Rawal v Judicial Service Commission & another; Omtatah (Interested Party); International Commission of Jurists (Kenya Chapter) & another (Amicus Curiae) (Petition 386 of 2015) [2015] KEHC 784 (KLR) (Constitutional and Human Rights) (11 December 2015) (Judgment)

Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR

Neutral citation: [2015] KEHC 784 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 386 OF 2015

RM MWONGO, WK KORIR, CW MEOLI, HI ONG'UDI & CM KARIUKI, JJ

DECEMBER 11, 2015

BETWEEN

HON (LADY) JUSTICE KALPANA H RAWAL ..... PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

THE SECRETARY, JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

AND

OKIYA OKOITI OMTATAH ..... INTERESTED PARTY

AND

INTERNATIONAL COMMISSION OF JURISTS (KENYA CHAPTER) . AMICUS CURIAE

KITUO CHA SHERIA ..... AMICUS CURIAE

High Court rules that the retirement age of judges appointed under the repealed Constitution was 70 years and not 74 years

The case revolved around the retirement age of judges appointed under the repealed Constitution. The court found that the retirement age of judges appointed under the repealed Constitution was 70 years and not 74 years.

Reported by Beryl A Ikamari

***Constitutional Law**-interpretation of constitutional provisions-principles of constitutional interpretation-whether constitutional provisions could have retrospective effect-whether the Constitution of Kenya 2010 reduced*

the retirement age of judges appointed under the repealed Constitution from 74 year to 70 years-Constitution of Kenya 2010, articles 259 & 10; Judicature Act (Cap 8), section 9.

***Constitutional Law**-interpretation of constitutional provisions-security of tenure of judges-retirement age of a judge-the retirement age of a judge who was appointed under the repealed Constitution-Constitution of Kenya 2010, articles 167(1,) section 7(1) & 31 of the Sixth Schedule of the Constitution; Judicature Act (Cap 8), section 9.*

***Constitutional Law**-interpretation of constitutional provisions-import of section 31(1) of the Sixth Schedule of the Constitution-whether section 31(1) was applicable only to officers serving under a fixed term and not to those serving under a tenure that would end on retirement age-Constitution of Kenya, 2010, section 31(1) of the Sixth Schedule of the Constitution.*

***Constitutional Law**-fundamental rights and freedoms-enforcement of fundamental rights and freedoms--right to fair administrative action, equality and freedom from discrimination and the right to property-whether the issuance of an allegedly premature retirement notice was a violation of the right to fair administrative action, equality and freedom from discrimination and the right to property- Constitution of Kenya 2010, articles 27, 40 & 47.*

***Statutes**-statutory interpretation-Judicial Service Commission-role and mandate of the Judicial Service Commission-role of the Judicial Service Commission with respect to vacancies in the Judiciary-manner in which the Judicial Service Commission was allowed to advertise for vacancies in the Judiciary-Judicial Service Act, No 1 of 2011, section 30 & Paragraph 3(1) of Part II of the First Schedule.*

Brief facts

The Judicial Service Commission (JSC) issued a retirement notice, to the Deputy Chief Justice on September 1, 2015, stating that she was due for retirement as from January 16, 2016, as she would be 70 years old by then. On September 6, 2015, the Judicial Service Commission placed an advertisement in the local dailies for a vacancy in the Office of the Deputy Chief Justice. The JSC earlier issued a circular dated May 24, 2011 indicating that the judges appointed to the Judiciary under the repealed Constitution would retire at 74 years. The position was retracted in a subsequent memo from the JSC dated March 27, 2014 in which it was stated that all judges had a retirement age of 70 years.

The petitioner sought redress in court. Her main contention was that under section 31(1) of the Sixth Schedule of the Constitution, there was a transitional provision which would allow her to retire at the age of 74 years. The retirement age of 74 years was provided under section 62(1) of the repealed Constitution as read with section 9 of the Judicature Act.

Issues

i. The import of the determinations in the case of *Nicholas Kiptoo arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others,* Petition No 23 of 2014, on the issuance of directives by the JSC.
ii. The nature of principles applicable to constitutional interpretation.
iii. Whether the issuance of the retirement notice was a violation of the Petitioner's rights to fair administrative action, equality and freedom from discrimination and the right to property.
iv. Whether a legitimate expectation was created by a circular which indicated that judges serving at the effective date, before the promulgation of the Constitution, would retire at the age of 74 years.
v. How and when the Judicial Service Commission could act on a vacancy at the Judiciary.
vi. Whether the Judicial Service Commission had authority to issue directions requiring a judge not to sit or preside over a matter.
vii. Whether constitutional interpretation allowed for retrospective application of constitutional provisions.
viii. The effect of the oath ascribed to judges under the Constitution of Kenya 2010.

ix. Whether section 9 of the Judicature Act which provided for a retirement age of 74 years for judges was unconstitutional given the provision of article 167(1) of the Constitution of a retirement age of 70 years for judges.

x. The import of section 31 of the Sixth Schedule of the Constitution on the retirement age of judges.

xi. Whether section 31 of the Sixth Schedule of the Constitution was applicable to officers serving in office for a fixed term and not those serving on a tenure that would end at retirement age.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 167

(1) A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.

Article 259

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2) If there is a conflict between different language versions of this Constitution, the English language version prevails.

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...

Sixth Schedule

Section 31

(1) Unless this Schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person.

Judicature Act (Cap 8)

Section 9 - Retiring age

For the purposes of section 62(1) of the Constitution, the age at which a person holding the office of judge shall vacate his office shall be seventy-four years.

Held

1. The case of *Nicholas Kiptoo arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others,* Petition No 23 of 2014 *(Salat Case)* had proceedings in which a letter was written raising various issues including the issue on a directive of the Judicial Service Commission requiring judges over 70 years not to preside over matters. It did not however determine the question on the retirement age of judges.
2. The determinations made in the *Salat case* were that the sanctity of the tenure of judges was such that it was not amenable to variation by any person or agency, that the Judicial Service Commission lacked the competence to determine the sitting of judges or the exercise of judicial mandate by judges and that the Judicial Service Commission directive was a nullity. It was not, therefore, a determination on the question on the retirement age of judges.
3. Historically, several efforts had been made towards creating a more democratic Constitution in Kenya. There were three drafts for a proposed new Constitution- two Constitution of Kenya Review Commission (CKRC) drafts, namely; Ghai and Bomas and the Proposed New Constitution (PNC Wako Draft.) However, efforts towards the making of a new Constitution stalled until after the 2007/2008 post-election violence experienced in Kenya.

4. The making of the Constitution of Kenya 2010 included a manifest commitment to change in fundamental respects. With respect to the handling of the judiciary, there were two views, one was that all judges would lose their jobs but would be allowed to apply for a reappointment and the other was that judges would remain in office and take an oath under the new Constitution and also submit themselves to a vetting process to assess their suitability. It was the vetting approach that was applied.
5. The Constitution of Kenya 2010 entailed the supreme law of the land. Article 2 of the Constitution provided that the Constitution was binding on all persons, State organs, was not amenable to a challenge on validity and was superior to all other laws.
6. The interpretation of the Constitution would include the application of the overarching principles provided for in article 259 of the Constitution and the national values and principles of governance provided for in article 10 of the Constitution. Any approach towards interpreting the Constitution had to fulfil the principles provided for in articles 259 and 10 of the Constitution.
7. A Constitution differed from a statute in terms of context, content and purpose. Technical rules of statutory interpretation would not necessarily be applicable to constitutional interpretation.
8. Holistic interpretation was applicable to constitutional interpretation. A contextual analysis of a constitutional provision alongside other constitutional provisions would be done in order to maintain a rational explication of the meaning of the Constitution in light of its history, the issues in dispute and the prevailing circumstances.
9. On the alleged violation of the right to fair administrative action, the Petitioner's claim was that the Judicial Service Commission had rescinded its earlier position on the retirement age of 74 years to one of 70 years, without affording her a hearing. Article 47 of the Constitution provided for the right to fair administrative action. It effectively gave the principle of *audi alteram partem* –every person must be heard before a decision was made against them- the status of a fundamental right. In principle, a body could not validly exercise its powers without first hearing the persons who were likely to be adversely affected by its decision.
10. There were indications that there was a memo in which the Petitioner and other Supreme Court judges expressed their views on retirement age. The right to be heard was capable of being satisfied via written representations and it would not be necessary for oral representations to be made.
11. The Petitioner had been afforded an opportunity to give written representations on the question of retirement age. Therefore, her right to fair administrative action under article 47 of the Constitution was not violated.
12. The right to equality and freedom from discrimination was recognized in article 27 of the Constitution. The right prohibits discrimination on the basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
13. The Petitioner's case was that she was being required to retire at 70 years while Hon Mr Justice Onyango Otieno was allowed to serve a term of 74 years. The Judicial Service Commission explained that Justice Onyango Otieno's retirement at 74 years was an error. However, the Petitioner did not show that after the issuance of the Memo, any other judge in a situation similar to hers had not been issued with a retirement notice or had been allowed to serve beyond the age of 70 years.
14. The Petitioner's claim was also that retirement at 70 years as opposed to 74 affected the pension she was to receive as a retiree. She stated that her vested right to have her salary and pension computed taking into account a retirement age of 74, was proprietary in nature and was protected in article 40 of the Constitution. Contrary to the Petitioner's claim, the office of a judge was a constitutional office which did not confer or vest a proprietary interest on the office holder.
15. There was no vested right to have pension calculated on the basis of 74 years as the retirement age. Retirement age was set in section 9 of the Judicature Act and could be altered at any time at Parliament's discretion. Article 40 of the Constitution only protected property capable of being owned.

16. Pension was to be paid either according to the law applicable at the time of appointment or when the officer became pensionable or based on a subsequent law which was more favourable to the officer. Pension could also be lost if an officer lost office by means other than retirement, including conviction for an offence. Once a decision was made on the Petitioner's retirement age, her rights to pension would be assessed in accordance with that decision.
17. There was an issue as to whether the circular issued to judges stating that those judges who were in office at the effective date would have a retirement age of 74 years created a legitimate expectation. A later memo indicated that the retirement age would be 70 years even for those judges. That issue rested on a determination on whether the contents of the circular or subsequent memo were a misrepresentation of the Constitution as relates to the retirement age of judges serving on the effective date and whether the Judicial Service Commission had the competence to issue directions on when and how a judge could sit.
18. There was an advertisement in the local dailies dated September 6, 2015 for a vacancy in the Office of the Deputy Chief Justice but it was made without a vacancy having been gazetted by the Chief Justice. Paragraph 3(1) of Part II of the First Schedule to the Judicial Service Act required the Judicial Service Commission to act on a vacancy only after the Chief Justice had acted on it. Under the provision, the vacancy had to exist or occur first, then the Chief Justice would issue a Gazette notice within 14 days on the occurrence of the vacancy and the Judicial Service Commission could then take action.
19. There had been non-compliance with section 30 of the Judicial Service Act and Paragraph 3(1) of Part II of the First Schedule to the Judicial Service Act which required transparency in the recruitment process for judges commencing with a Gazette Notice issued by the Chief Justice. The advertisement relating to a vacancy in the Office of the Deputy Chief Justice was therefore null and void.
20. The Judiciary and the Judicial Service Commission were distinct, separate and independent organs of state which performed different constitutional functions. The Judicial Service Commission played a facilitative role supportive of the Judiciary. The presence of the Chief Justice and the Chief Registrar on the Judicial Service Commission enabled a seamless flow of organ-relevant information between the two independent bodies.
21. When judges sat or presided over matters, they exercised judicial authority which was not subject to the control or direction of any other person or authority. Judicial authority was a sacrosanct authority solely exercised by courts. The Judicial Service Commission could not exercise judicial or administrative authority over judges' sittings. Judges who were also members of the Judicial Service Commission could not purport to exercise judicial authority when dealing with matters within the mandate of the Judicial Service Commission.
22. The JSC lacked the authority to issue directives on when a judge could sit and preside over court proceedings. Under section 5(2)(c) of the Judicial Service Act, it was within the authority of the head of the Judiciary to exercise general directions and control over the Judiciary.
23. Transitional and consequential provisions were mechanisms whose scope, purpose and duration were limited in order to ensure a smooth transition to the new constitutional order. Generally, the transitional and consequential provisions had different timelines depending on their purpose.
24. Transitional and consequential provisions were capable of conferring substantive rights and were part of the Constitution. It was possible to argue that a transitional provision had created a certain substantive right, for example that it protected tenure in office.
25. The rules of constitutional interpretation were applicable to transitional and consequential provisions. In case of conflict between transitional provisions and substantive provisions of the Constitution, a harmonious approach would be applied and the interpretation approach would guard against an interpretation that would lead to an anomaly or absurdity.

