REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 230 OF 2016

CONSOLIDATED WITH

PET. No. 236 of 2016, PET. No. 262 of 2016, PET. No. 259 of 2016, PET No. 270 of 2016, PET. No.272 of 2016, PET. No. 323 of 2016

Bernard James Ndeda.....1st Petitioner

Ezra Odondi Awino.....2nd Petitioner

Samuel Kimunya Gacheru.....3rd Petitioner

Teresa Muthoni Mwangi.....4th Petitioner

Okello Timothy Odiwour.....5th Petitioner

Nyaga Njage Wilkinson.....6th Petitioner

Teresia Njeri Ngugi.....7th Petitioner

versus

The Magistrates and Judges Vetting Board.....1st Respondent

The Judicial Service Commission.....2nd Respondent

The Attorney General.....3rd Respondent

JUDGMENT

Introduction.

1. This judgment disposes seven consolidated petitions, namely, Petition numbers **230** of 2016, **236** of 2016, **262** of 2016, **259** of 2016, **270** of 2016, **272** of 2016 and **323** of 2016. The common thread in the seven petitions is that they all seek a determination that Section **23 (2)** of the Sixth Schedule to the Constitution which ousts Courts jurisdiction to review decisions rendered by the Magistrates and Judges Vetting Board does not apply to Magistrates. The contestation is that since the word "Magistrate" does not appear in Section **23(2)** of the Sixth Schedule, a literal and natural construction is that the provision only relates to Judges, hence it only ousts this Courts' jurisdiction to review the Board's decisions relating to Judges but not Magistrates.

2. The Petitioners also assault the Board's decisions declaring them unsuitable to continue serving as Magistrates on several grounds among them, the process was conducted in a manner that violated their Constitutional Rights to a fair trial, the right to be presumed innocent, violation of their rights to legal representation, and that the Board exceeded its mandate and acted *ultra vires*, and in some instances it considered matters outside the set constitutional time frames.

Litigation history.

3. The Petitions were initially filed in different High Court stations in the Country as follows:- Petition No. **230** of 2016 was filed at Garissa High Court, Petition Nos. **262** of 2016 (Original number **13** of 2016) and **272** of 2016 (Original number **14** of 2016) were filed at the Malindi High Court, Petition Nos. **236** of 2016, **259** of 2016 and **270** of 2016 were filed at Nairobi High Court, while Petition No. **323** of 2016 (Original number **4** of 2016 was filed at Bungoma.

4. Subsequently, all the files were transferred to the Constitutional Division of the High Court of Kenya, Nairobi and an order consolidating all the files was made on **7th** October 2016. For good order and ease of reference, it was further ordered that the Petitioners and the Respondents in the consolidated files would henceforth be listed as first to seventh Petitioners and first to third Respondents respectively in the order shown in the above title.

5. On **16th** June 2016, the Hon. the Chief Justice (Retired) Dr. Willy Mutunga constituted a bench of three Judges under Article **165 (4)** of the Constitution comprising of Lenaola J, Onguto J. and Aburili J. to hear and determine these consolidated Petitions. However, the subsequent elevation of Lenaola J. to the Supreme Court necessitated the appointment of a fresh bench, hence the Hon. the Chief Justice constituted the present bench.

Historical Background.

6. The historical background relevant to this determination is that prior to the promulgation of the Constitution of Kenya, 2010, the Judiciary was viewed as a state organ embroiled in impunity, corruption, bias and under the control of the executive and would therefore not give an objective or impartial determination. In the words of then Chief Justice Dr. Willy Mutunga, "it is was an institution so frail in its structures, so thin in resources, so low on its confidence, so deficient in its integrity, so weak in public support that to have expected it to deliver justice was to be wildly optimistic.[1]

7. The Constitution of Kenya, 2010, ushered in a new set of national values, a new Bill of rights and a new system of government. It reset the relationship between the citizen and the state and reconfigured both the ethos and the architecture of governance.[2]The Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law."[3]Other key provisions include conferring sovereignty to the people of Kenya who delegate it to State Organs to perform their functions in accordance with the Constitution,[4] Leadership and Integrity,[5] Values and Principles of Public Service,[6] entrenchment of exercise of Judicial authority in the Constitution[7] and Independence of the Judiciary.[8]

8. Inevitably, the philosophy, values and the structures of the previous Constitution had to give way to those of the new constitutional order. This included enactment of new legislations, the realignment of the bureaucracy and management of institutions and the rallying of the national consciousness to the new dawn.[9]

9. Judges and Magistrates are accountable to the Constitution and the law which they must apply honestly, independently and with integrity. The Bangalore Principles of Judicial Conduct identified six core values of the judiciary, namely; Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence all of which are intended to establish standards of ethical conduct of Judges and Magistrates. These values were viewed as having been disregarded in the old order, hence, the 2010 Constitution sought to re-introduce the values as part of transforming the judiciary.

10. Section **23 (1)** of the sixth Schedule to the Constitution needs to be appreciated within the above background which aimed at achieving the much desired transformation of the Judiciary. Pursuant to the said provision, Parliament enacted the Vetting of Judges and Magistrates Act[10](herein after referred to as the Act) which established the first Respondent, (herein after referred to as the Board).

11. The second Respondent (hereinafter referred to as JSC) is a Constitutional Commission established under Chapter **15** of the Constitution. It is the Body mandated to implement the Boards decisions. The third Respondent is the Honorable Attorney General, the Principal legal Government adviser.

12. For ease of clarity, we will briefly summarize the facts of each Petition below. However one point of convergence is that all the Petitioners were serving Magistrates as at the effective date and each one of them submitted to the jurisdiction of the Board, was vetted and was found unfit to continue serving as a Magistrate. Their applications to the Board to review the decisions were all dismissed.

Petition No. 230 of 2016.

13. **James Bernard Ndeda,** (the first Petitioner) challenges the original and the review determinations dated **1st** March 2013 and **24th** March 2016 respectively on grounds that:- **(i)** the Board overstepped its mandate; **(ii)** violated the Constitution; **(iii)** it denied him legal representation; **(iv)** it subjected him to discrimination; **(v)** that the determination was premised on partisan analysis of facts and evidence and avoided exculpatory evidence; **(vi)** it failed to take into account his defense; **(vii)** it relied on the testimony of an unreliable and mentally unstable witness, a one **Felista Muthoni**; **(vii)** it failed to admit newly discovered evidence, but introduced new evidence to condemn him; **(viii)** that, the complaints by the said **Felista Muthoni** were the subject of proceedings before the J.S.C. which not only cleared him, but promoted him. He also states that the determination is unreasonable, influenced by open bias and hostility, and was based on an inaccurate Hansard.

Petition No. 236 of 2016.

14. **Ezra Odondi Awino** (the second Petitioner) challenges the decision dated **1st** March 2013 and review decision dated **24th** March 2013 for violating his fundamental rights and freedoms. He avers that the determination was founded among others, garnishee order proceedings made on **19th** October 2010 and subsequently stayed on **8th** November 2010, which proceedings fell outside the **27th** August 2010

jurisdictional cut-off point of the first Respondent. Further, the determination was premised on fundamental errors of fact in that the evidence of a one **David Oscar Owako** was discounted after it was discovered that his bank account upon which he alleged to have drawn two cheques in favour of the second petitioner in August 2010 were closed on **11th** February 2010.

Petition No. 262 of 2016.

15. **Samuel Kimunya Gacheru** (the third Petitioner) avers that the process was unfair, a witch-hunt, embarrassing and that the determination was premised on grounds that he had a lot of unexplained cash deposits. He states that his affidavit evidence explaining the various deposits was found unconvincing, yet there was no complaint of bribery against him. Further, he states that he was denied the opportunity to be represented by an advocate of his choice.

Petition No. 259 of 2016.

16. **Teresa Muthoni Mwangi** (the fourth Petitioner) challenges the determination made on **30th** January 2014 and review decision made on **22nd** January 2015 on grounds that:- (i) the determination was conducted outside the mandatory timeline set out under Section **23 (3)** of the Act which expired on **28th** March 2013, yet she was vetted on **2nd** August 2013 and **17th** September 2017. She states that the determination and her subsequent suspension from employment violated her rights to a fair hearing, fair labour practices, fair administrative action, and that it was unlawful, unreasonable and procedurally defective.

17. She also states that the Board of directed her not to delve into detail in certain matters only for the Board to turn around in its determination to base its verdict on the same issues. She states that the decision was based on extraneous and irrelevant matters and it took into account facts which were not part of the record/proceedings, and that the Board exceeded its mandate and acted *ultra vires*.

Petition No. 270 of 2016.

18. **Okelo Timothy Odiwour** (the fifth Petitioner) challenges the determination dated **13th** January 2015 and the review decision dated **13th** January 2016 on grounds that both decisions violated his rights to a fair trial. He states that the Board was biased. He also stated that the Board found that the he held on to a court file improperly, yet the complainant admitted he did not know whether that was the case. Further, he states that the finding that he ordered release of security deposit was against the available evidence.

19. Regarding a complaint by a one **Chebet Langat Ruto**, he avers that the Board was biased, it created a complaint that was never canvassed during the vetting process, and that the finding that he had poor research skills was not supported by evidence. Further, he avers that the Board denied him the right to legal representation and violated his rights under Article **47** of the Constitution. He states he was denied adequate opportunity to counter the evidence of a witness, yet the Board had the information for over two years and availed it to him merely a week to the vetting. He avers that the Board abused its discretion and refused to admit into evidence affidavits by **Jeremiah A. Omai** and **Bernard Oyugi Ombui** for want of a formal application, contrary to the regulations. Also, he avers that the Board considered matters which occurred before he become a Magistrate and changed a complaint midstream to justify the determination.

Petition No. 272 of 2016.

20. **Nyaga Njage Wilkinson** (the sixth Petitioner) states that a one **Martin Munene Mwai** complained that he imposed a sentence of five years which exceeded the prescribed sentence. He avers that the alleged error was on a point of law, and that the sentence was upheld by the High Court. He also averred that his evidence was not considered, and that the Board exhibited open bias.

Petition No. 323 of 2016.

21. **Teresia Njeri Ngugi** (the seventh Petitioner) states that she was not afforded sufficient time to prepare her response despite being served late and her request for leave to file further documents was declined. She avers that the process was unfair, unreasonable, and procedurally unfair. She states that she was vexed, intimidated and coerced to proceed without crucial documents. She also states that the charges against her were continuously varied to the extent that there was no certainty in the charges, and that queries about an alleged delayed ruling were adequately explained.

22. She also states that she was asked to supply Bank statements from the year 2007 to 2010 and was asked to explain some entries which she did. She averred that she was also said to have poor judgment writing skills, yet the Board recommended training for others with similar problems. Further, she avers that her review application was rejected despite having filed an affidavit explaining each and every Bank deposit. Also, she stated that the Board formulated complaints where none existed.

