salary that is the same.

36. It was disclosed that the 1st Respondent letter dated 18th August, 2018 is no longer in effect though at the time that the Petitioner filed this suit on 25th November, 2018 the said letter was in effect. It was superseded by a later communication dated 13th December, 2018 which clearly stated that the remuneration for Judges and Magistrates set in Table 1 shall supersede the remuneration for Judges and Magistrates set by 1st Respondent and communicated vide letter Ref. No. SRC/TS/JSC/3/35/8 dated 30th April, 2014 letter Ref. No. SRC/TS/JSC/3/25 dated 10th June, 2013 and letter Ref. No. SRC/TS/JSC/3/35/8 VOL. III (18) dated 18th August, 2017. It was therefore contended that courts do not make orders in vain. To the 1st Respondent, to make a declaration that the proposals contained in the 1st Respondent's letter dated 18th August, 2018 is illegal yet the contents of the letter have been nullified would be an exercise in futility.

37. As to whether the salaries of the affected judges should be backdated to 2012, it was contended that the issue of backdating goes back to 2014. The 1st Respondent had not advised in 2012, The Judges who have raised issues of disparities were appointed in 2016. Prior to 2013-2014 Judges were to be paid depending on when they were appointed. In 2014, the 1st Respondent approved the entry point for judges who were appointed in 2011/2012 to Kshs. 688,658. In 2017, the 1st Respondent reviewed the issue after in 2017, advising that the date of appointment was not going to be used. Further the 2nd Respondent raised issues of the overlapping of Judges salaries with that of Chief Magistrates and asked the 1st Respondent to address the issue and as at 2017 all affected Judges had been brought to the starting salary of Kshs. 657,000. To the 1st Respondent, it would not be fiscally unsustainable to backdate salaries to 2013. In any event there was no disparity in 2012, 2013, 2014 and 2015 because the salary was determined by the date of appointment.

38. The 1stRespondent contended that there have been no complaints from the affected Judges since 18th December, 2018. The disparities have been addressed as the 1st Respondent has carried out its constitutional mandate.

39. According to the 1st Respondent, there is no legal obligation placed on SRC on the 1st Respondent to gazette the remuneration of Judges or any other State Officer. The Kenya Gazette is the official bulletin of the Government. It announces the decisions of the Government but failure to set out remuneration via the Kenya Gazette does not amount to discrimination. The remuneration of judges does not necessarily require publication.

40. It was therefore its view that it has observed all the tenets of Constitutionalism, public finance and its mandate as set out in the Constitution. The court was therefore urged to finds that the Petition has no merit and dismiss it with costs to the 1st Respondent.

41. The case for the 2nd Respondent was that the Petitioner has failed to prove his case as against the Second Respondent and the Petition should be dismissed with costs. According to the 2nd Respondent, under Article 172(1)(b) of the Constitution of Kenya 2010, the Second Respondent's functions are inter alia to review and make recommendations on the conditions of service of judges and judicial officers other than their remuneration since under Article 230(4) of the Constitution it is the duty of the 1st Respondent to set and regularly review the remuneration and benefits of all state officers.

42. It was therefore its position that the duty of setting and reviewing the remuneration and benefits of judges is by Constitution bestowed upon the 1st Respondent and that the duty of the 2nd Respondent is only limited to implementing the 1st Respondent's recommendations. In addition, it was contended that all vacant positions of Judges are advertised through the media and that the salaries attached to the positions as set or reviewed by the 1st Respondents are in the public domain.

43. According to the 2nd Respondent, whoever applies for position of a judge is well aware of the salaries and benefits attached thereto before he or she applies for the position and before he or she takes the oath of office. Apart from the salaries, judges are entitled to other benefits such as vehicle, security, medical, airtime, security of tenure as well as retirement at 70 years of age all of which are non-remunerative and should be taken into account.

44. It was its position that Magistrates who have served the judiciary for a long time and are appointed as judges cannot have their salaries reduced and that harmonization of their salaries with those newly appointed judges would be subjective. In support of its position the 2nd Respondent relied on **Kiambu County Tenants Welfare Association –vs- Attorney General & Another [2017] eKLR** and submitted that

the Petitioner has failed to discharge the burden of proof, that the Petition filed herein lacks merit and should be dismissed with costs to the 2nd Respondent.