26. Generally, in statutory interpretation, a statutory enactment applied to the future and not the past unless a retrospective effect was clearly and manifestly intended by the legislature. On the other hand, constitutional interpretation was different from statutory interpretation.
27. A constitution would look forward and backwards and in its interpretation, it would be construed as an instrument that was always speaking to the past and the future. There were principles considered in determining whether a constitutional provision had retrospective effect.
28. In the *Macharia case*, there were three principles offered for assessments on whether a constitutional provision was of retrospective effect. The first was whether the language of the constitutional provision was forward looking. The second was the whiff test on whether there was a slight indication or sense that showed a retrospective orientation. The third was whether the provision had the effect of divesting an individual of a right legitimately acquired before the provision came into effect.
29. A proper retrospective provision in the Constitution affecting an individual's rights was not one that could be challenged as every constitutional provision was constitutional. Therefore, a retrospective provision in the Constitution was not alarming or unlawful or absurd.
30. The Petitioner could not succeed merely on the principle that a vested right could not be withdrawn under any circumstances. Where a constitutional provision had a clear retrospective orientation, the Court could not read an exemption to it unless the provision embraced such an exemption in respect of that right.
31. Security of tenure was guaranteed under the repealed Constitution. The repealed Constitution under section 62 as read with section 9 of the Judicature Act provided for a retirement age of 74 years. However the provision on retirement age could be raised or lowered by Parliament. Once a judge attained the statutory age for vacating office, that judge could not continue holding office as of right.
32. The Constitution of Kenya 2010 re-created, re-established and re-organized offices established under the repealed Constitution and it also created new ones. The Constitution re-created the Office of the Chief Justice who could serve for a term of a maximum of 10 years but had to retire when he attained the age of 70 years. The 2010 Constitution created the office of the Deputy Chief Justice which was an office supportive of the Chief Justice but had no express term limits.
33. When the Chief Justice retired, the Deputy Chief Justice would act as the Chief Justice. The terms of the Chief Justice included the fact that he was to retire at 70 years. A Deputy Chief Justice who had surpassed the age of 70 years could not qualify for appointment as the Chief Justice.
34. The oath taken under section 13 of the Sixth Schedule of the Constitution was to the effect that the judges were taking a fresh oath to mark a fresh start, they judges were aligning themselves to the 2010 Constitution and they judges undertook to uphold, observe, protect, defend and honour the Constitution. Generally the Petitioner's appointment to the Supreme Court and the taking of the oath had an effect on her retirement age.
35. Under section 7(1) of the Sixth Schedule of the Constitution a law which was in force under the repealed Constitution would be interpreted in a manner that would bring it into conformity with the Constitution. On the retirement age of judges, section 9 of the Judicature Act provided for a retirement age of 74 years while article 167(1) of the Constitution provided for a retirement age of 70 years.
36. Under article 2(4) of the Constitution, a law that was inconsistent with the Constitution was void to the extent of the inconsistency. Section 9 of the Judicature Act could not be brought into conformity with article 167(1) of the Constitution. Section 9 of the Judicature Act was therefore void.
37. Section 31 of the Sixth Schedule of the Constitution provided that unless otherwise provided in the Schedule, officers in offices established under the repealed Constitution would continue serving for the unexpired period of their term. The provision related to officers serving under a fixed term and not to officers who would serve for varying periods of time which would end at retirement age.
38. There was a difference between the word "term" and the word "tenure." The word "term" related to an office held for a specific pre-determined period of time in years. '"Tenure" referred to an office held

for an unspecified duration from an appointment date and ending upon the attainment of a specific age. Tenure referred loosely to the incumbency of an office from which removal was not permissible except by a tribunal on specified grounds such as misconduct or incapacity.

39. Section 31(1) of the Sixth Schedule did not apply to judges who were appointed under the repealed Constitution and were to serve until retirement age but not on the basis of a fixed term. Section 31(1) was also not absolute or unqualified; it was only applicable where other sections in the Schedule did not make provisions that were different from it.

40. The purpose of section 31(2) of the Sixth Schedule was to transition into the new constitutional order all public officers who were not serving on a fixed term, including judges. With respect to the Petitioner, the import of section 31(2) was that article 167(1) of the Constitution had a retrospective effect which bloated out all vestiges of tenure under the repealed Constitution. After being vetted, the Petitioner was to serve on terms which included the provision that a judge would retire from office upon attaining the age of 70 years, as provided for in article 167(1) of the Constitution.

Petition partly allowed. (The Court found that the retirement age of a judge appointed under the repealed Constitution was 70 years. Additionally, the Court quashed the retirement notice issued to the Petitioner and the advertisement for a vacancy in Office of the Deputy Chief Justice on grounds that the Judicial Service Commission did not have the mandate to issue the retirement notice or act on the vacancy in the manner that it did.)

Citations

East Africa

1. *Advocates Coalition for Development of Environment & others v Attorney General & another* [2014] 3 EA – (Explained)
2. *Anarita Karimi Njeru v Republic* (No 1) [1979] KLR 154; (1976 – 1980) KLR 1272– (Mentioned)
3. *Centre for Rights Education and Awareness (CREAW) & 2 others v John Harun Mwau & 6 others* [2012] 2 KLR 216 – (Mentioned)
4. *Communications Commission of Kenya & 5 others v Royal Media Service Ltd & 5 others* Petition Nos 14, 14A, 14B &14C of 2014 (Consolidated) – (Mentioned)
5. *Director of Pensions v Cockar* (2000) 1EA 38 – (Explained)
6. *Dry Associates Limited v Capital Markets Authority & another* Petition No 328 of 2011 – (Mentioned)
7. *Gacheche, Jeanne W & 5 others v Judges and Magistrates Vetting Board* Judicial Review Miscellaneous Application No 295 of 2012– (Explained)
8. *Gakuru, Robert N & others v Governor Kiambu County & 3 others Petition* No 532 of 2013 & 12,35,36,42 & 72 of 2014 Judicial Review Miscellaneous Aplication No 61 of 2014 (Consolidated)– *(Approved)*
9. *Hassan, Ahmed Issack v Auditor-General* Petition No 356 of 2014 – (Mentioned)
10. *In re the Principle of Gender Representation in the National Assembly & Senate* Advisory Opinion No 2 of 2012 – (Explained)
11. *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* Petition Nos 13A, 14 & 15 of 2013 (Consolidated)– (Affirmed)
12. *Judicial Service Commission v Mbalu Mutava & another* Petition No 337 of 2013 – (Explained)
13. *Kenya National Human Rights Commission* Advisory opinion No 1 of 2012 – (Mentioned)
14. *Keroche Industries Ltd v Kenya Revenue Authority & 5 others* [2007] 2 KLR 240 – (Explained)
15. *Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] 3 KLR 199 – (Mentioned)
16. *Management Committee of Kibiito Primary School & others v Uganda National Examination Board* Civil Miscellaneous Application Nos 0018 & 0022 of 2010 (Consolidated)– (Explained)
17. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012 – (Mentioned)
18. *Matiba v Attorney G*eneral Miscellaneous Application No 666 of 1990– (Mentioned)
19. *Mong'are, Dennis Mogambi v Attorney General & 3 others* Petition No 146 of 2011– (Agreed)

20. *Msagha, Amraphael Mbogholi v Chief Justice & 7 others* Miscellaneous Application No 1062 of 2004 – (Agreed)
21. *Mwau, John Harun & 3 others v Attorney General & 2 others* Petition No 541 of 2013 – (Mentioned)
22. *National Land Commission v Attorney General & 7 others* Advisory Opinion Reference No 2 of 2014 – (Mentioned)
23. *Ndyanabo v Attorney General* [2001] EA 485 – (Explained)
24. *Njoya, Timothy & 17 others v Attorney General & 4 others* [2004] 1 EA 194 – (Mentioned)
25. *Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012– (Explained)
26. *Republic v Chief Justice of Kenya & 6 others Ex Parte Justice Moijo Mataiya Ole Keiwua* Miscellaneous Application No 1298 of 2004 – (Explained)
27. *Republic v Elmann* [1969] 1 EA 357– (Explained)
28. *Republic v Kenya Revenue Authority, ex parte Aberdare Freight Services Limited* [2004] 2 KLR 530 – (Mentioned)
29. *Salat, Nicholas Kiptoo arap Korir v Independent Electoral and Boundaries Commission & 7 others* Petition No 23 of 2014 – (Explained)
30. *Speaker of the Senate & another v Attorney General & 4 others* Advisory Opinion No 2 of 2013– (Explained)
31. *Tinyefunza, David v Attorney General* (Constitutional Appeal No 1 of 1996) [1997] UGCC 3– (Explained)
32. *Uganda v Commissioner of Prisons ex-parte Matovu* (1966) EA 514 – (Mentioned)
33. *Waweru v Republic* (2007) AHRLR 149 (KeHC) 2006) – (Explained)

Namibia

1. *S v Acheson* (1991) (2) SA 805 (Nim) – (Mentioned)

Nigeria

1. *Rafiu Rabiu v State* [1981] 2 NCLR, 293 – (Explained)

South Africa

1. *S v Makwanyane & others* [1995] ZACC3 – (Explained)
2. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (7) BCLR 687 CC – (Explained)
3. *Justice Alliance of South African v President of the Republic of south Africa & others* 53/11 CCT 54/11,CCT 62/11)[2011] ZACC 23; 2011(5) SA 388 (CC); 2011(10) BCLR 1017 (CC) – (Explained)

Zimbambwe

1. *Metsola v Chairman Public Service Commission & another* [1989] 32 LR (SC) – (Explained)

Germany

1. *Okpisz v Germany*, No 59140/00, – (Mentioned)

Grenada

1. *Attorney General of Granada v Granada Bar Association* Civil Appeal No 8 of 1999 – (Mentioned)

Philippine

1. *Commission on Elections v Conrado Cruz, et al* GR No 186616 – (Agreed)

United Kingdom

1. *Council of Civil Service Unions Minister for the Civil Service* [1985] 374 – (Explained)
2. *Willis v United Kingdom*, No 36042/97, ECHR 2002 – IV– (Mentioned)

USA

1. *American States WS Co v Johnson* (1939) 31 Cal App 2d 606 – (Explained)
2. *Conner v Mayor, C of New York*, (1851) 5 NY 285 – (Mentioned)

3. *Cooper v Watson* 290 Minn 362 (Minn 1971 – (Explained)
4. *Gorman v City of New York* (280) App Div 39 (NY App Div) (1952) – (Mentioned)
5. *Marbury v Madison* 5 US 137 (1803) – (Mentioned)
6. *Miller Miller v State of California* (1977) 18 Cal 3d – (Mentioned)
7. *Stuart v Laird* (1803) 5 US (I Cranch) 299 – (Mentioned)
8. *Townsend v County of Los Angeles* (1975) 49 CA3D 263 – (Mentioned)
9. *Wawasee property Owners et Al v Wawasee Real Estate* & DNR, 11CADDNAR 88 (2007) – (Mentioned)

Texts and Journals

1. Bennion, FAR.,(Ed)(2008) *Bennion on Statutory Interpretation* London: Lexis Nexis 5th Edn
2. Black, HC.,(Ed)(1990)*Black's Law Dictionary* St Paul Minnesota:, West Group 6th Edn pg 1215
3. Ekaana, SM., (Ed) *Public Law in East Africa:* Law Africa pg 125
4. Fombad,C., Murray,c.,(Eds)(2010)*Fostering Constitutionalism in Afri*ca Cape Town: Pretoria University Law Press(PULP)
5. Stanley,H., Hogg, Q (Hailsham of St Marylebone).,(Eds)(1974) *Halsbury's Laws of England* London: Butterworth 4th Edn para 1515
6. Teitel, RG.,(Ed)(2002) Transitional Justice London: Oxford University Press
7. Wade, HRW., Forsyth, CF., (Eds)(2009) *Administrative Law* London: Oxford University Press 10th Edn pg 403

Journal & Articles

1. Clabresi, SG., Lindgren, J., 2005. Term Limits for the Supreme Court: Life Tenure Reconsidered. Harvard Journal of Law and Public Policy Vol 29 pg 770
2. Gross, AM., 2004. Constitution, Reconciliation, and Transitional Justice. Lessons from South Africa and Israel, Stanford Journal of Int Law 47
3. Mbao, MLM., 2007. The Politics of Constitution – making in Zambia: where does the Constituent Power Lie
4. Saunders, C., 2009. Toward a Global Constitutional Gene Pool. National Taiwan University Law Review 4 No 33

Statutes

East Africa

1. Civil Procedure Rules (cap 21 Sub Leg) order 21– (Interpreted)
2. Constitution of Kenya Review Act of 2008 (cap 3A) sections 5,6 – (Interpreted)
3. Constitution of Kenya, (Repealed) sections 10,23,26(1)(2); 23,(1); 27; 28; 31(1- 7); 45A(2); 45B; 60,A; 60A(11); 61(2),(6); 62,(1 – 7); 104(3),(5); 171(1); 172(1) – (Interpreted)
4. Constitution of Kenya, 2010 articles 1(1)(a)(d); 2(1),(4),(5); 3; 10,(2); 20(1); 22; 27,(4); 40,(1); 41(2)(b); 47(1); 50(1); 67; 68; 101(1); 102; 103(1)(f); 106; 127; 128(1); 142(1); 157(5); 159; 160; 162; 161(2),(a),(c),(3); 163; 164,(2); 165,(2); 166(1)(a)(2)(5); 167(1)(2); 168; 170(1)(3); 171; 172(1); 228(3); 229(3); 233; 248-254; 255(1)(g); 259; 260; 264; first schedule section 20(2); 24; 27; Sixth schedule sections 3,6,7,(1); 8(1); 13; 22; 23; 24; 31(1),(2 - 7); 32 – (Interpreted)
5. East Africa Order-In-Council [1902] article15 (1) -– (Interpreted)
6. Judicature Act (cap 8) section 9 – (Interpreted)
7. Judicial Service Act, 2011 (Act No 1 of 2011) sections 3,(a)(h); 5(2)(c); 8(a)(e); 13; 14; 22(7); 30 – (Interpreted)
8. Native Courts Regulation [1897] regulation 7 – (Interpreted)
9. Pensions Act (cap 189) sections 6(1)(c)(7) – (Interpreted)
10. Pensions Increase Act (cap 190) In general – (Interpreted)
11. Public Service Commission Act, 2012 (Act No 13 of 2012) section 31(1) – (Interpreted)

International Instruments

1. African Charter on Human and People's Rights, (1998) article 2,28
2. United Nations Basic Principles on the Independence of the Judiciary, (1985)
3. United Nations Universal Declaration on Human Rights, (1948) (UDHR) article 1,7

JUDGMENT

1. This is the third in a trio of petitions filed by judges who were serving on the date of the promulgation of the Constitution 2010. The judges are challenging the application to them of Article 167(1) which provides for retirement of judges at the age of seventy years. The petitions were all heard consecutively by this bench, for purposes of decisional consistency and expedition. These petitions include, in addition to the present suit; Petition No 244 of 2014 Justice Philip Tunoi and Justice David Onyancha v.The Judicial Service Commission and the Judiciary; and Petition No 495 of 2014Justice Leonard Njagi v. The Judicial Service Commission, the Judiciary and The Attorney General.