23. She also stated that she was denied the opportunity to be represented by an advocate of her choice and that the Board overstepped its mandate, was openly biased, and breached the laid down procedures including failing to serve her with the complaints and or failing to accord her sufficient notice.

First Respondent's Replying Affidavit.

24. The Board's response is contained the Replying Affidavit of **Reuben Chirchir**, its' Secretary and Chief Executive Officer filed in Pet No. **230** of 2016, Pet. **236** of 2016, and Pet. No. **323** of 2016. A common thread in his Affidavits is the averments that:-

> ***(i)*** *that this court lacks jurisdiction;*[11] *and that the Petitioners submitted to the jurisdiction of the Board and raised no objection at all; that in all the determinations, the Board took into account the principles of natural justice, Bangalore Principles and*

international best practices and the Constitution and the Act;

(ii) *that the Board exercised its jurisdiction properly and denied allegations of biasness or violation of the Petitioners' Constitutional rights and insisted that the Board is not bound by strict rules of evidence;*

(iii) *that all the petitioners were subjected to the relevant considerations under Section* ***18 (1)*** *and* ***(2)*** *of the Act and the Board was guided by Section* ***14 (1) (a)*** *of the Act in rendering all the determinations;*

(vi) *that vetting interview is not a trial but the subject is engaged informally in a discussion relating to procedural knowledge of the law, organizational and substantive skills, written and oral communication skills, integrity, temperament, good judgment etc.*

25. In addition to the above common averments, we now proceed to summarize below the Boards' specific responses to each Petition.

26. In Response to Petition No. **230** of 2016, **Mr. Chirchir** avers that the first Petitioner is not candid in his facts on the alleged denial of an advocate of his choice, that he was represented by an Advocate from the commencement of the interview to the conclusion, as evidenced by pages **2** to **171** of the Hansard of **22th** July 1015. He averred that that the first Petitioner was afforded a fair hearing and that his advocate cross-examined the complainant as shown in pages **50** to **112** of the Hansard of **22**th July 2015 and that he participated in the proceedings as demonstrated in pages **100, 101, 107, 108, 111, 112, 117** of the Hansard of **22th** July 2015.

27. He further avers that on the first day of the hearing, the first Petitioner was informed the reasons why his advocate **Mr. Kithi** was not allowed in the proceedings as reflected in page **8** of the Hansard, that there were valid reasons for the refusal to allow him relating to matters he had represented other Magistrates before the Board which needed to be investigated. Further, the first Petitioner expressed willingness to proceed with another advocate and was ably represented throughout the process, and even praised the manner in which the process was undertaken as recorded at page **22** of the Hansard, hence he first Petitioner was not prejudiced. Also, **Mr. Kithi** had filed lengthy and detailed submissions which were relied upon by the subsequent advocate.

28. Further, the allegations of bias were not proved and the review was heard by a different panel. Also, the document presented by the first Petitioner in support of the witnesses' mental state was disowned by the Ag. Medical Superintendent, Kerugoya Hospital **Dr. Muthee,** which casted aspirations on the first Petitioner's integrity. Though the matter had been before the **J.S.C.,** the alleged mental status only cropped up during the review.

29. As evidence of poor judgment writing skills, he averred that in criminal case number **1124** of 2008 the first Petitioner contradicted himself by discharging an accused person on "one limp" and proceeded to convict him on the other limp which was not possible. Also, he averred that the first Petitioner failed to issue typed proceedings in the said case thereby frustrating the lodging of an appeal.

30. In Response to the second Petitioners case, **Reuben Chirchir**, avers that the Board received information/or complaints from members of the public, the Law Society of Kenya and the **J.S.C.** He averred that certain complaints were identified as warranting inquiry and were summarized for presentation to the second Petitioner who was served with a notice to file a Response. He averred that the second Petitioner filed a Response and appeared before the panel, and he was afforded an opportunity to cross-examine witnesses. He averred that the vetting process was fair, and the second Petitioner was found unfit to serve. He averred that the Board was persuaded that the second Petitioner received two cash payments of **Ksh. 50,000/=** each as propounded in the complaint. He further averred that his application for review was considered, but the Board upheld its principal finding.

31. In response to the third Petitioners case, **Mr. Chirchir** avers that in compliance with the Rules of natural justice, the third Petitioner was granted the opportunity to respond and to be heard in person, the right to legal representation by a counsel of his choice and an opportunity to question the witnesses. Also, he averred that the third Petitioner was served with notice to file a Response and an addendum containing additional matters that the Board intended to discuss with him and that he filed a Response and at every stage he was asked whether he was ready for the proceedings and answered in the affirmative.

32. He averred that the Board received one complaint against the third Petitioner but did not consider the same since the issues arose after the effective date. The third Petitioner was asked to explain the numerous cash deposits in his account done by different people in different towns and the Board found his explanation to be incredible. He stated that the third Petitioner based his Petition on the assumption that complaints against a Judge or a Magistrate are the only factors that determine suitability, yet the Board was guided by the provisions of Section **14 (1)** and **(2)** of the Act and the relevant considerations under Section **18 (1) & (2)** of the Act . He stated that the third Petitioner was found wanting in competence, poor judgment writing, integrity issues and candor all of which cannot be confined to the effective date.

33. In response to the seventh Petitioners' case, **Mr. Chirchir** averred that:- **(i)** that the seventh Petitioner sought to present documents on the day of the vetting arguing that she was not personally served and the Board granted her time and an opportunity to be heard in person and to be represented by a advocate; **(ii)** that she filed a response; **(iii)** that the Board received complaints against her but did not consider one in which issues arose after the effective date; **(iv)** that she was not able to explain satisfactorily her handling of NBI Civil Case No. 6580 of 2008 in which the file disappeared after she allowed an application for summary judgment on **27**th April 2009. He averred that she failed to show concern after her attention was drawn to the matter, and that she admitted the error, and that she was unable to explain several large cash deposits in her account made before August 2010. Further, he averred that she sought to explain the same in documents she had not supplied.

34. **Mr. Chirchir** also averred that she admitted that her judgments were not up to standard, lacked structure, proper factual analysis and reasons. He also averred that she was arbitrary on costs and failed to consider authorities submitted by the parties, and that she admitted she did not do a good job in some of her judgments. He further averred that the Board considered all the facts and her admission of professional shortcomings and her failure to establish how a copy of a ruling she had delivered disappeared from the file and found her unsuitable to continue serving. He further averred that a separate panel heard and dismissed her application for review.

35. He also averred that her Petition is based on the assumption that complaints against a Judge or a Magistrate are the only grounds for removal; and that the Board was guided by sections **14** and **18** of the Act, hence, the test was whether she could pass the considerations under the said provisions, which she failed. He also averred that legal judgment or judgment writing skills, integrity and candor cannot be confined to the effective date.

36. The Board did not file Responses to the fourth, fifth and sixth Respondents' Petitions. Similarly, the third Respondent, the Hon. Attorney General did not file any responses or grounds to any of the Petitions. However, at the hearing, counsels for the Board who represented the Hon. Attorney General relied on the affidavits filed by the Board.

The Second Respondent's Response.

37. The JSC did not file a response or grounds of opposition to Pet Nos. **230** of 2016, **262** of 2016, **259** of 2016 and **272** of 2016. However, it filed grounds of opposition to the second Petitioners case (Pet. No. **236** of 2016) stating *inter alia* that this court lacks jurisdiction to entertain this case, that the Petition does not disclose a cause of action against the J.S.C., that the impugned decision has already been implemented and denied that the Petitioners rights were infringed as alleged.

38. Further, the JSC filed Replying Affidavits to Pet. No. **270** of 2016 and Pet. No. **323** of 2016 sworn by **Anne Amadi**, the Chief Registrar of the judiciary and the secretary to the J.S.C. In both affidavits she avers that in performing its functions, the JSC is required to apply Article **10** of the Constitution, the principles of leadership and integrity, the operational principles for constitutional commissions as well as applicable principles of constitutional interpretation and the Judicial Service Act.[12] She averred that the Petitioners were vetted out and the mandate of implementing the decision fell upon the JSC and it implemented the decisions, hence the orders sought have been overtaken by events. She also stated that under the law such removal is not subject to challenge/review in court and referred to court decisions which have upheld the ouster of this court's jurisdiction.

39. Also on record are grounds of objection by the third Respondent citing this courts lack of jurisdiction.

40. At the hearing **Mr. Anyona,** for the JSC adopted the above affidavits and grounds in opposition for all the Petitions.

Issues for determination.

41. From the opposing facts presented by the parties in support of their respective cases and from the detailed written and oral submissions made by the advocates for all the parties, we find that the following issues distil themselves for determination:-

> *a) Whether Section **23 (2)** of the Sixth Schedule to the Constitution applies to the Board's decisions declaring Magistrates unsuitable to continue serving.*
>
> *b) Whether the question of this Courts' jurisdiction to review decisions rendered by the Board has conclusively been determined by the Supreme Court of Kenya.*
>
> *c) Whether or not this Court can examine the merits of these Petitions.*
>
> *d) What is the appropriate order on costs?*

42. Discussing the above issues, particularly the issue whether or not Section **23 (2)** of the Sixth Schedule ousts the jurisdiction of this Court involves interpreting the relevant provisions of the Constitution and the statutory provisions. Accordingly, we find it necessary to restate the well-known general principles relating to constitutional and statutory interpretation, which are, in any event, incontrovertible.

Guiding principles of Constitutional and Statutory Interpretation.

43. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. The 'inevitable point of departure is the language of the provision itself,' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[13]

44. Article **259** of the Constitution introduced a new approach to the interpretation of the Constitution. The Article obliges courts to promote *'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance.* This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The duty to adopt an interpretation that conforms to Article **259** is mandatory.

45. Constitutional provisions must be construed purposively and in a contextual manner and that courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"[14] but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a particular provision.[15]

46. It is by now trite that the Vetting of Judges and Magistrates Act [16] having been enacted pursuant to Section **23 (1)** of the Sixth Schedule to Constitution must be understood purposively because it is umbilically linked to the Constitution. As we do so, we must seek to promote the spirit, purport and objects of the Constitution. We must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be

remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the Constitution as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. That the social and historical background of a legislation is important in seeking to identify the mischief sought to be remedied was appreciated in *Commissioner of Income Tax vs. Menon*[17]where it was held that one of the canons of statutory construction that a court may look into is the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal. It was the Supreme Court's view *In Matter of the Kenya National Human Rights Commission,*[18] at paragraph 26 that:-

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

47. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the Constitution as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.

48. Therefore, in construing the provision ousting the jurisdiction of this Court, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance. We are also obliged to be guided by the provisions of Article **159 (e)** which requires us to promote and protect the purposes and principles of the Constitution.

49. It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.[19]

50. It is thus clear that it is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article **259**.

51. Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual which is certain to subvert the societal goals and endanger the public good.