45. The 3rd Respondent, on its part, took the position that the genesis of the petition is the 1st respondent's circular referenced SRC/TS/JSC/3/35/8 VOL. 111(18) OF 18th August 2017 that set out the payment schedule of judges. In the said circular, judges from within the judiciary get to earn more than judges recruited from outside the judiciary. This, according to the petitioner is unfair since all judges perform similar tasks and there should be no distinction between a judge recruited from within the judiciary and those that were recruited from outside the judiciary.

46. It was noted that as at the time the petition was filed, the only circular guiding the remuneration of judges was the impugned one of 18/8/2017. However, following subsequent negotiations and resultant decisions, the circular has been overtaken by events and there is a new circular referenced SRC/TS/JSC/3/35/8/VOL III (42) and dated 13th December 2018. This circular sought to harmonize the remuneration and benefits of all judges. This circular departed from the impugned circular that had given varying remunerations for different categories of judges. Therefore, the issue of unfairness and disparities was settled by that circular.

47. According to the 3rd Respondent, formulation of a circular is a process and from the 2nd respondent's replying affidavit of **Ms Ann Gitau** sworn on 19th March 2019, there is evidence of the negotiations between the 1st and 2nd respondents in an attempt to reach an amicable settlement on matters of remuneration of judges. This fact cannot be overlooked since it is those negotiations that informed the current circular of 13th December 2018. The Respondent averred that the only disparity that was there on the issue of judges from within the judiciary and those from outside the judiciary was settled through the circular of 13th December 2018 and therefore the issues of discrimination also rest with the circular.

48. It was its case that the though the petitioner has alleged that the judges who joined in the year 2014, 2015 and 2016 were offered a lower starting salary than that of their predecessors, the petitioner failed to prove the claims of inequalities between salaries of judges who joined in 2011,2012,2014,2015 or 2016. Though the petitioner claimed that he learnt that judges of 2011 and 2012 were offered a low starting salary which was subsequently adjusted upwards and they were paid arrears starting from the date of their appointments, all his averments on backdating of arrears and people joining at a lower salary than their predecessors does not hold any water.

49. The court was urged to be keen and address the authenticity of the petitioner's claims as well as the veracity of the evidence he has annexed in support of his claims. The evidence annexed in support of the said claims are alleged copies of pay slips attached to his replying affidavit of 2nd April 2019. To the 3rd Respondent, those documents have no probative value because the said pay slips do not bear a rational connection to any person in the judiciary. First, they bear no names or any particulars that would really inform the recipient of the documents who they belong to. It is not even certain that the said pay slips have originated from the judiciary or that the contents thereof are true so as to be relied upon.

50. It was submitted that the petitioner, not being a judge is not privy to the inside information between the judges and the 2nd respondent. Thus, the annexed pay slips could either be fabricated or taken without authority so as to advance his narrative. If the judges were so aggrieved with the so called disparities, it was submitted that they should have come out to defend what should be their rightful position on remuneration issues. In support of this position, the 3rd Respondent relied on the decision of **Lenaola, J** in the case of **Okiya Omtatah Okoiti & 2 others vs. Attorney General & 3 others [2014] eKLR (Petition No. 58 of 2014)**.

51. According to the 3rd Respondent, if the petitioner wants the court to rely on the annexed documents he should be ready to demonstrate that he got them through lawful means. It was therefore submitted that the documents used by the petitioner in support of their case lack probative value in light of the non-disclosure of their source. The said documents do not meet the threshold of evidence under the ***Evidence Act*** and therefore there is no evidence in support of the petitioner's claims. In light of the lack of evidence in support of this averment, the claims as alluded by the petitioner as proof that discrimination exists owing to varying pay grades cannot be authenticated and therefore the said claims should be disregarded.

52. According to the 3rd Respondent, the petitioner seems to have an issue with the figure of Kshs 657,426 as the entry remuneration for judges as this is lower than that which was given to the judges who joined in the year 2011 as outlined variously in his replying affidavit of 2nd April 2019. With respect, the petitioner cannot dictate the amount or figure to be used as the remuneration for judges. This is because that is a function reserved strictly for the 2nd respondent under article 230 of the Constitution. Suggesting a specific figure from any person other than the 2nd respondent is tantamount to usurping the well-guarded Constitutional mandate of the 2nd respondent which will be unlawful and at variance with the dictates of the constitution. In this regard the 3rd Respondent relied on the decision of the Supreme Court in **Re the Matter of the Interim Independent Electoral Commission Sup. Ct. Application No. 2 of 2011; [2011] eKLR**, and **Trusted Society of Human Rights vs. The Attorney General and Others High Court Petition No. 229 of 2012,** at paragraph 63.