2. We confess that we have wrestled with these cases. They have not been easy – professionally or emotionally. They have not been made any easier by the fact that they involve our brother and sister judges, all of them our seniors. We have been conscious all along that the outcome will affect no less than thirty-five other judges of the superior courts.

FACTUAL BACKGROUND

3. This Petition seeks an interpretation of the question as to the constitutional age of retirement of a judge who was in office on the promulgation date of the Constitution, 2010 (the effective date). Through the Petitioner's affidavits, the following background emerges.

4. The Petitioner, Honourable Lady Justice Kalpana H. Rawal, was appointed as a Commissioner of Assize on about 2nd June, 1999. She was thereafter appointed a judge of the High Court under Section 61(2) of the repealed constitution vide Gazette Notice No. 3437, on 2nd June, 2000. On 19th December, 2011, she was appointed as a Judge of the Court of Appeal vide Gazette Notice No. 16159. In May, 2013, vide a Gazette Notice No. 7080 dated 29th May, 2013, she was appointed to the office of Deputy Chief Justice (DCJ) and the Vice-President of the Supreme Court of Kenya.

5. Earlier, by a circular dated 24th May, 2011(the Circular) to all Puisne Judges, the Judicial Service Commission (JSC), the 1st Respondent herein, communicated its decision on the retirement age of judges. The Circular was to the effect that the JSC had resolved that the retirement age of 74 years, in respect of judges who were serving on the effective date, had been saved under Section 31(1) of the Sixth Schedule of the Constitution, 2010. At the time of receipt of the Circular, the Petitioner was serving as a judge of the High Court which was an office established under Section 60 of the repealed constitution.

6. By a subsequent memo (the Memo) dated 27th March, 2014 addressed to the Petitioner, the President of the Court of Appeal and the Principal Judge of the High Court, the JSC conveyed its determination that the retirement age for all judges was 70 years. It also advised that all judges who were due for retirement, having attained the stated age, would be issued with notices of retirement.

7. The dispute herein was prompted by a retirement notice (the Notice) issued by the JSC through its Secretary, Ms Anne Amadi, the 2nd Respondent, on 1st September, 2015, to the Petitioner. In the notice, the JSC stated that the Petitioner was due to retire from service in the Judiciary with effect from 16th January 2016, upon attaining the age of 70 years.

8. Five days later, the JSC placed an advertisement in the Sunday Standard newspaper of 6th September, 2015. The advertisement declared that the office of the Deputy CJ and the Vice-President of the Supreme Court would fall vacant with effect from 16th January, 2016. The JSC called for applications from suitable candidates to fill the said vacancy.

9. In her Petition dated 10th September, 2015, and filed on 14th September, 2015, the Petitioner claims that the JSC had, in violation of Section 31(1) of the Sixth Schedule, resolved to retire her upon attaining the age of seventy (70) years in January 2016. Further, that the 2nd Respondent had swiftly moved to advertise the vacancy of her office, in furtherance of the offending determination by the JSC.

10. She therefore seeks the following orders;

> "a). A declaration that the Petitioner is at liberty and all the other judges appointed under the Repealed Constitution are at liberty by dint of Section 31(1) of the Sixth Schedule to the Constitution 2010, to serve in the judiciary until the attainment of the age of 74 years in accordance with the provisions of Section 62(1) of the Repealed Constitution as read together with Section 9 of the Judicature Act, which continue to be operative by reason of express constitutional provisions.
>
> b). A declaration that the Petitioner and all other judges appointed under the Repealed Constitution are entitled to continue to hear and determine disputes and preside over all other judicial proceedings and carry out all other judicial duties and functions until the attainment of 74 years.
>
> c). A declaration that the JSC has no constitutional and or statutory role in the allocation of judicial duties to individual judges and therefore purport to direct which judges will preside or sit in judicial proceedings.
>
> d). A declaration that it is an imprudent and irresponsible usage of public funds in contravention of Article 201(d) of the Constitution to pay judges who are not allocated judicial duties and functions.
>
> e). An order of certiorari calling into this Hon. Court for the purpose of quashing forthwith the retirement notice issued by the Respondent's dated 1st September, 2015 communicating the JSC's decision to unconstitutionally retire the Petitioner upon reaching the age of 70 years.
>
> f). An order of certiorari calling into this Hon. Court for the purposes of quashing forthwith the Respondent's decision to advertise, notify the public and announce a vacancy in the office of the DCJ and Vice President of the Supreme Court of Kenya published in the Standard Newspaper on Sunday of 6th September, 2015.
>
> g). The Respondents to bear the costs of this petition in any event.
>
> h). Such further orders as this Honourable Court may deem just and expedient."

THE PETITIONER'S CASE

11. The Petitioner's case is contained in her Petition, three affidavits in support thereof, written submissions, and lists of authorities.

12. Learned counsel Mr. Oraro, together with Mr. Kilukumi, Mr Okoth and Mr Ismail presented the Petitioner's case. It was Mr. Oraro's submission that the JSC is unconstitutionally purporting to retire the Petitioner upon her attaining the age of 70 years on the 16th January, 2016. It was his position that

under the provisions of Section 61(2) of the repealed Constitution, her retirement age was guaranteed, vested and accrued on her assumption of office. In that regard, he argued that Section 61(2) of the repealed constitution firmly secured the tenure of all judges appointed thereunder to a term to be prescribed by Parliament.

13. He added that under Section 9 of the Judicature Act, the said retirement age was constitutionally protected and safeguarded and could not be altered to the detriment of judges who held office under the repealed Constitution. This is because Section 104 (3) of the repealed Constitution had safeguarded and protected the salary, terms and conditions of employment of all judges serving thereunder.

14. In regard to the Constitution 2010, it was Mr. Oraro's contention that Article 167(1) does not apply to the judges serving on 27th August, 2010, as their retirement age of 74 years was saved by Section 31(1) of the Sixth Schedule to the Constitution 2010.

15. On the nature of the transitional and consequential provisions in the Sixth Schedule, it is Mr. Oraro's position firstly, that they are part and parcel of the Constitution as they were meant to be a bridge from the repealed constitutional order into the new order. He therefore claims that the provisions are not to be viewed as inferior to the substantive provisions. To support that submission, he relied on the decision of the Supreme Court in the Judges & Magistrates Vetting Board & 2 Others v. Centre for Human Rights & Democracy & 11 others (2014) e KLR (JMVB Case) wherein the Court of Appeal approved the findings in Law Society of Kenya v. Centre for Human Rights and Democracy & 13 Others (2013) eKLR recognizing that transitional and consequential provisions are the bridge between the two constitutional dispensations.

16. Secondly, counsel submitted on the manner in which the Court should interpret transitional and consequential provisions vis a vis the provisions of the Constitution. He argued that the Constitution could not be severed and dissected into main Articles and Schedules but must be interpreted as one document that had an in-built logical flow and consistency: as between one Article and another and between all Articles and Schedules thereof. He referred to the Court of Appeal decision in the case of Dennis Mogambi Mong'are v. Attorney General & 3 Others (2014) e KLR (Mong'are Case) where the Court while determining the status of the transitional and consequential provisions in the Sixth Schedule to the Constitution held that the Constitution is one document which contains substantive Articles and the Schedules thereto, and therefore should be interpreted as one indivisible document.

17. Thirdly, relying on the decision of Centre for Rights Education and Awareness & others v. John Harun Mwau & 6 Others (2012) e KLR, (CREAW Case) he further submitted that transitional provisions are drafted for a special situation. Where a transitional provision conflicts with a substantive provision, a harmonious interpretation must be adopted, he argued.

18. It was Mr. Oraro's further position that Section 31 of the Sixth Schedule is both transitional and consequential in nature. Specifically, he submitted that Section 31(1) of the Sixth Schedule was pegged on the antecedent provisions relating to the tenure of a judge. That the antecedent is that after a judge had been vetted, he/she carried along his or her rights and obligations accrued under the repealed constitution. It was therefore his contention that the already accrued tenure of a judge existed before the promulgation of the Constitution and preceded the creation of new offices under the Constitution. That the tenure of a judge is personal.

19. In regard to the submission made by the Respondents that the Petitioner had been appointed to the position of DCJ and Vice President of the Supreme Court, a new office established by the Constitution thereby destroying the basis for a claim to tenure under Section 31(1) of the Sixth Schedule, Mr. Oraro submitted that the Constitution created superior courts which are manned by persons known

as judges. That, further there is only one designation of a judge; a judge of a superior court, irrespective of the Court that the individual judge sits in, as tenure attaches to the person of a judge.

20. He however clarified that the only office in respect of which tenure attaches to the office rather than the individual judge is the office of the Chief Justice because the Chief Justice holds office for a term of ten years or until he retires on attaining the age of 70 years whichever is earlier, as is provided for under Article 167(2).

21. According to Mr. Oraro therefore, requiring the Petitioner to retire in accordance with the provisions of Article 167(1) of the Constitution would amount to a retrospective application of the Article and an infringement on her rights as vested and accrued prior to the promulgation of the Constitution. He relied on the case of Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others (2012)eKLR(Macharia Case). The Supreme Court held therein that the Constitution does not apply retrospectively unless expressly stated but that such retrospectivity could not apply if it would have the effect of divesting an individual of their rights legitimately accrued before the effective date.

22. He also referred the Court to comparative jurisprudence from both the Commonwealth and the United States of America to urge the point that it is a violation of judicial independence to retrospectively alter the retirement age of a judge to his disadvantage. In that regard, he referred the Court to a scholarly article titled 'Term Limits for the Supreme Court: Life Tenure Reconsidered' by Steven G. Calabresi and James Lindgren, Harvard Journal of Law and Public Policy (Vol 29) page 770. In the article, the authors discuss the retroactive application of term limits for judges concluding that it would be unfair to alter the arrangement struck on appointment.

23. He disputed the Respondents' contention that the Petitioner had during her interview for the position of DCJ been questioned about her retirement age. In any event, he claimed that one cannot negotiate or waive constitutional tenure. He relied on the case of Attorney General of Granada v. Granada Bar Association, Court of Appeal Civil Appeal No. 8 of 1999 for the proposition that retirement age is fixed by the Constitution and a judge can only be removed through the procedure established.

24. It was learned Counsel's further submission that it is not for the Respondents to determine the retirement age of judges because the judges do not serve at the pleasure of the Respondents. He opined that the tenure of a judge is fixed by the Constitution. It was his contention that this right cannot be derogated from through advertisements or resolutions arrived at in meetings of the JSC. It was his case therefore that the advertisement declaring a vacancy in the office of DCJ on 6th September, 2015 is unconstitutional and illegal there being no existing vacancy in the office of the Petitioner. As such the advertisement violates the provisions of the Judicial Service Act of 2011.

25. It was also the Petitioner's case that the JSC having taken a position through its Circular resolving that all judges who were in office on the effective date of the Constitution 2010 would retire upon attaining the age of 74 years, cannot retract therefrom by ascribing it to an error. That as a matter of fair administrative action the JSC could not retract from its first position without affording the Petitioner and all other judges adversely affected by the decision an opportunity to be heard before making the alleged unconstitutional resolution of 27th March, 2014. Further, that the JSC did not give the Petitioner written reasons for the decision. Mr. Oraro therefore argued that the JSC's actions amounted to a violation of the Petitioner's rights to fair administrative action under Article 47(1) and the right to fair hearing under Article 50(1) of the Constitution.