52. Words spoken or written are the means of communication. Where they are possible of giving one and only one meaning there is no problem. But where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, *after* enacting statutes becomes *functus officio* so far as those statutes are concerned. It is not their function to interpret the statutes. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

53. Therefore, a court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but in our view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

54. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

55. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

56. It is trite law that in interpreting the provisions of a statute the Court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the

words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.[20]

57. The Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others*[21] observed that:-

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

58. The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[22]To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.[23] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[24] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

(a) Whether Section 23 (2) of the Sixth Schedule to the Constitution applies to decisions declaring Magistrates unsuitable to continue serving?

59. **Mr. Ongoya** for the second Petitioner, submitted strongly that Section **23 (2)** of the Sixth Schedule to the Constitution does not oust this Court's jurisdiction to question or review the removal or the process leading to the removal of a Magistrate from office. He argued that a statute that purports to take away the jurisdiction of a Court must be given the most restrictive interpretation.[25] His argument is premised on the fact that the word Judge and Magistrates have been used separately in Section **23** of the Sixth Schedule and that the limitation of the jurisdiction having been expressed only in reference to a Judge, the same should not be extended to apply to Magistrates.

60. **Mr. Ongoya** also submitted that the Supreme Court in *Judges and Magistrates Vetting Board vs Kenya Magistrates and Judges Association & Another*[26] appreciated that the interventions by the Court could be permitted in certain circumstances. Further, he added that ousting this court's jurisdiction would have an impact on other rights such as right to access justice, fair hearing, equal protection and equal benefit of the law and that the provisions of Section **23 (4)** of the Act must meet the permissible limitations under Article **24** of the Constitution, hence to the extent it purports to oust the jurisdiction of this court, the same is unconstitutional.

61. **Mr. Kithi** for the first, third, fifth, sixth, and seventh Petitioners concurred with **Mr. Ongoya's** submissions that Section **23 (2)** ousts the jurisdiction of this court and that the omission of the word Magistrate is subsection **(2)** is deliberate. He urged the court to find that Parliament erred in enacting Section **23 (4)** of the Act which is inconsistent with the Constitution. In his submission, the rationale behind the omission of the word Magistrate in the provision in question is that the criteria and process of removal of Judges is different from grounds for removing Magistrates and that Section **23** only suspended Articles **160, 167** and **168** of the Constitution which relate to Judges only. While appreciating that the Supreme Court made determinations on the question of jurisdiction, **Mr. Kithi** argued that the determinations in question involved Judges and not Magistrates.

62. **Mr. Obondi** for the fourth Petitioner adopted the submissions by **Mr. Ongoya** and **Mr. Kithi** and added that the mischief that was intended to be cured was that unlike Magistrates, Judges would be appearing before fellow judges and that it cannot be said that there was a mistake in drafting the said provision. Further, the Board must be subject to jurisdiction of the High Court.

63. **Miss Omuom** for the first and third Respondents in all the Petitions adopted the submissions filed on **15th** November 2017 and the Replying affidavit of **Reuben Chirchir**. On the question of jurisdiction, she relied on Supreme Court Decisions rendered in *Judges and Magistrates Vetting Board vs The Centre for Human Rights and Democracy and Others.*[27]She argued that this court is bound by the said decisions by virtue of Article **163 (7)** of the Constitution. She also urged the court to consider the historical context in which the provision was enacted. She urged the court to find that it has no jurisdiction.

64. **Mr. Anyona** for the second Respondent relied on submissions filed in Petition Numbers **270** of 2016 and **323** of 2016. He also submitted that this court lacks jurisdiction. He cited *Dennis Mogambi Mongare vs A.G & 2 Others*[28] where the constitutionality of the "ouster clause" in Section **23** of the sixth schedule was discussed and the court held that it was not in conflict with the provisions of the Constitution and the relevant provisions of the Act. He also relied on the Supreme Court decision in *Judges and Magistrates Vetting Board vs The Centre for Human Rights and Democracy and Others*[29] in which the Supreme Court held that *"none of the Superior Courts has jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution and the Vetting of Judges and Magistrates Act."*

65. A Court's jurisdiction flows from either the Constitution or legislation or both. Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent.[30] Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[31]

66. In the words of Chief Justice Marshall of the U.S.A. in *Cohens vs. Virginia*:-[32]

> *"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We*

cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."

67. Section **23 (2)** of the Sixth Schedule to the Constitution provides that :- *"A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or by, any court."*

68. **Mr. Ongoya** correctly argued that the word "Magistrate" does not appear in the above provision, hence it was wrong for Parliament to include "Magistrates" in Section **22 (4)** of the Act.

69. The opening words of the above provision are *"a removal,"* followed by the word "**or**" "*a processes leading to the removal, of a judge…"* To appreciate the true meaning of this provision, it is imperative to ascertain the dictionary meaning of the word "or." Judge Learned Hand, widely considered the greatest judge never to have served on the U.S. Supreme Court, cautioned against the mechanical examination of words in isolation. He said:-

*"the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary;**[33]** but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.**[34]***

70. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no `rule of law' which forbids its use, however clear the words may appear on `superficial examination.[35] Courts have long used dictionaries to aid their interpretive endeavors. Dictionaries are, after all, reference books that help readers comprehend the meanings and boundaries of words, which is precisely the function judges must often perform.[36]The process of divining statutory meaning necessarily implicates linguistic concepts, and the value of dictionaries to interpretation must be judged in part on their ability to reflect the complexities of language. The meaning of a word used in ordinary speech or writing is a question of fact. Dictionaries provide a useful and often important source or aid from which the answer to that question of fact can be determined.

71. According to *dictionary.com*[37] the word **'or'** is used to connect words, phrases, clauses representing alternatives, it's used in correlation such as ***either or*.** The *Longman Dictionary of Contemporary English***[38]** defines *"or"* as:- *"Conjunction used between two things or before the last in a list of possibilities, things that people can choose from, either…… or……,*

72. The *New Choice English Dictionary***[39]** defines **"or"** as follows:- *'Conjunction denoting an alternative, the last in a series of choices.' Conjunction* is defined in the same dictionary as *"a word connecting words, clauses or sentences…"* The *Oxford Advanced Learner's Dictionary of Current English*[40] defines ***'or'*** as a word *"used to introduce another possibility".*

73. The *Concise Oxford English Dictionary defines***[41]"or"** as a *'conjunction used to link alternatives.'* The same dictionary defines the word *'conjunction'* as *a word used to connect clauses or sentences or to coordinate words in the same clause.*

74. The word **"or"** has also received judicial construction. The Supreme Court of India in *Fakir Mohd vs Sitam*[42] discussing the word "or" in a statutory provision stated:-

*"The word 'or' is normally disjunctive and the word 'and' is normally conjunctive. But at times they are read as vice-versa to give effect to the manifest intent of the legislature as disclosed from the context. It is permissible to read 'or' as 'and' and vice-versa if some other part of the same statute, or the legislative intent clearly spelled out, require that to be done."**[43]***

75. Also, the Supreme Court of India in *Natarajan K.R. vs Personnel Manager, Syndicate Bank, Industrial Relation Division*[44]stated:-

"In ordinary use the word 'or' is a disjunctive that makes an alternative which generally correspondents to the word 'either'. In face of this meaning, however, the word 'or' and the word 'and' are often used interchangeably. As a result of this common and careless use of the two words in legislation, there are occasions when the Court, through construction, may change one to the other. This cannot be done if the statute's meaning is clear, or if, the alteration operates to change the meaning of the law....."

76. In yet another decision, the Supreme Court of *India in J. Jayalalitha vs Union of India*[45] held that the term "or" which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean "and" also. It stated:-

"The dictionary meaning of the word `or' is : "a particle used to connect words, phrases, or classes representing alternatives". The word `or', which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean `and' also. Alternatives need not always be mutually exclusive. Moreover, the word "or' does not stand in isolation and, therefore, it will not be proper to ascribe to it the meaning which is not consistent with the context.... It is a matter of common knowledge that the word `or' is at times used to join terms when either one or the other or both are indicated…. In our opinion, the word `or' as used… would mean that the … the power to do either or both the things…"

77. The same principle is enunciated in *Crawford on Statutory Construction***[46]** where it is stated at page **322** that :-

"In ordinary use the word 'or' is a disjunctive that marks an alternative which generally corresponds to the word 'either.' In face of this meaning however, the word 'or' and the word 'and' are often used interchangeably…"

78. From the above definitions, the word ***''or''*** is used to *introduce another possibility or alternative*. Applying the foregoing construction, we are persuaded that the use of the word *"or"* in Section **23 (2)** connotes a conjunction joining alternatives which corresponds with the word *either*. The first possibility in this provision is *"a removal."* The second possibility after the word "or" *is a process leading to the removal, of a judge,.."* A literal interpretation of the above provision leads to the irresistible conclusion that the word *"removal"* should be construed to include the process leading to the removal of a Magistrate, while the second part of the provision refers to the second alternative, which is, a process leading to the removal of a Judge.

79. Our foregoing conclusion is strengthened by the fact that it is a settled principle of Constitutional construction that provisions of the Constitution touching on the same subject are to be construed together without one provision destroying the other but each provision sustaining the other. Section **23 (1)** of the Sixth Schedule expressly provides that "*Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article **160, 167** and **168,** establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of **all judges** and **magistrates** who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles **10** and **159.**"* It is our view that Sub-section **(2)** of Section **23** cannot be read in isolation without considering sub-section **(1)** if the intention of the drafter is to be effected.

80. In our view, it is clear that it was the intention of the drafters of the Constitution that both the serving Judges and Magistrates were to be vetted and that the process was insulated from court proceedings. We find and hold that the introduction of the word Magistrate in Section **22 (4)** of the Act is conformity with the provisions Section **23 (1) & (2)** of the sixth Schedule.

81. It is also important to point out that the intention of the legislation can be discerned from the preamble to the Act which reads *"An Act of Parliament to provide for the vetting of Judges and Magistrates pursuant to Section **23** of the Sixth Schedule to the Constitution; to provide for the establishment, powers and functions of the Judges and Magistrates Vetting Board, and for connected purposes."*The intention of the statute was to provide for vetting of Judges and Magistrates pursuant to Section **23** of the Sixth Schedule, hence, the inclusion of the word Magistrate is Section **22 (4)** of the Act cannot have been a mistake.

82. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

83. Further, to buttress our conclusion that the inclusion of the word Magistrate in the above provision was not a mistake and that section **23 (2)** of the sixth schedule covers both Judges and Magistrates, we also point out that the intention of the drafter can be gathered from the history leading to the enactment of the Constitution or a statute.