53. Based on the foregoing, it was submitted that where an organ such as SRC has been given power to perform a specific function by law, they should be allowed to perform the said duties without interference. That is essence of separation of powers and independence of the said office. The court should be careful not to veer into matters not within its purview. In essence, neither the court, nor the petitioner can review what has been set down by the 2nd respondent as the current remuneration for judges since that function squarely lies with SRC, the 2nd respondent herein.

54. It was therefore submitted that:

i. The petitioner has not proven his claims on inequality or discrimination in remuneration of judges.

ii. The circular known as SRC/TS/JSC/3/35/8 VOL. 111(18) OF 18TH August 2017 was replaced by the circular referenced

SRC/TS/JSC/3/35/8/VOL III (42) of 13th December 2018 which settled any disparities on remuneration of judges. In light of the new circular, the contents of the impugned circular of 18th August 2017 are inapplicable.

iii. The 2nd respondent is the only organ mandated to determine the salaries of judges and not any other person therefore all proposals made by the petitioner remain unfounded.

55. According to the 3rd Respondent, the entire petition therefore lacks merit and should be dismissed.

Determination

56. I have considered the issues raised in this petition.

57. The first issue for determination is whether the doctrine of separation of powers bars this court from entering into an inquiry of the issues raised in this petition. As regards as regards the doctrine of separation of powers, in his separation of powers theory, **Montesquieu** had sought to address the eternal mischief of abuse of power by those to whom it is entrusted. He observed [**The Spirit of the Laws** (1948)]:

> **When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.**

58. That this principle is reflected in our own Constitution appears in Article 1(3) thereof which provides that sovereign power which pursuant to Article 1(1) of the Constitution ***"belongs to the people of Kenya and shall be exercised only in accordance with this Constitution***":

> **"…is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—**
>
> **(a) Parliament and the legislative assemblies in the county governments;**
>
> **(b) the national executive and the executive structures in the county governments; and**
>
> **(c) the Judiciary and independent tribunals.**

59. This was appreciated by the High Court in **Trusted Society of Human Rights vs. The Attorney-General and Others, High Court Petition No. 229 of 2012; [2012] eKLR**, at paragraphs 63-64 where it held as follows:

> **"Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."**

60. Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people's sovereign power is vested in the *Executive, Legislature* and *Judiciary.*

61. The broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from **Commission for the Implementation of the Constitution vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR where Njoki, SCJ** opined that:

> "**The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting** ultra vires **the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."**

62. The system of checks and balances serves the cause of accountability, and it is a two-way motion between different State organs, and among bodies which exercise public power. The commissions and independent offices restrain the arms of Government and other State organs, and *vice versa.* The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers.

65. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

> **"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of**

executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

63. However, Article 2(4) of our Constitution which provides as follows:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

64. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore whereas the legislative authority vests in Parliament and the County legislative assemblies where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution the High Court is the institution constitutionally empowered to determine such an issue subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the Constitution since, under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore, there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to **"…** *institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention*."

65. My position is supported by the decision in **Coalition for Reform and Democracy (CORD) & Another versus the Republic of Kenya & Another (2015) eKLR** where the court stated *inter alia* at paragraph 125 that:

"Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution… Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid…"

66. Therefore, when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls upon the laps of the Judiciary to determine the same. As was held in **Jayne *Mati & Another vs. Attorney General and Another* - Nairobi Petition No. 108 of 2011** at paragraph 31:

"…separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution."

67. On that note, the Supreme Court in **Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR** stated that:

"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "

68. The Court went on to state as follows:

"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."

69. Ngcobo, J in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**on his part expressed himself as follows:

> **"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation…By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does."**

70. The Court went on to state as follows:

> **"While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."**

71. The South African Constitutional Court in ***Minister of Health and Others vs. Treatment Action Campaign and Others*** **(2002) 5 LRC 216**, **248 at** paragraph 99 **underscored** the Court's role to protect the integrity of the Constitution thus:

> **"The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."**

72. I am duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

73. In this case, the petitioner's case is that the actions of the respondents have discriminated against the judges appointed outside the judiciary vis-à-vis those appointed from within the judiciary. Article 10 of the Constitution, on the other hand provides that:

> **(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**
>
> **(a) applies or interprets this Constitution;**
>
> **(b) enacts, applies or interprets any law; or**
>
> **(c) makes or implements public policy decisions.**
>
> **(2) The national values and principles of governance include—**
>
> **(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

74. In setting out the remuneration, it is not in doubt that the 1st Respondent makes or implements public policy decisions. It is therefore bound by Article 10 of the Constitution to take into account the principles of non-discrimination and if it fails to do so or exercises its mandate in a discriminatory manner, it falls afoul of Article 10 and therefore invites the court to interfere with the exercise of its mandate.