26. Finally, Mr. Oraro submitted that the JSC's actions were not only unlawful but also violated the Petitioner's legitimate expectation, given the clear representations that had been made to her by the JSC that she would retire at the age of 74 years. Consequently, he urged that her salary and pension is to be computed on the basis of her tenure of 74 years.

27. In closing, Mr. Oraro urged the Court to grant the prayers sought in the Petition with costs to the Petitioner.

THE RESPONDENTS' CASE

28. The Respondents' case is contained in the Replying Affidavit and further affidavit of Anne Atieno Amadi, the 2nd Respondent who is the Secretary to the Judicial Service Commission and also the Chief Registrar of the Judiciary. The Respondents also filed written submissions and lists of authorities.

29. In her affidavit, Ms Amadi deponed that the Petitioner had applied for the position of DCJ with full knowledge that she would retire at the age of 70 years. And further, that the JSC recruited her on the basis that she had read and understood the terms stipulated in the advertisement made in the Standard newspaper of 4th December, 2012. Ms. Amadi contended that the Petitioner having been appointed under Article 166(1)(a), (2) and (5) the Constitution , her retirement age was also pegged to 70 years as is provided by Article 167(1) of the Constitution.

30. She deposed that at the time of being interviewed for the position of DCJ, the question of the retirement age was put to the Petitioner who confirmed her awareness of the fact that she would retire at the age of 70 years. As such, the Petitioner should not be allowed to approbate and reprobate.

31. Ms. Amadi further deposed that the position of DCJ being a creature of the Constitution, Section 31 of the Sixth Schedule to the Constitution does not apply to the holder of such office. And the Petitioner cannot derive a benefit from the provisions of Section 31 as it only applies to those who held offices established under the Repealed Constitution.

32. She averred that on the effective date, all serving judges appointed under the repealed Constitution took a fresh oath of office and swore to uphold and defend the Constitution. That the act of taking a fresh oath is tantamount to an acknowledgement by those judges that they henceforth held office under the Constitution and were bound by its provisions.

33. It was her further deposition that pursuant to the provisions of Article 167(1) of the Constitution, the JSC issued a notice to the Petitioner that she was due to retire on 15th January, 2016 upon attaining the age of 70 years. This decision was not discretionary as it was based on a constitutional requirement under Article 167 (1) which compels all judges to retire at the age of 70 years.

34. Ms. Amadi admitted that subsequent to the notice, the JSC also advertised the position of the DCJ in the Sunday Standard newspaper of 6th September 2015 to commence the process of filling the position immediately upon her retirement. That the urgency lay in the fact that due to the competitive recruitment process it would take time to identify a successor to the Petitioner. Ms Amadi therefore contends that the advertisement of the DCJ's position by the JSC is not actuated by malice as contended by the Petitioner. On the contrary the JSC is keen on ensuring a smooth transition in the office of the DCJ.

35. She further averred that the JSC's resolution as communicated vide the Circular was erroneous and contrary to the provisions of the Constitution and therefore of no effect. She thus contended that the Petitioner cannot rely on the said Circular in support of her Petition.

36. She stated that the Respondents have not directed the Petitioner to cease acting in her capacity as DCJ or executing her judicial function as she had not attained the retirement age of 70 years as stipulated under the Constitution.

The Respondents' Arguments

37. Mr. Ahmednasir, Senior Counsel and Mr. Kanjama, learned Counsel presented the Respondents case. It was Mr. Ahmednasir's submission that the Petition is unmeritorious, vexatious and a frontal assault on the Constitution.

38. As regards the transitional and consequential provisions under the Sixth Schedule, it was Mr. Ahmednasir's submission that contrary to the Petitioner's views, not a single provision therein confers a substantive right. That such provisions facilitate good housekeeping and in any event, have served their purpose. He argued that the provisions were in force for a given duration. He contended, that if the framers of the Constitution intended to preserve the retirement age of 74 years, then Article 167(1) of the Constitution ought to have been suspended or qualified by an exception in favour of the Petitioner. On the contrary, Article 167(1) was intended to come into effect immediately, and applied to judges who successfully underwent the vetting exercise.

39. In his understanding, Section 31(1) of the Sixth Schedule provides the bedrock of the Petitioner's complaint, viewed from three facets: firstly, as a substantive and not just a procedural short term provision; secondly, that the provision reserves her tenure for the unexpired period under the old Constitution and transmutes it to the new Constitution. Thirdly, that once her tenure was reserved on the effective date, a subsequent promotion to a new court under the Constitution had no impact on the same. According to him, the Petitioner is wrong on all accounts.

40. In his view, Section 31(1) of the Sixth Schedule raises three distinctively indicative yet interrelated issues. First, it refers to a person who on the effective date held or was acting in an office established under the former Constitution. Secondly, on the effective date such a person would continue to hold or act in that office. On this aspect, Mr. Ahmednasir submitted that the Petitioner continued to be a judge of the High Court after the effective date upon transiting from the repealed Constitutional order to a new Constitutional dispensation. Thirdly, that such a person continues to act and hold the said office under the Constitution for the unexpired period of the term of that person.

41. According to Mr. Ahmednasir, there was no conflict between Section 31 of the Sixth Schedule and Article 167 (1) of the Constitution. To him, transitional provisions are to facilitate a change from the repealed Constitution to the new Constitution. On this, he relied on the decisions in Rev. Dr. Timothy Njoya & 17 Others v. Attorney General & 4 Others (2013) eKLR(Njoya case) in which the High Court held that transitional provisions are included in the Sixth Schedule to facilitate a change from the repealed Constitution to the new Constitution. He also cited the Mong'are case (supra) wherein the Court of Appeal stated that transitional provisions facilitate transition into the new constitutional dispensation and remain in force until the purpose is achieved.

42. Nevertheless, even if there was a conflict, senior counsel submitted that, firstly, Section 31(1) of the Sixth Schedule did not survive the effective date as it was spent once it transited the concerned persons to the new Constitutional order. Secondly, that the provisions of the Sixth Schedule would give way to the substantive provisions of Article 167 (1) of the Constitution. On this submission, he cited the holding in John Harun Mwau & 3 Others v. Attorney General & 2 Others (2012) eKLR(Mwau case) that in the event of a conflict between a transitional provision and a substantive constitutional provision the former would supersede the latter because they dealt with the specific situation contemplated. He also relied on Njoya case (supra) and JMVB case (supra). On this aspect, learned Counsel concluded that upon transition to the new constitutional order, the Petitioner's terms of service and conduct are to be regulated according to the substantive provisions of the Constitution.

43. On the argument that notwithstanding the Petitioner's new position as DCJ she enjoys a tenure of 74 years, Mr. Ahmednasir submitted that such argument contradicts Article 264 of the Constitution, which provides that the former Constitution stood repealed on the effective date subject to the Sixth Schedule. It was the learned counsel's submission that the Petitioner could not peg her case on Section 31(1) of the Sixth Schedule as it was not relevant to her situation because of the fact that she was, subsequently, appointed to a new office of DCJ and Vice President of the Supreme Court. These offices were created under Article 166 of the Constitution and are therefore regulated under the new Constitution and not the former constitution.

44. The JSC further contends that the Petitioner was recruited on the basis that she had read and understood the terms stipulated in the advertisement made in the Standard newspaper of 4th December, 2012. Accordingly, her appointment was made in terms of Article 166(1) (a) (2) (3) as read with the First Schedule of the Judicial Service Act of 2011. Therefore the Petitioner's retirement age fell under the provisions of the said Constitution, specifically Article 167(1) of the Constitution stipulating the retirement age as 70 years. Moreover, he added, Article 167 (1) of the Constitution does not give any exception to the judges appointed previously.

45. In reply to the Petitioner's contention that the JSC is estopped from changing its position as regards the retirement age of judges in office on the effective date, Senior Counsel submitted that the doctrine of estoppel does not have any application in the present proceedings. Estoppel, he claimed cannot override the application of constitutional provisions. On this he relied on the Halsbury's Laws of England, 4th Edition at paragraph 1515 to the effect that the doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has on grounds of general public policy enacted it to be invalid.

46. As to the import and place of Section 7 of the Sixth Schedule on Section 9 of the Judicature Act, Mr. Ahmednasir submitted that, Section 7(1) applies to "All law", meaning that all statutes including the Judicature Act, common law and African customary law should be brought into conformity with the Constitution. Thus, if a provision in a statute is unconstitutional, it cannot be conformed to the Constitution. He further argued that a contrary interpretation would be inconsistent with Article 2(4) on the supremacy of the Constitution. He submitted that Section 9 of the Judicature Act ought to be read in conformity with Article 167(1) of the Constitution. Insofar as the said section negates what is expressly set out in the Constitution and is thus null and void he relied once more on the Njoya case and the Supreme Court case of Communications Commission of Kenya & 5 Others v. Royal Media Service Ltd & 5 Others (2014) eKLR (CCK case) to the effect that any law in force on the effective date must be read with necessary alterations, adaptations and qualifications with Section 7 of the Sixth Schedule, and if that was impossible, the offending law ought to be declared invalid.

47. Regarding the question of alleged violation of the Petitioner's legitimate expectation, it was the Respondents' position that, legitimate expectation can only be given effect if it is consistent with the law. Mr Ahmednasir observed that legitimate expectation comprises: an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable and the representation must be one which the decision maker has power to make. Hence there could not be a legitimate expectation against clear provisions of the law.

48. We pause here, to interpose the 2nd Amicus Curiae's submissions herein in order to ensure consistent flow in the background, given that the Respondents and later the Petitioner responded specifically to them.

THE 2ND AMICUS CURIAE'S SUBMISSIONS

49. Kituo Cha Sheria was admitted as Amicus Curiae on 16th September, 2015. It filed written submissions dated 27th October, 2015. Its brief was presented by learned Counsel Dr. Khaminwa.

50. Counsel contended that the issue before the Court is broader than the Petitioner herself as it will have a ripple effect beyond the borders of Kenya. That it concerns the rule of law and that the Petitioner was the first victim. He therefore urged the Court to consider the global picture and promote the rule of law.

51. It was his submission that the Petitioner has a legitimate expectation of retiring at 74 years, by virtue of Section 31(1) of the Sixth Schedule. He stated that Article 167(1) of the Constitution is only applicable to judges appointed after the effective date. That on the promulgation date, the Petitioner was already a judge and she took the oath of office to uphold the Constitution in that capacity. Hence the oath of office was not a fresh appointment because her terms of appointment had been spelt out in the former Constitution and the said terms continued under the Constitution.

52. Citing Articles 159, 160, 167 and 168 which provide for independence and security of judges Dr. Khaminwa stated they enable courts to resolve disputes in a fair and impartial manner. Dr Khaminwa brought to the attention of the court the decision of the Supreme Court in the case of Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others Petition No. 23 of 2014 (Salat case). The judgment therein was delivered a few days to the hearing of this Petition. Counsel submitted that the Supreme Court had in their decision in the Salat case determined the issue before this Court and that this Court was bound by that decision.

53. In response to the 2nd Amicus' submissions, the Respondents put forth the following arguments. It was Mr. Ahmednasir's submission that the majority in the Supreme Court in Nicholas Salat's case was led by the Petitioner in this Petition. On his part, Mr. Kanjama submitted that the portion of the decision dealing with the retirement of judges appointed prior to the effective date is merely obiter dicta as it does not deal with the issue that was before the Supreme Court. He argues it was in fact, per incuriam.

54. Resuming the theme of constitutional interpretation, Mr. Kanjama reiterated that the sovereign power of the people of Kenya is delegated to the three organs of State. Further, that the Constitution ought to be interpreted in the manner that the ordinary Kenyan understood it upon promulgation on 27th August, 2010.

55. Mr. Kanjama submitted that in construing Section 31 of the Sixth Schedule, the Court should consider it in unison with the entire Constitution, and therefore urged the Court to find and hold that it is Section 31(2) that applies to the Petitioner's transition.

56. As regards vested rights, it was Mr. Kanjama's submission that there is no vested right to a retirement age. In any event, the only vested right is that found in the Constitution.

57. Lastly, Mr. Kanjama took the position that the Petitioner cited violation of several rights provisions of the Constitution but had failed to demonstrate how they have been violated, in line with the dicta in of Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR (Mumo Matemu case) reiterating the requirement that a precise statement and demonstration be made in respect of a claim based on a violation of rights in the constitution.

58. The Respondents therefore urged the Court to dismiss the Petition with costs to them, as the same was not brought in the public interest.

THE 2nd INTERESTED PARTY'S CASE

59. Mr. Okiya Omtatah the 2nd Interested Party's response to the petition is contained in his written submissions dated 21st October, 2015. He was acting in person.

60. In his oral and written submission he stated that the law applicable to pensions and which was in force when the Petitioner was employed and which was saved by Section 32 of the Sixth Schedule is the Pensions Act (Cap 189), Laws of Kenya. He submitted that though with the formation of Judicial Service Commission, judges and magistrates are separated from the civil service, their pensions are still governed by the Pensions Act. This is because the JSC is still in the process of formulating a separate contributory scheme for judicial officers.