84. The background and rationale of the vetting of judges and magistrates was succinctly summarized by the ***Committee of Experts***, the body that was charged with the responsibility of finalizing the draft Constitution of Kenya before it was submitted to a national referendum. The Committee stated as follows in its ***Final Report***:-

> *"Submissions to the Committee of Experts on the Judiciary were virtually unanimous on one point: the judiciary must be reformed. The Committee of Experts received a number of submissions on how this should be done. These submissions can be classified into two groups: those that proposed that the entire judiciary should be reappointed (with all judicial officers or at least all judges being treated as having lost their jobs but permitted to reapply); and those that proposed a more gentle approach that judicial officers remain in office but are required to take a new oath and undergo a 'vetting process.…*
>
> *Informed by submissions, the weight of opinion at a technical consultation on the issue, the concerns of many of those directly involved in the justice system and its own understanding of the issue, the CoE decided that to retain the status quo and simply allow members of the judiciary to continue in office was not appropriate. In addition, on careful consideration of the options suggested in submissions, the CoE decided that wholesale reappointment of the judiciary was not appropriate. Instead, it decided that some form of vetting of the current judges should take place as was done in Bosnia Herzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe and as proposed by the CKRC and Bomas Drafts. This approach is also similar to that proposed by the August 2009 report of the Task Force on Judicial Reforms."*[47]

85. It will be noted that the Committee of Experts' recommendation on vetting was restricted to Judges only and did not include Magistrates. However, before the draft Constitution was submitted to and approved in the national referendum, the vetting process was extended to cover both Judges and Magistrates who were in office on the effective day.[48]

86. With the above background in mind, it is clear the intention of the drafters of the Constitution was that Judges and Magistrates who were serving as at the commencement date of the 2010 Constitution were to be subjected to vetting.

87. It is axiomatic that the vetting of Judges and Magistrates who were in office on the effective date was imperative, as a clear Constitutional principle, value and object which by dint of Article **259(1)** of the Constitution, must be given full effect. Vetting of Judges and Magistrates was part and parcel of the innovative provisions that on the whole have earned the Constitution of Kenya, 2010, the description of a transformative document that seeks to effect fundamental and large scale transformation of our political and social institutions through a democratic and legal process.[49]

88. In the *Speaker of the Senate & Another vs The Attorney General & Others*,[50] the Supreme Court recognized the principles embedded in the constitution as incorporating the transformative ideals of the constitution of Kenya, 2010. In his concurring Judgment, the Chief Justice observed that one needs to examine the historical context in order to understand why the Kenyan people use particular language in particular Articles of the Constitution.

89. As state above, the preamble to the Act provides "An Act of Parliament to provide for the vetting of Judges and Magistrates pursuant to Section **23** of the Sixth Schedule to the Constitution. The word Magistrate appears at the preamble clearly indicating the clear intention of the legislature which is to give effect to Section **23** of the Sixth Schedule. We cannot read Section **23 (2)** of the sixth schedule alone and ignore its sub-section **(1)** which mentions Magistrates. Nor can we ignore the preamble to the Act and the historical background discussed above. In view of our foregoing analysis, we find no inconsistency between the provisions of the Act and the Constitution.

90. The courts have severally held that the proper approach to the interpretation of a statute is to seek the intention of the legislature. The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. One does so by attributing to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account. The words used in an Act must therefore be viewed in the broader context of such Act as a whole. When the language of a statute is not clear and unambiguous one may resort to other canons of construction in order to determine the Legislature's intention.[51]

b) Whether the question of this Courts' jurisdiction to review decisions rendered by the Board has conclusively been determined by the Supreme Court of Kenya.

91. It is important to mention that the question of the High court's jurisdiction in determinations made by the Board has been the subject of determination by the Apex Court in Kenya. In particular, in the earlier referred to case of *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*[52] the Supreme Court held that the High Court lacks jurisdiction to adjudicate upon the *suitability* of a *Judge* or a *Magistrate* to continue in service; and the responsibility for such a determination, during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board.

92. Because of the centrality and relevancy of the above Supreme Court decision, we find it necessary to reproduce below extensively excerpts of the judgment.

> ***[191]*** *In our perception, just as in that of the learned High Court and Court of Appeal Judges in the* **Dennis Mogambi Mongare** *case, the ouster clause is not devoid of valid and effective grounding in law. The Constitution itself speaks from the platform of* Article 262 *(on "transitional and consequential provisions"), and by* Section 23(2) of its Sixth Schedule, *declaring thus:*
>
> *"A removal, or a process leading to the removal, of a judge, from office* ***by virtue of the operation of legislation*** *contemplated under subsection (1) shall not be subject to question in, or review by, any court."*
>
> ***[192]*** *Hardly any cogent argument has been advanced before this Court, that the Judges and Magistrates Vetting Act, which implements the ouster clause, is not indeed the legislation contemplated under Section 23(1) of the Sixth Schedule to the Constitution; and as there is no other legislation such as would claim that status, we have come to the conclusion that there is nothing out of harmony in the* common purpose of the Constitution, Section 23 of its Sixth Schedule, and the relevant statute – *the Judges and Magistrates Vetting Act.*
>
> ***[193]*** *It follows that a contest to the decision of the Judges and Magistrates Vetting Board, insofar as such a decision affects particular Judges involved in the vetting process, is in effect, a collateral challenge to the Board's authority: and this would be inconsistent with the terms of the Constitution.*
>
> ***[194]*** *The foregoing point clearly falls within the relevant historical context. It is to be recalled that the vetting process for judicial officers was the people's command, for the purpose of aligning the Judicial Branch to the new Constitution. Such a design is clear from the fact that the vetting process was defined by a restricted, transitional time-frame the logistics of which were regulated by a dedicated Schedule to the Constitution. The transitional concept is well depicted in the dissenting Judgment of* Lady Justice Sichale *at the Court of Appeal, as follows:*
>
> *"When a new Constitution is introduced, a range of provisions [is] needed to ensure that the move from the old order to the new order is smooth and, in particular, …the changes expected by the new Constitution are …effectively [implemented] [so as to sustain] [the] institutions that are retained under the new Constitution…. [Such] transitional provisions…are usually not included in the body of the Constitution because they have a temporary lifespan. Instead they are included in a schedule which is part of the Constitution but, because it is appended at the end…, its provisions will not interfere with the permanent provisions of the Constitution in the future."*
>
> ***[195]*** *The learned Appellate Judge thus proffers true justification for the design of Section 23 of the Sixth Schedule to the Constitution: it is a transitional and consequential provision, which is the foundation for the Vetting of Judges and Magistrates Act – the detailed law giving effect to the vetting principle of the constitutional document*.
>
> ***[196]*** *By the Constitution and by the Vetting of Judges and Magistrates Act, a comprehensive scheme is established, as a valid basis for the vetting process for Judges and Magistrates. The Vetting Board is required to vet the judicial officers* in accordance with the principles set out under Articles 10 and 159 of the Constitution *(see para. 173 of this Judgment). Article 10 in this regard, spells out the "national values and principles": the rule of law; democracy and the participation of the people; human dignity; equity; social justice; inclusiveness; equality; human rights; non-discrimination; protection of the marginalized; good governance; transparency and accountability. And Article 159 sets out three principles of operation: justice to be rendered to all persons irrespective of status; justice is not to be delayed; justice be done without undue regard to technicalities.*

[197] *It is in that* broad context of principles and values*, that the Judges and Magistrates Vetting Act is to be seen. Its operations, centered on the Vetting Board, were conceived as* transitional; *it would conclude its mandate during the transitional period.*

[198] *It emerges, as we have set out in detail, that the process of vetting for Judges and Magistrates is a* requirement *of the Constitution of Kenya, 2010; and that by a valid ouster clause, the main question which relates to the* suitability of a judicial officer to continue in service *under the new constitutional dispensation, is a matter reserved by law to the Judges and Magistrates Vetting Board. Not only is this the only tenable position in our perception, but it also emerges from relevant authority relied upon by* Sichale, JA *in her dissenting opinion:* **Harrikison v. Attorney-General of Trinidad and Tobage** *(1979) 31 WIR 348. The learned Judge made the following apposite inference:*

"I am of the opinion that a Court would be acting improperly if a perfectly-clear ouster provision of the Constitution of a country [in] which it is [the] supreme law is treated with little sympathy or [with] scant respect, or is ignored, without strong and compelling reasons."

[199] *This is the background against which we now proceed to resolve the main question brought before this Court. That question is* "whether Section 23(2) of the Sixth Schedule to the Constitution of 2010 ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board declaring a Judge (or Magistrate) as being unsuitable to continue serving as such."

[200] *We find that neither the High Court's Ruling of 30th October, 2012 nor the Court of Appeal's decision of 18th December, 2013 achieved clarity as to the relationship between the Courts? jurisdiction, on the one hand, and the jurisdiction of the Judges and Magistrates Vetting Board, on the other hand. We would clarify that by the terms of the Constitution itself, the High Court's general supervisory powers over quasi-judicial agencies, and its mandate in the safeguarding of the fundamental rights and freedoms of the Constitution, by no means qualify the ouster clause which reserves to the Judges and Magistrates Vetting Board the exclusive mandate of determining the suitability of a Judge or Magistrate in service as at the date of promulgation of the Constitution, to continue in service. The basis of the said ouster clause is found in the history attending the Constitution; in the requirement of the Constitution for essential transitional arrangements; and in the express terms of the Constitution, by virtue of which the Vetting Board was established to determine the suitability of certain judicial officers, for the purposes of the values and principles declared in the Constitution itself.*

[201] *The intent of the Constitution is to be safeguarded by the High Court, even when that Court acts within its supervisory remit in relation to quasi-judicial bodies, with the recognition that a holistic interpretation of the Constitution requires the fulfillment of its transitional provisions, such as those relating to the vetting process for Judges and Magistrates.*

[202] *For the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, it is our finding that none of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act. (Emphasis added)*

G. THE CONCURRING OPINION OF MUTUNGA, CJ & PRESIDENT

[213] *Thus, the ouster clause in issue in this matter ought to be strictly construed as a* transitional clause*, in the context of Kenya?s unique historical background. The supervisory jurisdiction of the High Court, and indeed the jurisdiction of any other Court, should remain in abeyance during the vetting process – as this is what the Kenyan people demanded. The people's voice is clearly and unambiguously sounded in the Constitution, and it remains supreme. What Kenyans wanted and envisaged was a new Judiciary, that they would have confidence in – with the new Judges being selected through a competitive process by the Judicial Service Commission, and the sitting Judges undergoing a vetting process, undertaken by an independent body,* the Vetting Board. *The voice of the people cannot be silenced or subverted by any Court of law, or any other institution. (Emphasis added)*

[214] *This Court has also found that no provision of the Constitution is "unconstitutional". Thus, although the Constitution does not obliterate judicial review, the fundamental principles of judicial review can be suspended as a transitional matter. The Vetting of Judges and Magistrates Act bears fidelity to the ouster clause, signaling that the intention was to suspend judicial review, in the transitional period. However, the Act has provisions to ensure that due-process concerns are duly addressed. The Court of Appeal (*Odek, JA*) in this matter, held that the Bill of Rights must be seen and read as part and parcel of the vetting procedures (at paragraph 53, p. 67). The Act specifically preserves judicial officers? due-process rights, and allows them to seek review before the Board (Section 22 of the Act).*

[215] *In the context of such painstaking care on rights-issues, in the conception of the vetting scheme, I have great difficulties with the argument that the ouster clause could have subverted, or even suspended the human rights of the Judges being vetted. The Act comprehensively addresses these constitutional concerns, as* Justice Odek *rightly finds. It is on this basis that the ouster clause is harmonized with the provisions of Bill of Rights, in Chapter 4 of the Constitution.*

[216] *Once the historical context of the ouster clause is appreciated, its harmonization with the provisions on the supervisory jurisdiction of the High Court, and the suspension of that jurisdiction during the transitional period, cannot be doubted. In the apposite words in the Ugandan case,* **Tinyefuza v. AG**, *Constitutional Appeal No. 1 of 1997, [1997] UGCC 3:*

"…the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."