75. Article 27(4) of the Constitution provides that:

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

76. The Respondents as organs of the State are clearly prohibited from discriminating against any person on inter alia the grounds set in the above provision.

77. The Petitioner's contention calls for a determination of what constitute discrimination and under what circumstances the court can interfere in allegations of discrimination. In **Peter K. Waweru vs. Republic [2006] eKLR** discrimination was defined in the following terms:

"…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 are 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."

78. Similarly, in **Andrews vs. Law Society of British Columbia (1989) 1 SCR 321**, **Wilson J**., defined discrimination as a:

"distinction which whether intentional or not but based on grounds relating to personal characteristics of individual group (which) has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society."

79. In his decision in **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J** (as he then was) held:

"The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification…The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally, it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim."

"The *Blacks Law Dictionary* defines discrimination as follows: "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- "A particular form of differentiation on illegitimate ground."…The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications

was found "to disqualify Negroes at a substantially higher rate than white applicants".

80. The learned Judge proceeded:

> **"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification…"**

81. Similarly the South African Constitutional Court in **Minister of Home Affairs vs. Fourie [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC)** at para 60 held that:

> **"Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human dignity requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma."**

82. As was appreciated by the South African Constitutional Court in **President of the Republic of South Africa vs. Hugo [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (Hugo) at para 41:**

> **"At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievements of such a society in the context of our deeply in-egalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."**

83. In **Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000** a case cited in **Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR,** the court stated that:

> **"This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application."**

84. In **S vs. Makwanyane [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)** at para 156 it was held by the South African Constitutional Court that:

> **"Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow."**

85. The same Court in **Prinsloo vs. Van der Linde [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC)** at para 25 held that:

> **"In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."**

86. In **Minister of Finance vs. Van Heerden [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (Van Heerden)** para 27 it was held that:

> **"It is…incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting**

patterns of hurtful discrimination and stereotypical response in our evolving democratic society."

87. At para 37 was held that:

> **"When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality."**

88. It is against the principle that **"all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts and the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation"** (**Tom *Bingam; The Rule of Law,*** London Penguin Press, 2010).

89. A reading of the replying affidavits and the submissions made by the Respondents clearly reveal that there were disparities regarding the salaries and/or remuneration between the judges appointed from within the judiciary and those appointed from outside the judiciary. What comes out is that those judges appointed from within the judiciary would "carry forward" their salaries to their offices as judges while the salaries of those from outside were to be set. In setting out the said salaries, it is contended, which contention is not disputed, that the salaries of those appointed from outside the judiciary was lower than those judges who had "carried forward" their salaries from their previous positions within the judiciary.

90. First and foremost, this petition is not about how much the salary of judge should be. That is a matter within the jurisdiction of the 1st Respondent. The Court's concern is simply to determine whether in so doing the 1st Respondent undertakes its mandate lawfully and constitutionally.

91. Article 166 of the Constitution provides that:

> **(1) The President shall appoint—**
>
> > **(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and**
> >
> > **(b) all other judges, in accordance with the recommendation of the Judicial Service Commission.**
>
> **(2) Each judge of a superior court shall be appointed from among persons who—**
>
> > **(a) hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;**
> >
> > **(b) possess the experience required under clause (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and**
> >
> > **(c) have a high moral character, integrity and impartiality.**
>
> **(3) The Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have—**
>
> > **(a) at least fifteen years experience as a superior court judge; or**
> >
> > **(b) at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or**
> >
> > **(c) held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years;**
>
> **(4) Each judge of the Court of Appeal shall be appointed from among persons who have—**
>
> > **(a) at least ten years' experience as a superior court judge; or**
> >
> > **(b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or**
> >
> > **(c) held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.**
>
> **(5) Each judge of the High Court shall be appointed from among persons who have—**

at least ten years' experience as a superior court judge or professionally qualified magistrate; or

at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or

(c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

92. What comes out from the said Article is that the positions mentioned therein are appointive and not promotional. In other words, a person does not become a judge of a superior court by way of being promoted from one position to another but by being appointed to that position. The only unique feature in that appointment is that those serving within the judiciary are eligible for appointment to the office of a judge of superior court if they meet the legal and constitutional threshold.