61. Mr. Omtatah's contention is that Section 32 of the Sixth Schedule cannot be used to trump Article 167 (1) of the Constitution. That Section 32 is not about tenure but pensions, gratuities and other benefits conferred under the former Constitution and enjoyed during the tenure and after retirement. He relied on the following cases; Gorman v. City of New York (280) App. Div. 39 (N.Y App. Div) (1952);Miller Miller v. State of California (1977) 18 Cal.3d; Townsend v. County of Los Angeles (1975) 49 CA3D 263; and Conner v. The Mayor, C. of New York, (1851) 5 N.Y 285 in demonstrating the relationship between tenure and pension in public office.

62. His further submission was that on the effective date, the old judiciary including the office that the Petitioner then held was abolished as the old Constitution was repealed, and simultaneously, new courts established pursuant to the provisions of Articles 162, 163, 164, 165 and 169 of the Constitution. Thus subject to Section 23 of the Sixth Schedule, the Petitioner became a judge of the new High Court established under Article 165 of the Constitution. He claims that on the effective date the Petitioner did not continue in the office of judge of the High Court created under the former Constitution, but was transited under Section 22 and 23 of the Sixth Schedule into the office of a judge of the High Court established under Constitution 2010. The transition, he claims, was the reason why the Petitioner had to take a new oath of office but would later undergo vetting as established under the Sixth Schedule.

63. It is therefore Mr. Omtatah's view that the Petitioner having been thus, must retire at the age of 70 years. In that regard, he argues that the Petitioner should, instead of challenging her retirement age, pursue her enhanced benefits for the abolished office with the Pensions Department of the National Treasury. He pointed out that retirement on abolition of office is provided for in Sections 6(1) (c) and 7 of the Pensions Act and further Sections 20(2), 24 and 27 of the First Schedule to the Pensions Act which provide for compensation for persons retired on similar grounds. On that basis he argues that the Petitioner ought to be paid enhanced pensions with an extra one year of service awarded for every four years worked.

64. On the question whether the tenure applicable to judges is statutory or contractual, he contended that save for the Chief Justice, judges do not serve for fixed terms but are employed on permanent and pensionable terms. Thus their tenure is dependent on what the law provides and not on terms of any private contract. And that, the tenure conferred on judges by the Legislature pursuant to Section 62 of the former Constitution was varied by dint of the provisions of Article 167(1) of the Constitution.

65. He argues that security of tenure prescribes a constitutional or legal guarantee that an office holder cannot be removed from office except in exceptional and specified circumstances. That security of tenure offers protection by ensuring that an office holder cannot be victimized for exercising their powers in respective functions and duties. That Section 31 of the Sixth Schedule has made a distinction between contractual employment under Section 31(1) and employment by Statute in Section 31(2).

According to him Section 31(1) does not refer to judges because it secures the unexpired period of the term in offices that were not abolished, and yet the offices of judges were abolished. It is his contention that Section 31(1) could not have saved the 74 years' retirement age in respect of judges because the Petitioner was not on contract. He cited examples of persons serving on terms as including the President, Prime Minister, Members of Parliament, Commissioners', Councillors and parastatal heads.

66. As regards the applicability of Section 31(2) he claimed that it was applicable to judges and other public employees hired under Statute. He contended that the judges were to hold office under the current Constitution but subject to the provisions of Section 7 and 24 of the Sixth Schedule.

67. His position was that there is a fundamental difference between retirement age and term of service. That a 'term' is a fixed or limited period for which engagement is intended to last but retirement is in respect of the age in years at which a person is expected or required to cease work. That retirement age gives the possible maximum length of time an employee may serve in an office but it does not automatically confer any pension benefits or rights since these follow actual service rendered. Returning to Section 31 of the Sixth Schedule which uses the word 'term' and 'retire' he urged that in effect a judge would retire on attaining the age of 70 years and the Chief Justice would hold office for a term of ten years. It is his case therefore that the Petitioner had a retirement age and not an unexpired term on the effective date.

68. On the issue of the retirement age as stipulated under Section 9 of the Judicature Act, he contended that the Judicature Act cannot revive the former Constitution as it was an Act of Parliament. Therefore, the Judicature Act, must be read with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution as provided under Section 7 (1) of the Sixth Schedule. Accordingly, it is his position that the retirement age of judges was validly varied and reduced from 74 to 70 years under the Constitution.

69. As regards the retrospectivity of Article 167(1) of the Constitution, Mr. Omtatah relied on the Macharia Case (supra) in submitting that a retroactive law is not necessarily unconstitutional. In any event he stated that the office of judge under the former Constitution was abolished and judges now serve in the new office of judge established under Constitution and that being so the question of retroactive application of Article 167(1) does not even arise.

70. Regarding the issue of legitimate expectation as raised by the Petitioner, it was his submission that the Constitution is the supreme law of the land and she cannot rely on an erroneous decision as a basis to her claim. His position is that across the world, the mandatory retirement age of judges is 70 years and there being no express provision in the Constitution to provide that judges appointed under the former Constitution retained their retirement age of 74 years, all judges must retire at 70 years of age.

71. In his view, constitutional reforms did not undermine judicial independence, or the tenure of judges; because these, together with adequate remuneration as well as conditions of service, age of retirement and pension, are adequately secured by the Constitution as well as the Statute. According to him a true independent judiciary has three characteristics; impartiality, enjoys respect for judicial decisions and freedom from interference by third parties with an interest in the outcome of cases.

72. He submitted that the people can only interfere with the independence of the Judiciary through a referendum as stipulated under Article 255(1)(g) of the Constitution 2010.

73. Finally, Mr. Omtatah argued that the Petitioner is pursuing a private right and not the public interest. He therefore urged the Court to dismiss the petition with costs.

THE 1ST AMICUS CURIAE'S SUBMISSIONS

74. The 1st Amicus Curiae, the International Commission of Jurists (ICJ), was represented by Mr. Mogeni and Mr. Nyaundi. At its first appearance, it was indicated that ICJ would appear as the 1st Interested Party, but subsequently, and with consent of the parties, applied to be amicus. ICJ filed written submissions dated 21st October, 2015 and a list of authorities.

75. Mr. Mogeni submitted that Kenyans clearly established certain institutions under the new Constitution. One of them was the Judiciary in respect of which Kenyans did not envisage that there would be two sets of judges. He argued that no provisions of the Constitution can be said to be unconstitutional. He urged the Court to consider Articles 2(4), 10 and 159 in determining the issues in this petition. To him, there was no conflict between the provisions relevant to this Petition as Article 167(1) was very clear.

76. Mr. Nyaundi argued that this case calls upon the Court to make a clear pronouncement on the letter and spirit of the Constitution, as drawn from its words with regard to the retirement age of judges serving on the effective date. He referred the Court to the principles applicable to the interpretation of a Constitution. He urged the Court to consider the plain meaning of the words used in the articles at hand as well as the provisions of the Sixth Schedule to the Constitution. Secondly, he stated that the Court should discern the intention of the framers of the Constitution, especially the understanding the drafters had in in respect of the intended provision in their own time and in the present. Thirdly, he urged the Court to give effect to the interpretation that is based on principles of natural rights or fundamental law.

77. It is his position that security of tenure of judges enables judges to serve more fearlessly and confidently without worrying about the possibility of losing office through victimisation. He relied on the US case of Marbury v. Madison 5 U.S 137 (1803) where it was observed that to unduly disturb the tenure of office is nothing less than a violation of vested rights.

78. In his view Section 104(5) of the former Constitution was good law when it was in force, but it is since repealed. He asserted that on the effective date the Kenyan society underwent a revolution overhauling the governance system. That the Preamble and Article 1(1) of the Constitution contain the aspirations of the people of Kenya. That the people determined through the Constitution the manner in which they would be governed. They also stipulated the manner in which certain institutions would be transited into the new constitutional order in compliance with the expectations of the people.

79. He submitted that the proper meaning and import of Article 167(1) of the Constitution, cannot be realized without an understanding of Section 31 of the Sixth Schedule to the Constitution. He asserted that Section 31 (1) is a general provision and is qualified by the subsequent provisions. He particularly stressed that the phrase, 'Unless this schedule provides otherwise' necessitates a reference to the subsequent sub-sections and other sections of the Schedule for a comprehensive understanding of Section 31.

80. He opined that the words 'they shall continue to hold or act in office' meant that a judge's term in office would not be terminated by the Constitution while the words 'under this Constitution for the unexpired period' meant that they continue holding office under the terms of the Constitution as if appointed under the Constitution 2010. That under Section 31(2), the phrase 'shall hold office so far as is consistent with this Constitution' meant that all rights and obligations of the judges are now under the new dispensation including the tenure of office. Further the phrase 'shall continue to hold or act in that office as if appointed to that position under this Constitution' means that they hold office under the terms of the new Constitution.

81. It is his position that the Court in resolving the apparent conflict between Article 167(1) and Section 31(1) of the Sixth Schedule, ought to invoke the doctrine of purposive interpretation of the two provisions. In that regard he asserts firstly, the purpose of the transitional provision is to ensure a smooth exit from the former Constitution to the new order without undermining the precepts of the new order. That, on that basis, the Constitution provided for vetting to determine the suitability of all judges and magistrates who were in office on the effective date, to continue serving in accordance with the values and principles set out in Articles 10 and 159 of the Constitution.

82. Secondly, that the contest on the retirement age of judges is between Article 167(1) of the Constitution which stipulates that a judge shall retire from office upon attaining the age of 70 years, and Section 9 of the Judicature Act, which stipulated that a judge appointed under Section 62(2) of the former constitution was to retire at 74 years. He contended that Article 2(1) of the Constitution proclaims the supremacy of the Constitution and therefore the Constitution supersedes the Judicature Act. It therefore follows that the only valid provision for the determination of the retirement age of judges is Article 167(1) of the Constitution which sets it at 70 years.

83. As to the place of security of tenure, he stated that it secures the stability of the individual judge and assures the purpose of their independence in exercise of his functions under the law. Recognizing that the Petitioner is entitled to security of tenure, he submitted that security of tenure of judges who served under the former Constitution can be considered on three fronts. First, the legitimate expectation of ordinary employees and State office holders. Second, from a purely contractual lens where a contract can be frustrated through change of law. Third, following the promulgation of the Constitution, a new normative framework dissolved prior rights and entitlements under the former Constitution and ordained a different charter.

84. Article 167(1) of the Constitution, in his view, repealed and replaced the provisions of Section 62(3) of the former Constitution. It is his case therefore that a repealed constitutional order cannot exist alongside a new normative framework. Consequently, any rights and entitlements that may be claimed under the old order must be strictly construed to be subservient to the public interest as ordained under the new constitutional order. On that submission he referred the Court to the United States case of Stuart v. Laird (1803) 5 US (I Cranch) 299.

85. Mr. Nyaundi concluded by stating that the retirement age for all judges is 70 years. He urged that the transitional provisions of the Constitution be read in harmony with the other provisions of the Constitution.

THE PETITIONER'S RESPONSE

86. In response, Mr. Kilukumi learned counsel on behalf of the Petitioner submitted that the key question for determination in this Petition is whether the retirement age of judges in office on the effective date is 70 or 74 years, and the said issue was not dealt with by the Supreme Court in the Nicholas Salat case (supra). He submitted that the Supreme Court had only decided that the JSC did not have power to determine whether and when judges would sit or not sit, which finding was binding on this Court.

87. On the transitional and consequential provisions, he submitted that these are not sunset provisions as submitted by Mr. Ahmednasir. He asserted that those provisions were consequent upon the repeal of the former Constitution. That Section 31(1) applies to judges transiting from the former Constitution to the Constitution 2010, and it has not lapsed. He claimed that Section 31(1) of the Sixth Schedule would cease to apply when the last judge who was in office on the effective date attained 74 years. He stated that whenever the term 'unexpired' had been used in the Sixth Schedule, it was representing the period of outstanding service for different office holders.

88. He further stated that Article 167(1) applies to the judges appointed after the effective date, because it has a prospective application. Section 31(1) of the Sixth Schedule preserved the unexpired term of judges in office on the effective date under the repealed constitution. Further, that Section 31(2) applies to 'public officers' other than judges because judges are 'State Officers'.

89. Lastly, he asserted that the retirement age is uniform for all judges, irrespective of the court they sit in because neither the Constitution nor the repealed constitution had made any distinction in that regard.

ANALYSIS AND DETERMINATION

90. Having heard the parties' counsel and having considered the material availed to us at the hearing, we are of the view that the issues for determination are as stated below:

1. What is the effect of the Supreme Court decision in the case of Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others, Petition No. 23 of 2014 (Salat case) on this Petition?

2. What is the historical background, context to and character of the Kenyan Constitution; and what are the applicable principles of its interpretation?

3. Whether the Respondents' actions violated the Petitioner's constitutional rights.

4. Whether the JSC's Memo of 27th March, 2014 was in breach of the Petitioners' legitimate expectation to retire at the age of seventy four (74) years as conveyed by the circular dated 24th May, 2011.

5. Whether the JSC has any mandate or role in the regulation of sittings of Judges; and whether the advertisement of a vacancy in the office of Deputy Chief Justice was lawful?