[218] *Although certain jurisdictions, such as India and Germany, have perceived judicial review as an immutable structure of their Constitutions, these jurisdictions do not have Constitutions that are as unique as Kenya?s. We must ask whether the foreign jurisdictions we seek reliance upon, have Constitutions and, if they do, whether these Constitutions have provisions akin to* **Articles 1, 23, 159** *and* **259** *which emphasize the* sovereignty of the people*; or whether they have* principles and values*, like the ones found in Article 10, which apply to the interpretation and application of the Constitution; or whether they have legislation similar to our* Supreme Court Act*, which introduces Kenya?s historical context into the interpretation of the Constitution. If the answers to these questions are in the negative, then the common law doctrines found in other jurisdictions, foreign cases and foreign constitutions, must be interpreted in such a manner as to reflect our modern Constitution, and our unique conditions and needs.*

H. THE CONCURRING OPINION OF RAWAL, DCJ AND VICE-PRESIDENT

[221] *The vetting of Judges and Magistrates was one of the constitutional precursors to the enforcement of Chapters Six and Ten of the Constitution, and was intended as a mechanism for the judicial fulfillment of Articles 10 and 159 of the Constitution. Based upon the intended objective of the vetting process, it was also a filter, to ensure that according to the dictates of Article 73, the authority entrusted to Judges and Magistrates as State Officers would be exercised in a manner that enhances public confidence in the integrity of the office (and the institution) of the Judiciary. In order to ensure that this was effected, Section 13 of the Vetting of Judges and Magistrates Act (Cap 8B, Laws of Kenya) [VJM Act] sanctioned the vetting of Judges and Magistrates, conducted in accordance with the provisions of the Constitution and the VJM Act. This requirement, as elaborated under Section 23 to the Sixth Schedule, underscored vital object of examining the* suitability *of judicial officers appointed in the pre-2010 constitutional era, to continue serving in accordance with the Constitution, and in the reformulated framework of constitutional governance in Kenya. As such, the foundational objective of the vetting process was the psychic alignment of the Judiciary to the dictates of the Constitution, both in* institutional *and* leadership *capacities. This transformation or realignment was to be guaranteed primarily through the process of vetting, to ensure the commitment of the Judges and Magistrates in office, to constitutional imperatives, in values and principles. As a point of emphasis, the examination of this constitutional alignment was to be conducted in accordance with the Constitution.*

[222] ***Section 23*** *of the Sixth Schedule to the Constitution, as indicated in the Judgement of the majority, bears certain notable elements: first, the time- prescription of the Constitution for the enactment of required legislation; and secondly, the limitations of time attached to the vetting mechanisms and procedures. Such time prescription reinforces the transitional nature of the vetting process. This transitional aspect was specifically prescribed to guarantee the* suitability *of all Judges and Magistrates serving in the pre-2010 constitutional era to serve as Judges and Magistrates within the normative scheme of the Constitution. This transitory mechanism can be seen as an addition to the normative guarantees mandated by the Constitution, in its governance profile. It is worthy of note, that the vetting clause elevates the effect of the statutory provision that was anticipated beyond that of Article 160 (Independence of the Judiciary), Article 167 (Tenure of Office of the Chief Justice and other Judges) and Article 168 (Removal from Office). In passing the Constitution, Kenyans may be regarded as saying:* "We acknowledge the independence of the judiciary - the post-transitory Judiciary." *In addition, the Constitution entrenched several mechanisms to ensure that the objectives achieved by the vetting process would be constantly sustained, by other institutions, and through mechanisms established or authorized under the Constitution, agencies in this category being, for instance, the Judicial Service Commission.*

[223] *Besides ousting the jurisdiction of the High Court, or any other Court for that matter, in reviewing either the removal or the process leading to the removal, of a Judge from office, the Constitution in my view, also excluded the powers of the High Court to exercise original jurisdiction in claims brought before it as a consequence of the mandate of the Vetting Board. The application of the phraseology, "shall not be subject to question in," in my view, represents an immunity for the Vetting Board?s decision. The intended finality of the decisions of the Vetting Board is further reinforced.* Black?s Law Dictionary *(9th Edition), at pp. 1366 defines* **"question"** *as* **"2. An issue in controversy; a matter to be determined."** *The Constitution specifies the causes of action open to the remit of the High Court. Article 165 (3) (b) gives the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Article 165 (3) (d) further empowers the High Court to hear any question regarding the interpretation of the Constitution. This jurisdiction, is distinguished from the High Court?s appellate jurisdiction [Art.165 (3)(c)], and its supervisory jurisdiction [Art. 165 (6)].*

[224] *The precursors to the judicial provisions in the new Constitution can be traced back to the processes outlined at paragraphs 79-92 of the Judgement of the majority; and its mode of operation can be recognized from the recommendations of the Taskforce on Judicial Reforms, led by the Mr. Justice Ouko, which was appointed on 29th May, 2009. While the initial Taskforce dealt with issues unique to the Judiciary before the promulgation of the Constitution, its expansion following the presentation of its initial report was mandated to consider the recommendations in the initial Report, against the provisions in the proposed Constitution. It was also required to consider any other measures or proposals necessary to strengthen and enhance the performance of the Judiciary. This Taskforce recommended that legislation be enacted to establish an independent tribunal, and mechanisms and procedures for vetting sitting Judges and Magistrates, as envisaged in Clause 23 of the Sixth Schedule to the proposed Constitution. The Taskforce recognized (page 81 of its Report) that the vetting process was a means of restoring public confidence in the Judiciary, and providing a fresh start under the new Constitution. Essentially, it was seen as a duty on the part of the State to prevent the recurrence of human rights abuses, corruption, and abuse of office, within the Judiciary.*

[225] *It is clear that the vetting process as conceptualized, was an act in institutional accountability and, ultimately, an aspect of the re-birth of a State guided by norms of Constitutionalism. The assurance of such accountability, through the process of vetting, is what has been challenged, in the instant matter, as creating a jurisdictional conflict with the High Court which also plays a critical role in guaranteeing constitutional accountability, through the enforcement of the Constitution. But as already noted, the vetting process was premised upon a call by Kenyans, to regularize the delivery of justice by the Courts. The past malaise in the Judiciary had necessitated the conception of a mechanism to restore public confidence in that organ. Vetting was a constitutional obligation defined and set out in the Vetting of Judges and Magistrates Act. The obligation was reposed in specified body, for a specified time-frame, in order to allow the institution of the Judiciary to be brought into conformity with the dictates of the Constitution. The composition of the Vetting Board included international personalities, and was anchored upon international best practice.*

[226] *One has to take a holistic view of the Constitution: with the roles of the Judiciary, Parliament and the Executive, guided by normative prescriptions such as Articles 10 and 129; and the provision on Parliamentary representation, as sanctioned by Article 81, within the framework of the principles of the electoral system. The centrality of governance in Kenya is based upon the sovereignty of the people, which is uniquely delegated to Parliament and the legislative assemblies in the county governments, the national executive and executive structures in the county governments, and the Judiciary and independent tribunals. The people, by directly electing members of Parliament and the legislative assemblies in the counties under the Constitution, delegated that power through the ballot. The composition of the Executive, as sanctioned by processes under the Constitution, was also a direct derivation from the people?s mandate. The special feature regarding the Judiciary?s transition, was that there was no elective component emanating from a direct donation of power by the people. A solution was therefore necessary, and this solution was an* evaluation of suitability, *a* transitory mechanism, *to lodge the Judiciary into the* normative functional structure *of the Constitution; a one-off prescription that would constitutionalize the operations of this arm of government. Such was the command of the Constitution. The mechanism adopted was a direct constitutional derivative, with a clear and specific mandate. Transitions, as judicial notice may be taken, do bear unsettling demands, and there is no exception in the present instance. I might add that the vetting process, though personified, not only concerned the Judge, but also the public. Judges in the pre-constitutional regime operated in a constitutional structure which, though not as elaborate or as desirable as that which we adopted in 2010, did have limitations arising from the scheme of public power.*

[227] *Different jurisdictions have dealt with this question of transition in different ways; and perhaps the most complex was the experience of East and Central Europe, after the fall of the communist regimes. It is not my intention to delve into the merits or demerits of this process, but rather, to show the radical measures taken by other jurisdiction during such transition. In the said regions, there had been an attempted purification of existing societal and power structures, with individuals targeted, as a means of achieving post-Communist reforms. The Judgement of the majority extensively covers comparative judicial practice as regards ouster clauses. The unique case of East-Central Europe goes to the actual process drawn from a historical overlap of change of the local society, and the global shift in international politics. The Kenyan case of vetting, though exacting and challenging, had its foundations in the people?s will, as expressed in the Constitution. It was only temporary in nature. Judicial officers experienced the tumult of transition in their own personal ways; but the Constitution required it; the country needed it; and that obligation had to be fulfiled.*

[228] *In conclusion, the people of Kenya ordained legislation on mechanisms and procedures for vetting, to be conducted within a specified time-frame, to determine the suitability of Judges and Magistrates. The majority Judgement (at paragraph 159) cites paragraphs from the decision of the Court of Appeal which are relevant to the issue of the constitutionality of Section 19(3) of the VJM Act. In concurrence, I would reiterate the content of paragraph 189 in the majority Judgement, to the effect that the High Court lacks jurisdiction to adjudicate upon the* suitability *of a Judge or Magistrate to continue in service; and the responsibility for such a determination, during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board. (Emphasis added)*

93. Article **163 (7)** of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme court. Clearly, the interpretation of Section **23 (1) (2)** of the Sixth Schedule in the above case by the Supreme Court is binding on this court by dint of Article **163 (7)** of the constitution.[53] The binding nature of the Supreme Court decision under Article **167 (7)** of the Constitution is absolute. Article **163 (7)** is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court[54] and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.[55]

94. Clearly, by dint of the above clear provisions of the Constitution, the Supreme Court decision cited above and by virtue of Article **163 (7),** the conclusion becomes irresistible that this Court lacks jurisdiction to entertain these Petitions. On this ground alone, we find and hold that these consolidated Petitions must fail.

c) Whether this Court can examine the merits of the Board's decisions.