93. Accordingly, a person who is appointed to the office of a judge of a superior court does not lose his or her previous entitlements by the mere fact that he or she has been appointed to that position. This is because, one does not have to resign from the previous position in order for one to be appointed to the position of a Judge of a superior court. Accordingly, even where a serving judicial officer applies for appointment as a judge of a superior court, he/she does not thereby lose the protection of the provisions of Article 160(4) of the Constitution which provides that the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.

94. Considering the unique appointment procedure of a judge of a superior court, it follows that even a magistrate who is appointed as a superior court judge does not by that fact become disadvantaged in terms of his/her remuneration.

95. However, being an appointment, whether one comes from within or outside the judiciary, they are at par in so far as their remuneration is concerned. None should be disadvantaged based on where he/she comes from. To create disparity between those who are serving in the judiciary and those not serving would imply that it is an added advantage for one who is appointed from the judiciary. That is a disparity that in my view has no legal basis. To be permissible such disparity or differentiation must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and must have a rational relation to the object sought to be achieved by the law in question. Judges, whether appointed from within the judiciary or outside perform similar tasks. None of the respondents has educated me the existence an intelligible differentia which distinguishes a judge recruited from within the judiciary and one recruited from outside the judiciary. Similarly, I am not aware of any rational relation between the disparity in the remuneration between judges recruited from within the judiciary and those recruited from outside the judiciary to the object sought to be achieved by the policy in question.

96. Whereas the 1st Respondent avers that it is bound by the principles in the Constitution with regard to Public Finance set out in Article 201 of the Constitution, the 1st Respondent ought to take into account the provisions of Article 230(5) of the Constitution requiring it to take into account "*the need to ensure that the public services are able to attract and retain the skills required to execute their functions.*" Further, the 1st Respondent is expected to take into account the guiding principles set out under section 12 of the ***Salaries and Remuneration Commission Act, No. 10 of 2011*** requiring it to be guided by the principles of "*equal remuneration to persons for work of equal value*".

97. The 1st Respondent, is a constitutional body established under Article 230(1) of the Constitution 2010 and Article 230(4) of the Constitution 2010 stipulates that its powers and functions are to:

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.

(5) In performing its functions, the Commission shall take the following principles into account—

c. the need to ensure that the total public compensation bill is fiscally sustainable;

d. the need to ensure that the public services are able to attract and retain the skills required to execute their functions;

e. the need to recognize productivity and performance; and

f. transparency and fairness.

98. In addition to the powers set out under Article 230 (4) Constitution 2010, the 1st Respondent has power to: inquire into and advise on the salaries and remuneration to be paid out of public funds; keep under review all matters relating to the salaries and remuneration of public officers; 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; conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices.

99. Accordingly, by failing to harmonise the remuneration of judges appointed from within the judiciary with those from outside the judiciary, the 1st respondent is abdicating its constitutional and statutory mandate. Remuneration of judges, in my view is one of the tenets of the independence of the judiciary and that is why the remuneration and benefits payable to, or in respect of, a judge is constitutionally ring-fenced and are not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge are not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.

100. Independence of a judge requires that a judge carries out his/her mandate without having undue worries about how his/her post-retirement life will turn out. A judge whose post-retirement is uncertain is bound to be exposed not only to the vagaries and fragilities inherent in transient politics of the day but also to the proclivities of those in power with a view to being accorded a "soft landing" upon retirement. Accordingly, the remuneration, benefits and post-retirement benefits are tenets of the judicial independence package.

101. By subjecting judges to a disparity in their remuneration based on their origin, the 1st Respondent has created a differentiation between the judges based on one's choice of where to ply his/her trade whether in private or public sector. That differentiation is not permissible under any law and cannot be justified. It is upon the 1st Respondent to set remuneration in such a way that each tier of the judiciary is remunerated in accordance with its superior rank. A system where for example a Magistrate's remuneration is higher than that of a Judge of a Superior Court flies in the face of judicial hierarchy and is unacceptable. It is upon the 1st Respondent to set up salaries and remuneration that do not infringe upon the judicial hierarchy while ensuring that the constitutional and statutory principles are adhered to.