6. The nature and function of transitional and consequential provisions in the Constitution.

7. What is the retirement age of Judges who were in office prior to the promulgation of the Constitution, 2010?

8. What are the orders as to Costs?

WHAT IS THE EFFECT OF THE SUPREME COURT DECISION IN THE CASE OF NICHOLAS KIPTOO ARAP KORIR SALAT v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS PETITION NO. 23 OF 2014 (SALAT CASE) ON THIS PETITION?

91. Arguments on the Salat case were only orally presented as the judgment of the Supreme Court was delivered a few days to the hearing of this Petition. We note at the outset that the advocates devoted a good deal of their oral submissions to that decision. It was the submission of Senior Counsel Dr. Khaminwa that a decision on the retirement age of judges had been made by the Supreme Court in that case. He opined that the aforesaid decision was binding on this Court.

92. In response, Mr. Ahmednasir submitted that the said decision is absurd, and for the Supreme Court to transgress into a matter pending before the High Court was an abuse of the court process. At the very least, he submitted, the judgment was per incuriam and should be treated as obiter dicta and not an authority binding on this Court, as suggested by counsel for Kituo Cha Sheria.

93. The issue emerging from the submissions is whether the retirement age of judges who were in office on the effective date has been determined by the Supreme Court, and as a corollary, whether that decision is binding on this Court.

94. How then did the question of the retirement age of judges become an issue in an election dispute before the Supreme Court? The answer is provided in the portion of the judgment titled: "E. CONTRETEMPS AFFLICTING JUDGMENT-DELIVERY: APPREHENSIONS OF COUNSEL" found at paragraphs 65 to 77 which contain the judgment of the majority on the question of the retirement age, with Chief Justice Mutunga dissenting.

95. We note from the judgment of the Supreme Court that prior to the delivery of their judgment, the judges hearing the election dispute came across two letters. One was addressed to the Hon. the Chief Justice and President of the Supreme Court, and the other to the Registrar of the Supreme Court. The letters were authored by Mr. Koceyo who was appearing for the appellant therein. Through those letters counsel raised two issues which he thought were likely to affect the validity of the imminent Court judgment.

96. The first concern raised in the letters touched on "the legal ramifications that may ensue, should the Judgement be delivered after the lapse of 60 days as contained in Order 21 of the Civil Procedure Rules." The second apprehension was stated to be the "fact that it is now in the public domain that the Judicial Service Commission [JSC] has directed Judges over 70 years [of age] not to preside over matters." We presume that the second concern was directed at Justice Dr Phillip Tunoi, SCJ who is aged over 70 years, and not the Petitioner herein who will attain the age of 70 years in January, 2016.

97. The Supreme Court judges found that the correspondence from the advocate touched on the following fundamental constitutional issues:

> " (i) the citizen's guaranteed right "to have any dispute that can be resolved by the application of law", "decided in a fair and public hearing before a court" [The Constitution of Kenya, 2010, Article 50(1)];
>
> (ii) the trust held by the Judiciary as custodian of the people's sovereign power [The Constitution of Kenya, 2010, Article 1(3)]; and
>
> (iii) the right and obligation of a Judge who is over 70 years of age and still in office, to preside over matters in Court – in view of the directive of the Judicial Service Commission."

98. Invoking the doctrine of judicial notice in respect of the said letters the learned judges proceeded to make the following finding at paragraph 76:

> " (76) This Court takes the position that the security of tenure for all Judges under the Constitution of Kenya, 2010 is sacrosanct, and is not amenable to variation by any person or agency, such as the Judicial Service Commission which has no supervisory power over Judges in the conduct of their judicial mandate. We find and hold that the Judicial Service Commission lacks competence to direct or determine how, or when, a Judge in any of the Superior Courts may perform his or her judicial duty, or when he or she may or may not sit in Court. Any direction contrary to these principles, consequently, would be contrary to the terms of the Constitution which unequivocally safeguards the independence of Judges. It follows that the said directive concerning Judges of the Superior Courts, issued by the Judicial Service Commission, is a nullity in law."

99. The Supreme Court majority wrapped up their decision by concluding at paragraph 77 as follows:

> "(77) Responding to the issues raised by learned counsel, as regards obligations vested in this Supreme Court [The Supreme Court Act, 2011 (Act No. 7 of 2011), Section 3(a) and (b)], we hereby signal that the Court's Bench, as constituted by the learned Justices who rendered service in this case, indeed bears the constitutional mandate to hear and determine the cause in hand – notwithstanding the apprehensions of learned counsel. Accordingly, we hereby conclude the Court's determination with the Orders set out in paragraph 112 of this Judgment."

100. It must be remembered that the appellant's counsel before the Supreme Court had raised a query about the constitutionality of the Supreme Court bench, which concerns the Court deemed appropriate to address.

101. It would appear that at the time of the judgment, the JSC had issued a directive to judges aged over 70 years directing them not to preside over any matters. We note from the proceedings in Nairobi High Court Constitutional Petition No. 244 of 2014, Justice Phillip Tunoi and another v The Judicial Service Commission and another, of which we are seized, that there was in existence a valid conservatory order issued by our brother Odunga, J. The orders restrained the JSC from taking any steps towards the retirement of Tunoi, SCJ and Onyancha, J, pending the hearing and determination of their Petition. No doubt the Supreme Court, being the apex Court in the land, was irked by the JSC's action, which they would not countenance.

102. In our reading, the effect of the Supreme Court judgment as relates to the query was, first, to restate the sanctity of tenure of judges: it determined that such tenure is not amenable to variation by any person or agency; second, it held that the JSC lacks competence to direct or determine the sittings of judges or how they exercise their judicial mandate; and third it determined that the directive of JSC on sittings of judges was a nullity. The Court did not, however, touch upon or determine the question of the retirement age of judges. That, we note, is the key live issue before us.

103. It follows therefore that, in this case, nothing turns on whether or not the disputed portion of the judgment of the Supreme Court, was per incuriam or obiter dicta.

104. We now turn to consider the merits of the issues raised in this petition. In their submissions the Respondents have argued that a constitution looks backward and forward in a bid to re-engineer the social order and address past injustices. We were referred to the CCK case in that regard.

105. On our part, we consider it apposite to examine three related issues; namely the historical background and context of the 2010 Constitution, the character of the Constitution and the principles applicable in its interpretation.

WHAT IS THE HISTORICAL BACKGROUND & CONTEXT TO, AND CHARACTER OF THE KENYAN CONSTITUTION; AND WHAT ARE THE APPLICABLE PRINCIPLES OF ITS INTERPRETATION?

The historical background and context

106. Every nation has epochs of tranquility and prosperity; war and discord and attendant decline; reconciliation and rebirth. For Kenya the 1990s were marked by the struggle and campaign for constitutional reform. The 1963 Independence Constitution had undergone several amendments including the introduction of multiparty politics in 1991. Several efforts to bring about a more

democratic Constitution had been made culminating principally in the three draft Constitutions: two Constitution of Kenya Review Commission (CKRC) Drafts, namely, Ghai and Bomas, and the Proposed New Constitution (PNC Wako Draft). However, the constitutional process had all but stalled by 2007, the year of the last general election under the repealed Constitution.

107. The results of the General Elections were disputed by the losing political side. This dispute resulted in hitherto unseen breakdown of law and order. In scenes reminiscent of civil war, neighbour turned against neighbour. In the hotspot areas of the ensuing violence, hundreds of thousands of "outsiders" were evicted from their homes. Slightly over 1,000 people were killed and over 600,000 others were displaced in violent out-breaks all over the country.

108. It is ironic that this spectre of violence and breakdown of law and order served to reinvigorate the stalled constitutional process, ushering in what the Committee of Experts Report of October, 2010, (COE 2010) refers to as a "constitutional moment". Almost overnight, the need for peace and reconciliation rendered legal and constitutional changes inevitable and urgent. The country had to transit from what was seen as an authoritarian system of government; from conflict to peace; from a fragmented nation to unity; to address the ugly past and aspire to a new future of hope as one people. The Committee of Experts was instituted to conduct a process of harmonisation of the existing drafts of the constitution and to spearhead the constitutional process. The Constitution of Kenya Review Act of 2008 would govern the process.

109. In his paper, the Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel, Aeyal M. Gross (Stanford Journal of Int. Law 47 (2004)) argues that:

> " The need to be both backward-looking forward-looking is typical of periods of transition and political change ... a Constitution may play a significant role in furthering transitional justice by addressing five critical issues:

1. constitution – making as part of the reconciliation process;

2. defining the nature of the state;

3. including a broad equality provision, addressing the past, history, and collective memory;

4. defining property and land rights; and

5. defining social and economic rights"

110. The author goes on to contend that the South African constitution making process fits that bill. He continues:

> " The law plays an exceptional role during transitions ..... is caught between the past and future, between retrospective and prospective, between the individual and the collective."

111. Here at home, the Committee of Experts Interim Report, 2009 (COE 2009) observes at paragraph 2.9:

> " Globally most recent constitutions have been made in the aftermath of civil conflicts and, as far as the situation in Kenya is concerned, an important task of the (constitution making) process is to promote reconciliation and national unity."

112. At the end of the process Kenyans ratified the 2010 Constitution. We think that even on a cursory comparison between the repealed constitution and the new Constitution, that the latter, like the South African Constitution does manifest a serious commitment to change in fundamental respects.

113. Insofar as the Judiciary was concerned, the preliminary report of the COE 2009 dated 17th November, 2009 states at para 6.4.4:

> " Submissions to the Committee of Experts on the Judiciary were virtually unanimous on one point: the Judiciary must be reformed."

114. The Report further states that the CoE received various submissions on how this should be done. The public submissions were 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 requested to take a new oath and to undergo a 'vetting' process.

115. In their final report dated 11th October, 2010, (COE 2010) the CoE stated that this matter was revisited under the heading: "(iii) Transitional provisions on the Judiciary". After setting out the views of the public regarding the transitional provisions on the Judiciary, the Committee observed:

> " The Judiciary is the third organ of the government. Unlike some members of the executive and the members of the legislature, members of the Judiciary (i.e. judges) are not elected and enjoy security of tenure. While the provisions concerning elections would ensure that the constitutional office holders who belong to the other organs of government could be transited effectively through the electoral process, which will actually "vet" their suitability under the new constitution - no such mechanism exists for judges and other appointive constitutional office holders
>
> There was therefore also need for an appropriate transition mechanism for judges. The Final Report of the Constitution of Kenya Review Commission stated that "serious allegations were made against the Judiciary, including inefficiency, incompetence and corruption." Furthermore the need for Judicial Reform was identified as one of the long term issues causing conflict in Agenda Four of the Kenya National Dialogue and Reconciliation in February 2008. The Judiciary itself acknowledged this need for reform and established a Task force on Judicial Reform, the report of which was published in August 2009 and informed the CoE's proposals.
>
> Like all the other forms of institutional reform that have a constitutional dimension, judicial reform entailed structural reform as well as mechanisms that would enable and require individual officeholders to comply with the provisions for office within the new constitutional order. Given the public's expressed concerns about the poor state of the judicial system, there was need that these concerns be addressed in a way that restored public confidence in the administration of justice. Not providing for a transitional mechanism for the judiciary would have further eroded the public's confidence in the justice system.
>
> Yet the means of restoring public confidence must also not undermine the Judiciary as an institution. The CoE considered the suggestion of the "clean slate" approach but were of the opinion that like the "radical surgery" it ran the risk of undermining the Judiciary and also would condemn wholesale all members of the Judiciary. The CoE held the view that the vetting procedure allowed those members who wanted to continue serving to be eligible for reappointment whilst those who preferred not to could choose the option of resigning with their appropriate benefits. The transitional provisions in the RHDC also provided that the processes for vetting be in keeping with international principles. Accordingly, the

Committee of Experts retained the framework of the Harmonized Draft Constitution in the RHDC with some minor modifications to the detail."

116. The foregoing is the background to the provisions relating to the Judiciary and the respective transitional and consequential provisions in the 2010 Constitution.

Of Constitutions Generally

117. The Constitution is undeniably "the supreme law of the land [in] that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn" (Rafiu Rabiu v. the State [1981] 2 NCLR, 293, pg 326.

118. This view is also taken by Melvin L.M. Mbao in an article entitled: "The Politics of Constitution – making in Zambia: where does the Constituent Power Lie?" a contribution to the book "Fostering Constitutionalism in Africa" edited by Charles Fombad & Christina Murray. The author makes reference to the Mun'gomba Constitutional Commission Review Report (2005) 493 which observed that:

> " A constitution is not an ordinary piece of legislation. It is the people's sovereign and inalienable right to determine the forms of governance for their country by giving to themselves a constitution of their own making".

119. Similarly, in the case of S. v. Makwanyane & Others [1995] ZACC3 at paragraph 267 the Chief Justice of South Africa, Justice Ismail Mohamed observed:

> " ....all constitutions seek to articulate with differing degrees of intensity and detail, the shared aspirations of a nation, the values which bind its people and which discipline its government and its national institutions, the national ethos which defines and regulates that exercise and moral and ethical direction which that nation has identified in its future."