95. We are clear in our minds that the Supreme Court in *Judges and Magistrates Vetting Board and 2 Others vs. Centre for Human Rights and Democracy and 11 Others*[56] settled the legal point with regard to the process of vetting or the outcome of vetting process by the Vetting Board, that the courts have no jurisdiction to review the process or the outcome. By dint of Article **167 (3)** of the Constitution, the Supreme Court decision is binding to this Court.

96. We are also aware of the Supreme Court decision in *Judges and Magistrates Vetting Board vs Kenya Magistrates & Judges Association & Another*[57]whereby the Apex Court held that:-

[63] *We find and hold that the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can only investigate the conduct of Judges and Magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date. To hold otherwise would not only defeat the transitional nature of the vetting process, but would transform the Board into something akin to what Lord Mersey once called* "an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be" (Lord Mersey *in* **G & C Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd (1913).** *Lord Mersey used the analogy of* "a dog" *to refer to the* "Equity of Redemption" *in the law of mortgages. Here, we use it to refer to* "a jurisdictional mandate" *within our constitutional set-up; and not, the Board* per se.

97. In our view, to understand the two Supreme Court decisions, namely *Judges and Magistrates Vetting Board and 2 Others vs The Centre for Human Rights and Democracy & 11 Others*[58] (hereinafter referred to JMVB"1") and *Judges and Magistrates Vetting Board vs Kenya Magistrates & Judges Association*[59](herein after referred to JMVB"2"), it is important to appreciate the issues which were presented in the two cases. This is because a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[60]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leathem,[61]that "Now before discussing the case of Allen vs. Flood[62] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)

98. The ratio of any decision must be understood in the background of the facts of the particular case.[63] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[64] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[65] Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[66] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[67] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[68]

99. The difference between the two decisions was ably captured by the Supreme Court in JMVB "2" in the following words:-

[36] *It was argued before this Court that the ruling in* ***Judges and Magistrates Vetting Board & Others v. The Centre For Human Rights And Democracy,*** *Petition No 13A of 2013 consolidated with Petition No 14 of 2013 and Petition 15 of 2013 (JMVB (I)) precludes this Court from answering the question before it – whether the Board can investigate allegations of impropriety on the part of judges and magistrates who were in service on the effective date, arising from acts or omissions by the said judicial officers after the effective date. The contention by Counsel was that the decision in JMVB (I)means this Court does not have jurisdiction to entertain this appeal.*

[37] *On the foregoing point, two basic questions arise, namely:*

i. what was the main question before this Court in JMVB (1)? And

ii. what was the answer to (1) above, and what was the consequential decision by this Court?

[38] *The main question before this Court in JMVB(1) was whether Section 23(2) of the Sixth Schedule to the Constitution, as read with Section 22(4) of the Vetting of Judges and Magistrates Act, ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board.*

[39] *Having extensively considered the frontiers of Section 23(2) of the Sixth Schedule to the Constitution, this Court (at paragraph 202) stated categorically as follows:*

"For the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, it is our finding that none of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act."

[40] *In other words, this Court consciously articulated the state of the law, in accordance with the Constitution: the removal of a Judge or Magistrate, or a process leading to such removal by virtue of the operation of the Judges and Magistrates Vetting Act by the Vetting Board, cannot be questioned in any court of law. That remains the valid position, under the law.*

[41] *Today this Court, is faced with a different question: whether the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can investigate the conduct of Judges and Magistrates who were in office on the effective date, on the basis of alleged acts and omissions arising after the effective date.*

[42] *In answering this question, the two superior Courts had to interpret Section 23 of the Sixth Schedule to the Constitution, as read with Section 18 of the Judges and Magistrates Vetting Act. It is their interpretation that has led to this appeal before us. This appeal, was filed as of right, pursuant to Article 163 (4) (a) of the Constitution, because it involves the interpretation or application of the Constitution.*

[43] *We do not see how our decision in JMVB (1), which was responding to a different question, can deprive this Court of its jurisdiction to interpret and apply the Constitution, in conformity with Article 163 (4) (a) thereof.*

[44] *Learned counsel, Mr. Rao was well aware of the jurisdictional position when he submitted thus:*

"Today's case is different; it is not about individual vetting decisions. It is about a mandate itself. What is at stake in this case is fidelity in the interpretation of that mandate and giving true and accurate effect to the Constitutional and Legislative provisions that define it."

[45] *We have no hesitation in finding that this appeal is properly before us, and that this Court has jurisdiction in every respect, to determine the issue. In this regard, we are unconvinced by the submissions of learned counsel, Mr Kanjama to the contrary. To*

decline to determine the question as framed, on the basis of an unsubstantiated claim of lack of jurisdiction, would defeat the vetting process, notwithstanding the clear terms of the Constitution.

100. Conscious of the binding nature of the ouster clause and the application of Article 163 (7) of the Constitution by dint of the Supreme Court decision in **JMVB"1",** as the Supreme Court held in **JMVB 2**, we find no difficulty in holding that where the Board exceeds its constitutional and statutory mandate, then, this Court can intervene. The Supreme Court in JMVB 2 held, the Board could only *investigate the conduct of Judges and Magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date.* Our understanding of JMVB "2 "is that where there is proof that the Board considered matters outside the period provided under the law, then, the Court could intervene.

101. We have no doubt that the Constitution and the Act established a comprehensive and objective system of factors that were to guide the vetting process. The Constitution required the Board to vet the suitability of the Judges and Magistrates in accordance with the values and principles set out in Articles **10** and **159.** Article **10** includes amongst others binding national values and principles: the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability. Article **159** goes on to enunciate three guiding principles of justice: it should be done to all irrespective of status, that it should not be delayed and that it should be administered without undue regard to procedural technicalities.

102. **Mr. Ongoya** argued that the second Petitioners' determination was premised on material that were outside the jurisdiction of the Board. We have carefully examined the findings of the Board and indeed the entire record. The Second Petitioner, faced four complaints. None of them was shown to have been outside the jurisdictional mandate of the Board.

103. **Mr. Ongoya** also argued that the determination was premised on fundamental errors of fact such as cheques allegedly drawn in favour of the second Petitioner, yet it turned out that the complainants' account was closed long before the cheques were issued. In our view, this is an invitation to this Court to examine the merits of the decision, which we can't do by dint of the ouster clause and the binding nature of **JMVB "1**".

104. **Mr. Kithi** submitted that the Petitioner in Pet No. **262** of 2016 was asked to provide his Bank statements, M-pesa statements and even his spouses Bank statements, which he argued was not within the Boards mandate and that he was expected to remember all the entries in violation of the constitutional guarantee on presumption of innocence. In our view this is an invitation to the Court us to look into the merits of the decision, which we cannot do by dint of the Supreme Court decision and the ouster clause.

105. **Mr. Kithi** also submitted that the determination against the Petitioner in Petition No. **270** of 2016, was based on a decision he made in the course of his judicial functions, which decision was appealed against, but the High Court did not detected the mistake. Again, this is an invitation to this Court to delve in to the merits.

106. He also argued that Petitioner in No**. 272** of 2016 was faulted on a decision he made in the exercise of his judicial functions. Again, we find that this is an invitation to this Court to delve into the merits of the decision.

107. **Mr. Kithi** also argued that the Petitioner in No. **323** of 2016 blame was premised on money from a spouse, which was outside the mandate of the board. We find that this is an invitation to this Court to examine the merits of the decision.

108. **Mr. Obondi** for the fourth Petitioner, argued that the Board erred in finding her unsuitable on grounds that she had **Ksh. 165,000/=** in her account, notwithstanding the fact that there was no complaint of financial impropriety against her and despite detailed affidavits explaining the source of the funds. We find and hold that this is an invitation to this Court to delve into the merits of the decision, which we cannot do.

109. Perhaps, we should add that there is merit in the Boards' response to all the allegations as propounded in **Mr. Chirchir's** affidavits that the Petitioners assumed that a complaint against a Judge or Magistrate is the only factor that determined their suitability. In this regard, to appreciate the mandate of the Board and the province of the complaints, one must understand the provisions of section **14 (1) (a)** of the Act.

110. We are strengthened in our holding by the Supreme Court decision in the above cited case in the following words:-

> ***[95]*** *Section **14(1)** of the Vetting of Judges and Magistrates Act provides that the Vetting Board has the power to – **"(a)** gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary; **(b)** interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and **(c)** hold inquiries for the purposes of performing its functions under this Act."*
>
> ***[96]*** *Indeed, the vetting process as described in the Vetting of Judges and Magistrates Act is* sui generis, *or of its own kind, as the Vetting Board does not act as a Court of law which is exclusively an arbiter;* it can conduct an investigation, and can act as an adjudicator. *The Judges and Magistrates Vetting Board?s* Interim Report *(September 2011- February 2013) recognizes this (at pages 37-38), when it states that the Vetting Board is* sui generis, *because it is not similar to a civil or criminal trial, or to any scheme of job interview.*

111. Section **14** is couched in the following words:-

14. Powers of the Board

1) Subject to section 18, the Board shall have all the powers necessary for the execution of its functions under the Constitution and this Act, and without prejudice to the generality of the foregoing, the Board shall have the power to—

a) gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;

b) interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and

c) hold inquiries for the purposes of performing its functions under this Act.

2) In the performance of its function, the Board—

a) may inform itself in such manner as it thinks fit;

b) may receive on oath, written or oral statement

c) shall not be bound by strict rules of evidence; and

d) shall not be subject to the direction or control of any person or authority.

112. Also relevant is Section **18** of the Act which sets out the relevant considerations which the Board takes into account. These include *(a) whether the judge or magistrate meets the constitutional criteria for appointment as a judge of the superior courts or as a magistrate; (b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and diligence; (c) any pending or concluded criminal cases before a court of law against the Judge or Magistrate; (d) any recommendations for prosecution of the Judge or Magistrate by the Attorney-General or the Kenya Anti-Corruption Commission; and* (e) pending complaints or other relevant information received from any person or body, including the- *Law Society of Kenya; Ethics and Anti-Corruption Commission, Advocates Disciplinary Tribunal; Advocates Complaints Commission; Attorney-General; Commission on Administration of Justice; Kenya National Human Rights and Equality Commission; National Intelligence Service; National Police Service Commission; or Judicial Service Commission.*

113. Section **18 (2)** provides that in considering the matters set out in sub-section **(1) (a)** and **(b),** the Board shall take into account professional competence, the elements of which include intellectual capacity, legal judgment, diligence, substantive and procedural knowledge of the law, organizational and administrative skills, and the ability to work well with a variety of people, (b) written and oral communication skills the elements of which include the ability to communicate orally and in writing; the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and effectiveness in communicating orally in away that will readily be understood and respected by people from all walks of life; (c) integrity, the elements of which shall include- (i) a demonstrable consistent history of honesty and high moral character I professional and personal life; (ii) respect for professional duties, arising under the codes of professional and judicial conduct; and (iii) ability to understand the need to maintain propriety and appearance of propriety.