102. It is my view that the 1st Respondent has not done this. While it may have taken steps to harmonise the remuneration of those serving in the judiciary at present (and I am not saying that it has), that decision ought not to be an ad hoc one but there must be in place a policy guiding the remuneration of judicial officers that takes into account fair treatment based on known constitutional and statutory provisions rather than merely longevity of service in the judiciary in whatever capacity. In doing so the 1st Respondent must ensure that the provisions of the laws relating to employment are also adhered to with respect to the terms and benefits already enjoyed by those in service.

103. Though the Respondents contend that since the disparity complained of has been addressed in **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006 (Rawal, J On 2/02/07) (Hck) [2008] 2 EA 311** it was appreciated that:

> **"The Courts, generally, while hearing applications under the process of judicial review, may it be under the Constitution or under Order 53 of the Civil Procedure Rules are faced with serious issues involving Civil and Constitutional rights and liberties of a person and that is why it is elevated as a special jurisdiction even under the Civil Procedure Rules. While protecting fundamental rights, the Court has power to fashion new remedies as there is no limitation on what the Court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal.** See **Gaily vs. Attorney-General [2001] 2 RC 671; Ramanoop vs. Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); Wanjuguna vs. Republic [2004] KLR 520…The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, specially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many facetted jurisdiction and discretionary powers of the High Court. See *The Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361."**

104. Section 11 of the ***Fair Administrative Action Act, 2015*** provides as follows:

> **(1) In proceedings for judicial review undersection 8 (1), the court may grant any order that is just and equitable, including an order**
>
> **(a)declaring the rights of the parties in respect of any matter to which the administrative action relates;**
>
> **(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**
>
> **(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**
>
> **(d) prohibiting the administrator from acting in a particular manner;**
>
> **(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;**
>
> **(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**
>
> **(g) prohibiting the administrator from acting in a particular manner;**
>
> **(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;**
>
> **(i) granting a temporary interdict or other temporary relief; or**
>
> **(j) for the award of costs or other pecuniary compensation in appropriate cases.**

105. This Court is therefore empowered to fashion appropriate remedies. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled

to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6**:

> **"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."**

106. In **Hoffmann vs. South African Airways [2000] ZACC 17; 2001 (1) SA 1; [2000] 12 BLLR 1365 (CC) at paras 42-3,** the Constitutional Court of South Africa held that:

> **"In the context of our Constitution, 'appropriate relief' must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make 'any order that is just and equitable'. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, '[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate'. Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness. Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration. In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination."**

107. Having considered the issues raised herein particularly the fact that the existence of disparities was not denied I grant the following orders:

> ***a.*** **A Declaration that paying Judges of the High Court of Kenya and judges of equal status a starting rate that is lower than the starting Remuneration of other Judges of the High Court of Kenya and courts of equal status appointed to the same office on the same day is a violation of the affected Judge's rights not to be discriminated against as guaranteed by Article 27 of the Constitution of Kenya, 2010 and a violation of their rights as guaranteed by Articles 41 (2) of the Constitution.**
>
> ***b.*** **A declaration that the Appointment to the office of Judge of the High Court of Kenya and or a judge of courts of equal status is a substantive appointment and not a promotion from a position of Magistrate or any other office and as such all persons appointed to office of Judge of the High Court of Kenya and courts of equal status are entitled to similar starting remuneration and benefits.**
>
> ***d.*** **A declaration that the purported categorization by the 1st and 2nd Respondents of the High Court Judges and Judges of courts of equal status based on whether they were appointed from outside or within the judiciary is unconstitutional.**
>
> ***e.*** **A declaration that the 1st Respondent's communication on the remuneration of Judges and Magistrates contained in its letter Ref No. SRC/TS/HRCOH/3/25 dated 10th June 2013 is discriminatory to the extent that it subjects judges appointed in 2014, 2015 and 2016 to a lesser starting salary than the starting salary of those appointed prior to the said period.**
>
> **i. A declaration compelling the 1st and 2nd Respondents to pay (unless already paid) all the affected judges the starting salary equal to the starting salary paid to the judges appointed with them on their respective dates of appointment (whichever is higher), and, that the said amount(s) plus benefits be backdated to their respective dates of appointment and paid promptly.**

108. There will be no order as to costs this being litigation in the nature of public interest litigation.

109. It is so ordered.

Read, signed and delivered in open Court at Machakos this 18th day of December, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Ms Daar for Mr Miller for the Petitioner.

Ms Wafula for the 1st Respondent

Mr Wamasa for the 2nd Respondent

Miss Robi for Miss Kamande for the 3rd Respondent

CA Geoffrey