120. Emphasising the function of a constitution the Supreme Court of Nigeria in the Rafiu Rabiu case stated as follows:

> " The function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities, must involve, ours being a plural, dynamic society, and therefore, technical rules of interpretation of statutes are to some extent inadmissible in a way as to defeat the principles of government enshrined in the Constitution."

121. In the same vein, the Supreme Court of Kenya had occasion to consider the different styles and expressions in constitutions for indeed they are as varied as the constitutions themselves. In the Advisory Opinion No. 2 of 2012, In the matter of the Principle of Gender Representation in the National Assembly and the Senate the Court observed:

> "(54) A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify value systems, an ethos, a culture, or a political

environment within which the citizens aspire to conduct their affairs and to interact among themselves and their public institutions."

122. As the basic law then, the Constitution organizes state power, creates structures and institutions, sets the relationships between the people themselves and the organs of state, engenders change, and espouses the cherished ideals of the nation.

123. By comparing the Constitution and other law in a country, a clearer understanding of the standing and role of the Constitution can be developed. Saunders Cheryl in her article "Towards a Global Constitutional Gene Pool" [2009] UMelb LRS 25 (available online at austlii.edu.au), identifies key distinctions between constitutions and ordinary law as follows:

> " The first and most obvious distinction between Constitutions and other law is the close identification of Constitutions with the states or other polities to which they relate. Each state has a Constitution of its own, whether embodied in a single formal document or not. A Constitution may be regarded as constituting or reconstituting the state. In any event, it typically is the source of legitimacy for the authority of the organs of the state. The Constitution derives its own legitimacy from theories about the locus of sovereignty within the state. On any view, therefore, there are at least as many Constitutions as there are states; and no two state Constitutions are the same.
>
> A second point of distinction concerns the roles of a Constitution. Constitutions typically organise the power of the state; create its institutions; structure fundamental aspects of the relationship between the state and its people and sometimes between the people inter se; provide the basis on which to identify the validity of other state law. In these respects, Constitutions represent a form of positive law, which is quintessentially state law, although differing in important respects from ordinary state law.
>
> But Constitutions perform other roles in the polity as well. Almost every Constitution has some kind of symbolic value, for which it may deliberately have been designed, although symbolic status may also inadvertently be acquired. In this connection, a Constitution may be used to reinforce certain goals of the state of which national unity, inter-communal respect, peaceful co-existence and national self-determination are possible examples. A Constitution may play, or be perceived to play an expressivist role within a state, reflecting its history and culture. All or parts of a Constitution may be aspirational, particularly during periods of transition or transformation. In some cases, all or part of a Constitution may be cosmetic, with a view to influencing perception rather than action.
>
> Third, Constitutions typically lie somewhere between politics and positive law. In the early 21st century, almost all Constitutions are legal instruments, representing positive law in whole or in large part. Most Constitutions also are accepted as a type of higher law, which is given effect through a form of judicial review. But in the final analysis, the original authority for the Constitution of a state depends on factors that lie beyond law and the ongoing effectiveness of the Constitution as superior law depends on the acquiescence of powerful political actors. Moreover the nature of a Constitution is such that it is likely to be supplemented significantly, not only by a variety of "legal formants" but by political practices and understandings of various kinds. The extent of dependence on the latter varies, with the United Kingdom as an extreme case.
>
> Most contemporary Constitutions are somewhat more contrived, in the sense that they are deliberately made at a particular moment in time, drawing on other constitutional models. A Constitution is likely to be the product of an historical moment, or a succession of such

moments. Constitutions tend to be written with past, as well as present problems in mind. All else being equal, constitutional choices are likely to show evidence of path-dependency. Constitutions are written to last, whether or not they actually do so. A Constitution that is long-lived is likely to be encrusted with historical experience that may be critical to an understanding of it. Such a Constitution may well have developed organic characteristics of its own, of which the interdependence of its component parts is a common sign.

One final, potentially relevant point of distinction between constitutional and private law concerns the relationship between constitutional and legal systems. There is a degree of correlation between the two. Most states with a common law legal system have constitutional arrangements that are influenced by one or other of the common law constitutional traditions of the United Kingdom and the United States or, often, by some composite of the two." (Emphasis added)

The Character of the Constitution of Kenya 2010

124. In understanding the character of our Constitution, there can be no better place to start than the expansive preamble of the Constitution which states:

> " PREAMBLE
>
> We, the people of Kenya—
>
> ACKNOWLEDGING the supremacy of the Almighty God of all creation:
>
> HONOURING those who heroically struggled to bring freedom and justice to our land:
>
> PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:
>
> .....
>
> .....
>
> RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:
>
> EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:
>
> ADOPT, ENACT and give this Constitution to ourselves and to our future generations."

125. The Kenyan Constitution of 2010 has variously been hailed as transformative and radical in light of its progressive text and tenor. This is what the High Court of Kenya remarked in the case of Jeanne W. Gacheche & 5 Others v. The Judges and Magistrates Vetting Board JR Misc. Application No. 295 of 2012:

> " It is easy to understand that the new Constitution adopted by Kenyans in 2010 is a reformist Constitution and a radical departure from the old constitutional dispensation in many ways, not the least of which is the recognition of the sovereignty of the people of Kenya and the identification, preservation and development of human rights, both at the individual level and at the communal level."

128. Distinguishing the Constitution of Kenya 2010 from the conventional "liberal" minimalist constitutions of the past which were principally concerned with the legitimacy and control of public

power, the Supreme Court of Kenya in the Speaker of the Senate and Another v. The Attorney General & 4 Others In the Advisory Opinion No. 2 of 2013 observed:

> "Kenya's Constitution ... is a transformative charter ... the avowed goal of today's Constitution is to institute social change and reforms, through values such as social justice, equality, devolution, human rights, rule of law, freedoms and democracy."

127. A key feature of the 2010 Constitution is the exalted status of "the People" and the express recognition of their sovereign power. Thus Article 1 articulates our theory on "the locus of sovereignty of the state" of Kenya (see Saunders, supra). It states:

> "All sovereign power belongs to the people of Kenya and should be exercised only in accordance with this Constitution."

Additionally, the supremacy of the Constitution as articulated in Article 2 declares it as binding on all persons, State organs, not amenable to challenge on validity, and having force above all other laws.

128. A further defining feature of the Constitution is found in the provision on national values and principles of governance in Article 10 (2), which states:

> "(2) The national values and principles of governance include—
>
> (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
>
> (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
>
> (c) good governance, integrity, transparency and accountability; and
>
> (d) sustainable development."

126. Undoubtedly, the crowning feature of the 2010 Constitution is the expansive Chapter on the Bill of Rights (Chapter Five) with specific mechanisms for enforcement. On this aspect alone, the repealed Constitution is a pale shadow of the new Constitution. As a direct consequence of this Constitution, multiple statutes have been enacted to give effect to the Bill of Rights and the Constitution generally. This development has in many respects totally overhauled and transformed approaches to geo-politics, the legal system and the socio-economic environment.

130. Other jurisdictions have equally transformative constitutions. A case in point is South Africa, which upon abandoning the apartheid system adopted a transformative Constitution. In the case of S v. Makwanyane (supra) the court stated:

> "The South African Constitution [...] represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to democratic, universalistic, caring and inspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic." (Emphasis added)

131. The character of the South African Constitution was extensively considered in the case of Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism & Others 2004 (7) BCLR 687 CC. At Para 73 Ngcobo, J stated:

> " South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed "to create a new order based on equality in which there is 'equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms'. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognizes the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms...."

132. South Africa had been long characterised by prolonged periods of racial division and exclusion with the State viewed as belonging to only one racial group – thus the necessity to emphasise in the new Constitution, as in Kenya's, that South Africa belonged to all its citizens and that all were equal.

133. The preambles and equality clauses in both Kenya's and South Africa's constitutions cross resonate in the details. The South African Constitution of 1997 was preceded by an interim Constitution which contained constitutional principles to direct the future framework of the new Constitution in the future. The principles could not be amended and had a higher status than the interim Constitution. In addition, there were other facilitatory arrangements.

134. In the same way, the Constitution of Kenya Review Act (as amended) contained enduring principles to guide the constitutional review, as follows:

> " 4. The object and purpose of the review of the Constitution is to secure provisions therein—
>
> (a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
>
> (b) establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action;
>
> (c) recognizing and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the
> Government and its officers to the people of Kenya;
>
> (d) promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
>
> (e) respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;

(f) .... establishment of an equitable frame-work for economic growth and equitable access to national resources;

....

(h) strengthening national integration and unity;

....

(k) committing Kenyans to peaceful resolution of national issues through dialogue and consensus."

135. Other provisions such as Section 5 and 6 contained principles to guide review organs and for the adoption of the Constitution by a referendum. The will of the people and their participation takes a central place in the principles. It can therefore be seen that the historical context in the two countries played an important role in shaping the constitutions in place today: "the backward-looking and forward-looking" nature of transitional periods as described by Aeyal (supra).

136. Citing Ruti G. Teitel's Transitional Justice (2000), Aeyal further states:

> " From a transitional perspective, what is considered constitutionally just is contextual and contingent, relating to the attempt to transform legacies of past injustices."

He continues:

> " Constitutions thus play an important role in shaping political change, and.... If one accepts that the usual role of a Constitution is entrenchment, the outcome will be a status quo constitutionalism that views current distribution of rights and entitlements as fixed and worthy of constitutional protection.... my contention is that constitutions must always engage simultaneously in entrenchment and dis-entrenchment...."

137. A historical approach to the Constitution is underscored by the decision of the Supreme Court as enunciated in the dicta of Mutunga, CJ, in the JMVB case (supra) at para 212 where he stated:

> " During the process of formulating the new constitution, it became clear that the public's confidence in the judiciary was severely eroded. The Kenyan people wanted all sitting Judges and Magistrates who were in office on or before 27th August, 2010 retired. The public's concerns had to be addressed, and a compromise was reached, which called for the vetting of the sitting Judges and Magistrates....compromises of this kind have a tendency to create penumbras...In the Communications Commission of Kenya Case, the Court recalled its decision in Speaker of the Senate and Another vs. Attorney General & 4 others Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR where it had stated that:
>
> 'Constitution making does not end with promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitutions borne out of long-drawn compromises, such as ours, tends to create.' "

138. Emphasizing the importance of the historical context in giving meaning to the Constitution the Chief Justice continued in the JMVB Case:

> " Although the High Court and the majority in the Court of Appeal convincingly argued, relying on jurisprudence from various jurisdictions, that the High Court has supervisory

jurisdiction over the decisions of the Vetting Board, they had not appreciated the unique historical context in which Kenya's Constitution should be interpreted." (Emphasis added).

139. The historical context and respect for the will of the people as reflected in the Constitution occupies a special place in many judgments of the Supreme Court of Kenya. From the foregoing, it is evident that the historical context of the 2010 Constitution is critically relevant to a proper adjudication of the matters before us.

140. Clearly, there are other jurisdictions whose constitutional jurisprudence inter alia adopts a historical approach. We are thus unable to adopt a clinical approach based solely on the text as suggested by the Petitioner, thereby shunting aside the historical context to a peripheral position. Of necessity, the "backward and forward-looking" process of creating a new Constitution gave birth to a unique and transformative Constitution that was the end product of that process.

Principles of Constitutional Interpretation

141. Undoubtedly, this case will turn on the holistic interpretation this Court assigns to the relevant substantive constitutional provisions and the transitional clauses contained in the Sixth Schedule. Before dealing with the parties' submissions on this score we wish to set out generally what we consider to be principles of interpretation as are relevant to the matter before us.

142. In so far as the Kenya Constitution is concerned the overarching principles are encapsulated in Article 259 which provides:

"(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2) .....

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things –

(4)...."

143. In addition all State organs, State officers, public officers and all persons are bound by the national values and principles of governance whenever they apply or interpret the Constitution and any law as required under Article 10 (2), as earlier stated.

144. It follows that any interpretational approach no matter how esoteric and esteemed its source, must pass muster the principles set out in Articles 259 and 10 of the Constitution.

145. We believe these principles and the legal precedent set by our courts form a practical sifting mechanism for our courts while engaging in comparative constitutionalism.

146. Saunders Cheryl (supra) identifies the challenges inherent in comparative constitutional law. She states:

"Much of the discourse of comparative constitutional law focuses on the established constitutional systems in North America and Europe and a few outrider states with similar

arrangements, based on similar assumptions. These are the progenitors of many of the conceptions of world constitutionalism. They are deeply interesting subjects of comparative study in their own right .... One consequence of the concentration on North America and Europe is that constitutional law and practice in other regions where the majority of states are located, is not factored into mainstream comparative constitutional law and is, in effect marginalized. Marginalisation may take a variety of forms: overlooking the constitutional experience of particular state and regions, assuming their effective similarity with western constitutional systems; reserving them for specialist study by those with anthropological or sociological interest and skills. To a greater and lesser degree, all other regions are affected in one or more of these ways; Africa, South America, Scandinavia, the Middle East, and the Pacific."