114. Other considerations include (d) fairness, the elements of which shall include- (i) a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and (ii) open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views; (e)temperament, the elements of which shall include- (i) demonstrable possession of compassion and humility; (ii)history of courtesy and civility in dealing with others (iii) ability to maintain composure under stress; and (iv) ability to control anger and maintain calmness and order.

115. Other considerations stated in the section include good judgment, including common sense, elements of which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles; and legal and life experience, the elements of which include— (i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and (ii) broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of different ethnic and cultural backgrounds, and demonstrable interests in areas outside the legal field; and (h) demonstrable commitment to public and community service, the elements of which shall include the extent to which a judge or magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular.

116. **Mr. Kithi** submitted that the Petitioner in Pet No. **230** of 2016 was denied the opportunity to be represented by an advocate of his choice. Responding to this issue, **Mr. Chirchir** in his Replying Affidavits stated that on the first day of the hearing, the Petitioner was informed the reason why his advocate was not allowed. This is reflected at page **8** of the Hansard. He also averred that the Petitioner was not prejudiced and in any event **Mr. Kithi** had filed lengthy and detailed submissions which were relied upon by the subsequent advocate.

117. **Mr. Chirchir** averred that there were valid grounds for not allowing **Mr. Kithi** to appear before the Board. The grounds related to matters **Mr. Kithi** had appeared on behalf of Magistrates and the matters needed to be investigated. He also stated that as the Hansard shows, the Petitioner expressed willingness to proceed with another advocate, and, he was ably represented throughout the process and even praised the manner in which the process was undertaken as appears at page **22** of the Hansard. **Mr. Chirchir** further stated that in view of the foregoing, there was no prejudice to the Petitioner and that the allegations of bias were not proved.

118. In our view, **Mr.Kithi's** argument touches on the process which we cannot delve into.

119. Similar arguments of denial of legal representation were made on behalf of the Petitioners in Pet no**. 262** of 2016 and in Pet No. **270** of 2016. Again, we reiterate that this is an invitation to this Court to examine the process and outcome which we cannot do. Further, on the allegations of biasness, it is our conclusion that this is also an invitation to this Court to examine the process and outcome, which, as stated above, is not open to this Court by dint of the ouster clause and the Supreme Court decision.

120. **Mr. Obondi** for the seventh Petitioner submitted that the seventh Petitioner was vetted outside the timeline, hence the entire process was illegal and void. We have examined the Petition filed in this Court. This submission is not anchored on matters pleaded in the Petition at all or in the Review proceedings. We take the view that examining such a new issue which did not feature in the proceedings at all is improper and would amount to this Court undertaking a review of the decision contrary to the ouster clause.

121. We should also add that addressing the question of the time frame, the Supreme Court in the above case stated:-

> ***[97]*** *With regard to the time-frame of the Vetting Board, Section 23 of the Sixth Schedule to the Constitution provides that Parliament was required to enact legislation setting out the time-frame for the vetting process. Pursuant to this, Section 23 of the Judges and Magistrates Vetting Act provides that:*
>
> > *"**(1)** The vetting process **once commenced shall not exceed a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year.***
> >
> > *"**(2)** The vetting process**, once commenced, shall be concluded not later than the 31st December, 2013** and any review of a decision of the Board shall be heard and concluded within the above specified period.*
> >
> > *"(3) Despite subsection (2), the Board shall conclude the process of vetting all the judges, chief magistrates and principal magistrates not later than the 28th March, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period"* (emphasis supplied).
>
> ***[98]*** *The foregoing Section was amended by the Vetting of Judges and Magistrates (Amendment) Act, 2013 (Act No. 43 2013), which came into force on 10th January, 2014. Section 3 of the Amendment Act extended the time-frame for the vetting process to 2015, as follows:*
>
> *"Section 23 of the principal Act is amended –*
>
> > *(a) in subsection (1) by deleting the words **„a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year? and substituting therefor by the words „the period specified by this section?;***
> >
> > *(b) in subsection **(2) by deleting the expression „2013? and substituting therefor the expression „2015?"*** (emphasis supplied).
>
> ***[99]*** *By virtue of the above amendments, the legislature changed the initial time- frame within which the Vetting Board would carry out the vetting process, at the request of the Board itself. First, the legislature extended the vetting process to a period exceeding the initial one year, upon request. Second, it extended the period of completion of the vetting process after its commencement, from 31st December, 2013 to 31st December, 2015 – an additional two years as from the initial conclusion date. This time-frame gives the valid span of time within which the Vetting Board carries out its functions, and any functions outside the said time-frame would be contrary to the law.*

122. In conclusion, we find no reason impeach the impugned decisions on grounds that the Board exceeded its constitutional and statutory mandate.

d) What is the appropriate order on costs?

123. It is common knowledge that courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights. Such an order, in our view must be viewed from the lens of our constitution which guarantees access to justice. The Court must exercise caution and ensure that costs do not become a barrier to access to Courts. Discussing costs as a barrier to access to Courts, we are reminded of the phrase *"Justice is open to all, like the Ritz Hotel"*[69]attributed to a 19th Century jurist. Costs have been identified as the single biggest barrier to litigation in many countries.[70] Not only does the applicant incur their own legal fees; they run the risk of incurring the other side's.

124. For all potential litigants, the risk of exposure to an adverse costs order is a critical consideration in deciding whether to proceed with litigation. There is little point opening the doors of the Courts if litigants cannot afford to come in, in the fear, if unsuccessful, they will be compelled to pay the costs of the other side, with devastating consequences to the individual or group bringing the action, which will inhibit the taking of cases to court.[71]

125. The rationale for refusing to award costs against litigants in constitutional litigation was appreciated by the South African constitutional court which observed that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[72] The court was quick to add that this is not an inflexible rule[73] and that in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.[74] The rationale for the deviation was articulated by the

South African constitutional Court in *Affordable Medicines Trust vs Minister of Health* where **Ngcobo J** remarked:-

> *"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."* [75]

126. **Sachs J**, set out **three reasons** for the departure from the traditional principle:-

> *"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.*
>
> *Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.*
>
> *Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."* [76]

127. Discussing the same point, the Supreme Court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [77] observed that:-

> *"in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs……"*

128. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.[78] The "nature of the issues" rather than the "characterization of the parties" is the starting point.[79] Costs should not be determined on whether the parties are financially well-endowed or indigent.[80] One exceptions which can justify a departure from the general rule, is where the litigation is frivolous or vexatious.[81] That has not been demonstrated in this case nor was it alleged.

129. There is nothing before us to suggestion that this Petition is frivolous or vexatious. We find no reason to depart from the generally accepted jurisprudence discussed above and award an order of costs against the Petitioner.

Comments on the Vetting of Judges and Magistrates Act.

130. We find it appropriate to make some general observations on the Vetting of Judges and Magistrates Act. It is true that the Constitution and the Act established a comprehensive and objective system of factors that were to guide the vetting process. These were captured by the Supreme Court in JMVB 1 as follows:-

> ***[95]*** *Section **14(1)** of the Vetting of Judges and Magistrates Act provides that the Vetting Board has the power to – **"(a)** gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary; **(b)** interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and **(c)** hold inquiries for the purposes of performing its functions under this Act."*
>
> ***[96]*** *Indeed, the vetting process as described in the Vetting of Judges and Magistrates Act is* sui generis, *or of its own kind, as the Vetting Board does not act as a Court of law which is exclusively an arbiter* ***; it can conduct an investigation, and can act as an adjudicator****. The Judges and Magistrates Vetting Board's* Interim Report *(September 2011- February 2013) recognizes this (at pages 37-38), when it states that the Vetting Board is* sui generis, *because it is not similar to a civil or criminal trial, or to any scheme of job interview.*

131. The statute created a body with powers to ***conduct an investigation, and act as an adjudicator***. The Act mandated the Board to hear applications for Review. Considering the implications of the ouster Clause, we are of the considered opinion that Parliament ought to have included in the Act provisions establishing an appellate mechanism to be undertaken by a totally different body as opposed to the same Board. A look at the amendments made to the Act through a bill passed on **5th** December 2013 and assented to by the President on **24th** December 2013 which amended the provisions of Section **22 (1)** of the Vetting Act by deleting the word "*same panel*" substituting it with the words "*a new panel to be constituted by the chairperson of the board*", supports our view herein.

132. It is our view that the act should have created an independent appellate body within the act as opposed to a review by a new panel. This could have insulated the process from perceptions of bias. The rule against bias is one of the twin pillars of natural justice. The first pillar is the hearing rule. The bias rule is the second pillar of natural justice and requires that a decision-maker must approach a matter with an open mind that is free of prejudgment and prejudice. The principle upon which the bias rule has been founded in modern times can be traced to

Lord Hewart's famous statement that *"justice should not only be done, but be seen to be done."*[82] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. The law permitted the Board to receive complaints, investigate, ask for information from the affected Judge or Magistrate, prosecute the complaint, hear the matter and render a decision. Such a scenario, in our view offends the principles of natural justice.

133. As the Supreme Court of Appeal of South Africa observed[83] *"All statutes must be interpreted through the prism of the Bill of Rights."*This statement is true of decisions made by statutory bodies. It could not have been the intention of the Constitution to establish a body that receives complaints, investigates, adjudicates and renders decisions.

Summary of findings

134. In view of our analysis and findings on the issues discussed above, it is our conclusion that:-

*a) In ordinary use the word 'or' is a disjunctive that makes an alternative which generally correspondents to the word 'either.' The word "**or**" is used to introduce another possibility or alternative, that is either, or. It can also be used in interchangeably with the word "and." The dictionary definitions and judicial construction leave us persuaded beyond doubt that the use of the word "or" in Section **23 (2)** immediately after the word "removal," introduces another possibility, the first possibility being a removal. The second possibility is " a process leading to the removal, of a judge. In our view, the declaration by the Board that a Magistrate is unsuitable to continue serving amounts to a removal within the said provision.*

*b) A literal and proper construction of the use of the word "or" in Section **23 (2)** of the Sixth Schedule which reads "A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or by, any court is that the said provision does not exclude the removal of a Magistrate .*

*c) The word Magistrate appears at the preamble clearly indicating the clear intention of the legislature which is to give effect to Section **23** of the Sixth Schedule. We find no inconsistency between the provisions of the Act and the Constitution. We conclude and find that it was the intention of the drafters of the Constitution and the Act that all the serving Judges and Magistrates as at the effective date were to be vetted and their suitability to continue serving be determined in accordance with the Act. We find and hold that Section **23 (2)** of the Sixth Schedule expressly applies to a removal of a Magistrate, or, a process leading to the removal of a Judge.*

d) The High court's jurisdiction in determinations made by the Board has been the subject of determination by the Apex Court in Kenya. In particular, in Judges & Magistrates Vetting Board & 2 others vs Centre for Human Rights & Democracy & 11 others[84] the Supreme Court held that the High Court lacks jurisdiction to adjudicate upon the suitability *of a Judge or a Magistrate to continue in service; and the responsibility for such a determination, during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board.*

*e) Article **163 (7)** of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme Court. Clearly, the interpretation of Section **23 (1) (2)** of the Sixth Schedule in the above case by the Supreme Court is binding on this court by dint of Article **163 (7)** of the Constitution.[85] The binding nature of the Supreme Court decisions under Article **163 (7)** of the Constitution is absolute. Article **163 (7)** is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court[86] and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.[87]*

*f) Constitutional provisions touching on the same subject are to be construed together without one provision destroying the other but each provision sustaining the other. Section **23 (1)** of the Sixth Schedule expressly provides that "Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article **160, 167** and **168,** establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of **all Judges** and **Magistrates** who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles **10** and **159."** It is our view that Sub-section **(2)** of Section **23** cannot be read in isolation without considering sub-section **(1)** if the intention of the drafter(S) is to be effected.*

*g) From the preamble to the Act, it's clear that the intention of the statute was to provide for vetting of Judges and Magistrates pursuant to Section **23** of the Sixth Schedule, hence, the inclusion of the word Magistrate is Section **22 (4)** of the Act cannot have been a mistake. Further, it is also clear from the provisions that it was the intention of the drafters of the Constitution that both the serving Judges and Magistrates were to be vetted. The word Magistrate in Section **22 (4)** of the Act is conformity with the provisions Section **23 (1) & (2)** of the sixth Schedule.*

*h) That the vetting process is governed by the Act and in particular Sections **14** and **18** of the Act.*

*i) By dint of the Supreme Court decision in Judges and Magistrates Vetting Board and 2 Others vs. Centre for Human Rights and Democracy and 11 Others,[88] no Court has jurisdiction to review the process or the outcome of the vetting process. By dint of Article **167 (3)** of the Constitution, the Supreme Court decision is binding to this Court. Differently put, this Court may not examine the merits of the decision.*

j) We find no reason impeach the impugned decisions on grounds that the Board exceeded its constitutional and statutory mandate.

*k) **Orbiter-** The statute created a body with powers to **conduct an investigation, and act as an adjudicator**. The Act mandated the Board to hear applications for Review. Considering the implications of the ouster Clause, we are of the considered opinion that*

Parliament ought to have included in the Act provisions establishing an appellate mechanism to be undertaken by a totally different body as opposed to the same Board. This could have insulated the process from perceptions of bias

l) Courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights. Such an order, in our view must be viewed from the lens of our constitution which guarantees access to justice. The Court must exercise caution and ensure that costs do not become a barrier to access to Courts. The rationale for refusing to award costs against litigants in constitutional litigation is that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[89] This is not an inflexible rule[90] and in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.[91] There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."[92]

135. In view of our herein above analysis of the issues, finds and conclusions, we find and hold that these consolidated Petitions must fail. Consequently we dismiss these consolidated Petitions with no orders as to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 22nd day of June, 2018

Jessie Lesiit

Judge

J. Wakiaga

Judge

Grace Ngenye

Judge

John Mativo

Judge

John Onyiego

Judge

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[1]Chief Justice Dr. Willy Mutunga, as quoted by the East African Centre for law & Justice, www.eacli.org, 9th June 2012.

[2]**Njeri Githang'a, Law Reporter, June 2013, http://kenyalaw.org/kenyalawblog/a-compilation-of-summaries-of-selected-cases-on-the-interpretation-of-the-constitution-of-kenya-2010/. Accessed on 24th November 2017.**

[3] Article 10 (1) (a)-(e).

[4] Article 1.

[5] Chapter six of the Constitution.

[6] Chapter thirteen of the Constitution.

[7] Article 159.

[8] Article 160.

[9] Ibid.

[10] Act No. 2 of 2011.

[11] Mr. Chirchir referred to Supreme Court Petition Nos. 13A of 2013, Pet No 29 of 2014, 14A of 2014 and High Court J.R. No. 295 of 2012.

[12] Act No. 1 of 2011.

[13]See Wallis JA dealt with the matter as follows in Natal Joint Municipal Pension Fund vs Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18].

[14]*Investigating Directorate: Serious Economic Offences and Others vs Hyundai Motor Distributors (Pty) Ltd and Others*: In *re Hyundai Motor Distributors (Pty)* Ltd and Others vs *Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

[15] *Johannesburg Municipality vs Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted *Jaga vs Dönges, N.O. and Another*; *Bhana vs Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 664G-H.

[16] Supra note 9.

[17] {1985}] KLR 104; {1976-1985]} EA 67,

[18] Advisory Opinion No. 1 of 2012; [2014] eKLR

[19]*South Dakota vs. North Carolina*, 192 US 268(1940).

[20]This rule is restated by Joubert JA in *Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800(A)* at 804BC.

[21] {1987} 1 SCC 424.

[22]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes" https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[23] Christopher G. Wren and Jill Robinson Wren, The Legal Research Manual: A game Plan for Legal Research and Analysis(2d. ed. 1986).

[24] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning.

[25]Counsel *Anisminic Ltd vs Foreign Compensation Commission* {1968}APP. LR.

[26]Supreme Court Petition No. 29 of 2014.

[27]Pet. No. 13A of 2015, 14 & 15 of 2013 and also Supreme Court Decision in Pet. No. 29 of 2014 - {2014}eKLR

[28] Pet. No. 146 of 2011

[29] Supra

[30] The Supreme Court of Kenya In the matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (unreported)

[31] *Samuel Kamau Macharia vs. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011

[32] 19 U.S. 264 (1821)

[33]{491 U.S. 440, 455}

[34] *Cabell vs. Markham*, 148 F.2d 737, 739 (CA2), aff'd, 326 U.S. 404 (1945).

[35]See also *United States vs. American Trucking Assns., Inc.*,310 U.S. 534, 543 -544 (1940)

[36]Kevin Werbach, LOOKING IT UP: The Supreme Court's Use of Dictionaries in Statutory and Constitutional Interpretation, April, 1994 issue of the Harvard Law Review.

[37] Therasus.com.

[38] Third Edition, Longman, www.longmam.com.

[39] Published by Peter Haddock Limited, Bridlington, England, 1997.

[40] 6th Edition, Oxford University Press.

[41] Eleventh Edition, Oxford University Press.

[42] {2002}1 SCC 741 at 747

[43]See Statutory Interpretation by Justice G.P. Singh, 8th Edition, 2001, p.370.

[44] {2003-I-LLJ-384, 387

[45] {1999} (3) SC 573, 583

[46] {1940} Edition

[47] See final report of the committee of experts on constitutional review, 11th October, 2010.

[48] Judges & Magistrates Vetting Board & Attorney General v Kenya Magistrates &Judges Association [2014] eKLR.

[49] Ibid.

[50] SC Advisory Opinion Reference No. 2 of 2013.

[51]These rules of interpretation were set out in *S v Toms: S v Bruce* [1990] ZASCA 38; 1990 (2) SA 802 (AD) at 807H-808A.

[52] {2014} eKLR.

[53] See Woods Manufacturing Co. vs The King {1951} S.C.R. 504 at page 515 and Youngsam R (On the Application of) vs The Parole Board {2017}EWHC 729.

[54] Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others {2017}eKLR.

[55] See Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others {2015}eKLR citing Sir Charles Newbold, P in Dodhia vs National & Grindlays Bank Ltd & Another {1970} E.A. 195.

[56] {2014} eKLR [i.e. Petition No.13A of 2013 as consolidated with Petition No.14 f 2013 and 15 of 2013].

[57] {2014} eKLR.

[58] Supra.

[59] Supra note 57.

[60] MANU/SC/0047/1967.

[61] {1901} AC 495.

[62] {1898} AC 1.

[63] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986.

[64] Ibid.

[65] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59).

[66] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr.

(Citing Lord Denning).

[67] Ibid.

[68] Ibid

[69] Sir James Matthew, 19th Century jurist.

[70] 2 Mel Cousins BL (2005) *Public Interest Law and Litigation in Ireland*, Dublin: FLAC, October 2005 and see Stein R. & Beageant J., *"R (Corner House Research) vs the Secretary of State for Trade and Industry"* (2005) 17(3) Journal of Environmental Law 413.

[71] Toohey J.'s address to the International Conference on Environmental Law, 1989 quoted in *Blue Mountains Conservation Society Inc vs Delta Electricity* [2009] NSWLEC 150 [19].

[72]*Hotz and Others vs University of Cape Town* [2017] ZACC 10, citing *Biowatch Trust vs Registrar, Genetic Resources* [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch).

[73] Ibid.

[74] See, for example, *AB vs Minister of Social Development* [2016] ZACC 43; 2017 (3) BCLR 267 (CC) at para. 329; *Minister of Home Affairs vs Rahim* [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) at para 35; *Sali vs National Commissioner of the South African Police Service* [2014] ZACC 19; 2014 (9) BCLR 997 (CC); (2014) 35 ILJ 2727 (CC) at para 97.

[75] {2005} ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

[76]*Biowatch Trust vs Registrar, Genetic Resources* [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch)

[77] Supra note 4.

[78] Supra note 32.

[79] Ibid.

[80] Ibid.

[81] Supra Note 32.

[82] *R vs Sussex Justices Ex p McCarthy* {1924} 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": *Shrager vs Basil Dighton Ltd* {1924} 1 KB 274 at 284.

[83]Serious *Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd vs Smit NO and* [2000]

[84]{2014} eKLR

[85]See Woods Manufacturing Co. vs The King {1951} S.C.R. 504 at page 515 and Youngsam R (On the Application of) vs The Parole Board {2017}EWHC 729.

[86] Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others {2017}eKLR.

[87] See Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others {2015}eKLR citing Sir Charles Newbold, P in Dodhia vs National & Grindlays Bank Ltd & Another {1970} E.A. 195.

[88] {2014} eKLR [i.e. Petition No.13A of 2013 as consolidated with Petition No.14 f 2013 and 15 of 2013]..

[89]*Hotz and Others vs University of Cape Town* [2017] ZACC 10, citing *Biowatch Trust vs Registrar, Genetic Resources* [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch).

[90] Ibid.

[91] See, for example, *AB vs Minister of Social Development* [2016] ZACC 43; 2017 (3) BCLR 267 (CC) at para. 329; *Minister of Home Affairs vs Rahim* [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) at para 35; *Sali vs National Commissioner of the South African Police Service* [2014] ZACC 19; 2014 (9) BCLR 997 (CC); (2014) 35 ILJ 2727 (CC) at para 97.

[92] Affordable Medicines Trust vs Minister of Health {2005} ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.