147. Concerning claims that constitutions are increasingly globalising in form and substance, resulting in convergence on such aspects as the rule of law, democracy, social security and the organisation of territory, Saunders states that Constitutions are not written in a vacuum; and urges caution by noting:

> "...A degree of convergence of constitutional concepts, institutions and norms is the inevitable result. But convergence in form does not necessarily mean convergence in understanding, in values and priorities, or in the operation of constitutional arrangements in practice in the face of a plethora of local contextual factors. There may be convergence in these respects as well in consequence of, for example, inter-jurisdictional borrowing by judges at the interpretive stage...." (Emphasis added)

148. She further observes that:

> "Inevitably, convergence is patchy: most pronounced although far from complete, in relation to rights, less reliable in relation to constitutional features of a Constitution. As in earlier times, it remains true now that apparent similarity may mask underlying difference. Be they ever so similar in design, constitutional arrangements are likely to have different effects in different cultural contexts and in states in different stages of constitutional development. It follows that it cannot be assumed that principles and institutions adopted by one state will operate precisely in the same way ... in the interconnected setting of a constitution moreover, adopted institutions will be affected by the rest of the Constitution, of which they are likely gradually to adopt. The challenge of comparison is further exacerbated by the generality with which many key constitutional concepts are expressed, leaving considerable scope for varied understandings." (Emphasis added)

149. A similar caution is echoed by Mutunga CJ exhorting courts to develop our own local jurisprudence appropriately fertilized by suitable comparable foreign jurisprudence, in Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 Others where he states:

> "In the development and growth of our jurisprudence, Commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the U.S. yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country. A negative side of the mechanistic approach to precedent, is that it tends to produce a mind-set: "If we have not done it before, why should we do it now?" The Constitution does not countenance such a pre-determined approach. All the cases cited in this matter were subjected to an inquiry into their respective contexts. We

sought to find out whether they are still good law, or have been overturned. We did all this because our progressive needs, under the Constitution, are different; and there is the need to bear in mind that our Constitution remains always, as our brother Judge Ojwang has emphasized, a transformative charter of good governance.

While our jurisprudence should benefit from the strengths of foreign jurisprudence, it must at the same time obviate the weaknesses of such jurisprudence, so that ours is suitably enriched, as decreed by the Supreme Court Act."

150. In the Advisory Opinion No. 2 of 2012, in The Matter of thePrinciple of Gender Representation in the National Assembly and the Senate (supra), the Supreme Court stated that the Kenyan Constitution fuses express safeguards and public commitment with declarations of general principles and statements of policy, and continues:

> "…. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm….". (Emphasis added)

151. As earlier stated, a constitution differs in context, content and purpose from an ordinary statute. Therefore, certain technical rules of interpretation of statutes may not be applicable to constitutional interpretation: see Rafiu Rabiu case(supra). Unlike a mere statute, the Constitution does not mechanically define government structure and relations between the government and the governed, as per Mohamed, A.J in S. vs. Acheson (1991) 2SA 805. Rather the Constitution is a: "mirror reflecting the national 'soul', the ….ideals and aspirations of a nation, the articulation of the values that bind its people and discipline its government". In Ndyanabo vs. Attorney General [2001] EA 485 the Court of Appeal in Tanzania stated that the interpretation of a Constitution must be guided by the basic principle that it "was a living instrument with a soul and life of its own."

152. In the JMVB Case, the Supreme Court (Judgment of Mutunga, CJ) restated the guidelines for the construction and interpretation of the 2010 constitution as follows:

a. No Constitutional provision is "unconstitutional"

b. The historical context is relevant to the accurate interpretation of the Constitution. In his words, Mutunga, CJ stated:

"Thus in interpreting the Constitution, courts must take cognisance of Kenya's unique historical context."

The Chief Justice remarked on the dissenting opinions of Murgor & Sichale, JJA in Centre For Human Rights v JMVB and Others the Court of Appeal Nairobi Civil Appeal No. 308 of 2012 as follows:

> "I adopt the respective dissenting opinions of the learned Appellate Judges … which present persuasive, authoritative textual and historical arguments to support the conclusion that the

decisions of the Judges & Magistrates Vetting Board (created in accordance with section 23 Sixth Schedule) are not subject to review by the High Court ... the majority in the Court of Appeal ... had not appreciated the unique historical context in which Kenya's Constitution should be interpreted, and relied on foreign jurisprudence. The history of the country must be considered and "a stereotyped recourse to interpretive rules of common law, statutes of foreign cases can subvert relevant contextual approaches" See:(Communication Commission of Kenya & 5 Others v. Royal Media Services Ltd. & 5 Others [2014] eKLR (para 137, 356 & 358).

c. That the Constitution ought to be interpreted holistically In context and "in its spirit" See: CCK case. In the Matter of the Kenya National Human Rights Commission, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR, the Supreme Court had stated at paragraph [26]:

"... But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances."

Further citing, the Ugandan case of Tinyefunza v. Attorney General Constitutional Appeal No. 1 of 1997, [1997] UGCC3 the Supreme Court articulated the harmonious reading of the Constitution as stated therein:

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

153. Similar principles for the interpretation of the Constitution were articulated by the Constitutional Court of Uganda in Advocates Coalition for Development of Environment & Others v. Attorney General & Another [2014] 3 EA where it was stated inter alia that:

"

"i. The widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters. In certain context, a liberal interpretation of the constitutional provision may be called for.

ii. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore, should be given a dynamic progressive and liberal flexible interpretation, keeping in mind the ideals of the people and their social economic and political-cultural values so as to extend fully the benefit of the right to those it is intended for. (South Dakota vs. North Carolina, 192, US 2681940 LED 448.)

iii....

iv. No one provision of the Constitution is to be segregated from the others and be considered alone, but, all provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.

v. Judicial power is derived from the people and shall be exercised by courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people and courts shall administer substantive justice without undue regard to technicalities (Article 126(1) and (2) (e) of the Constitution of Uganda of Uganda, 1995.)

vi. The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent or in contravention of the Constitution is null and void to the extent of the inconsistency. (Article 2(1) and (2) of the Uganda Constitution, 1995)

vii. Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity. See also the case of Uganda Law Society vs. Attorney General Constitutional."

154. The Court also referred to the case of R. v. Elmann [1969] 1 EA 357 where it was stated:

> " We do not deny that in certain contexts a liberal interpretation of the Constitution may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is where the words used are precise and un-ambiguous. They are construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put on the words."

155. We conclude this section by stating that we stand guided by the Supreme Court's repeated exhortations to adopt holistic interpretation of the Constitution. This being the "contextual analysis of a constitutional provision, alongside other provisions to maintain a rational explicationof what the Constitution must be taken to mean in light of its history, of the issues in dispute and of prevailing circumstances" as opposed to: "extrapolation of discrete provisions into each other, so as to arrive at a desired result" (para 488); See in the matter of the Kenya National Human Rights Commission Supreme Court Advisory opinion No. 1 of 2012; 2014 (eKLR) para 26.

WHETHERTHE RESPONDENTS' ACTIONS VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHT

156. It is now established that where fundamental rights and freedoms are alleged to have been violated, a party who seeks to invoke the court's jurisdiction under Article 22, so as to enforce the Bill of Rights, must identify the violated right and corresponding provisions, and demonstrate how they are violated in relation to him. See Anarita Karimi Njeru v. R [1979 KLR 261; Matiba v. AG, High Court Misc. Appl. 666/1990.

157. We will now deal with the following alleged breaches in respect of rights to: fair administrative action; equality and freedom from discrimination; protection of the right to property; and fair labour practices.

158. It was Mr. Oraro's submission that the Respondents' actions in issuing the retirement notice dated 1st September, 2015 violated the Petitioner's rights to Fair Administrative Action, Equality and Freedom from Discrimination and the Right to Property. We shall determine each of the alleged violation of fundamental rights and freedoms separately.

Fair Administrative Action

159. Mr. Oraro's contended that the JSC in retracting its earlier position as contained in the Circular, namely, that the Petitioner would retire at 74 years violated her right to fair administrative action as provided under Article 47 of the Constitution. He claimed that it was unconstitutional for the JSC to rescind its earlier position without affording the Petitioner an opportunity to be heard and to make representations prior to the JSC reaching its second decision.

160. In response to the above submission, Mr. Ahmednasir submitted that the JSC is not barred from rectifying its original position upon making a discovery that it was erroneous and in violation of the Constitution.

161. Article 47 of the Constitution provides for the right to fair administrative action in the following terms:

> "
>
> "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action
>
> (3)...."

162. It has been held that Article 47 was intended to subject administrative processes to constitutional discipline, hence relief for administrative grievances related to fair administrative action, was no longer confined solely to the realm of common law. See Dry Associates Limited v Capital Markets Authority & Another H C Petition No. 328 of 2011.

163. In that regard, the old and revered rule of natural justice, audi alteram partem –every person must be heard before a decision can be taken against them – is now recognized as a fundamental right under the Bill of Rights in the Constitution. The gist of this principle is traceable from an ancient rule of wide application covered in the treatise of Administrative Law, Tenth Edition by H.R.W Wade and C.F. Forsyth at page 403. Drawing from the analogy of the trial of Adam and Eve in the garden of Eden the authors state:

> "...even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also."

164. Regarding the rules of natural justice, the Ugandan High Court at Fort Portal stated in the case of The Management Committee of Kibiito Primary School and Others v Uganda National Examination Board, HC Civil Misc. Applic No.0018 of 2010 as consolidated with The Management Committee of Makondo Primary School and Others v Uganda National Examination Board, HC Civil Misc Applic No. 0022 of 2010, as follows:

> "It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God; hence the rules enjoy superiority over all laws made by humankind. It therefore follows that any law, or practice by humankind that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi

alteram partem' literally translates into 'hear the parties in turn'; and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given notice, and accorded a just and fair hearing."

165. Here in Kenya, the High Court in Republic v The Honourable The Chief Justice of Kenya & 6 Others Ex Parte Justice Moijo Mataiya Ole Keiwua, [2010] eKLR also expressed itself as follows:

> " We must state that the rules of natural justice are not engraved on tablets of stones. However, fairness demand[s] that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision[s] affecting individuals, the courts will not only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any making decision authority which is acting judicially shall be fair in all circumstances."

166. As to what entails the right to be heard, the Court stated that:

> " The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence."

167. The principle emerging from the above-cited decisions is that a body cannot be deemed to have exercised its legal powers validly without first hearing the people likely to be adversely affected by the decision consequent to that exercise of power. The rationale being that once the decision is made, it may be difficult to reverse. See Ahmed Issack Hassan v Auditor-General [2015] eKLR.

168. The courts have had occasion to discuss the exercise of administrative action with regard to the JSC in the case of Judicial Service Commission v. Mbalu Mutava & Another [2015] eKLR, stating:

> " JSC as a State Organ exercises the functions specified in Article 172. However, not all its decisions adversely affect the rights or legal position of any person. What is an administrative action targeted by Article 47(1) will depend on a proper construction of Article 47(1) in conjunction with relevant provisions of the Constitution including Article 10 relating to national values, article 21 on the Bill of Rights, Article 73 on leadership and integrity, and the empowering provisions of the Constitution or law on the basis of which the decision is made or contemplated to be made. In other words, it will largely depend on characteristics of the decision, the nature and substance of the decision and the objective it is intended to achieve. An administrative action includes an administrative decision which adversely affects or is likely to affect any person made or contemplated to be made by certain public officers,

state officers and state organs in the national and county executives pursuant to a power conferred by the Constitution or any written law." [Emphasis supplied]

169. In this regard Mr. Ahmednasir asserted that, the Respondents did not consider it necessary for the Petitioner to be heard before the second decision was made, since its first decision as reflected in the Circular had been made in violation of the Constitution.

170. We note from the affidavit of Ms Anne Amadi sworn on 16th September, 2015 that the Petitioner, together with Justices Tunoi, Ojwang and Ibrahim, did forward a memo dated 17th April, 2014 to the JSC. In part the memo states:

> "We trust that the full, lawful quorum of the JSC did consider and appreciate the special memorandum placed before the Chief Justice (on 17th January, 2014) by the affected Judges coming from the Supreme Court.....we ourselves have again carefully considered and analysed the several memoranda: and our reading of this has led us to the firm position of conviction, that, by the Constitution and by all law, the employment and service rights of the forty-some judges, cannot be taken away by JSC's announcement of 2nd April, 2014. This, we believe, is true for all our terms of service as judges and even more certainly, as regards our retirement date, which remains fixed at 74 years since our respective dates of birth...."

171. It is clear from the quoted memo, that the Petitioner and the other Supreme Court Judges were heard and gave their input as far back as 17th January, 2014 before the impugned decision was made.

172. There are various modes of according a hearing to a party, and these do not necessarily take an oral format. The rule of natural justice could be satisfied via written submissions, depending on the circumstances. In Administrative Law (supra) the authors opine that:

> "A hearing will normally be an oral hearing. But in many cases it may suffice to give an opportunity to make representations in writing"

173. Similarly, S.S. Ekaana Musa in Public Law in East Africa at page 125 cites the Zimbabwean case of Metsola v. Chairman Public Service Commission & Another [1989] 32 LR (SC) where the court held:

> "The audi alteram partem maxim is not a rule of fixed content, but varies with circumstances....the right to be heard in appropriate circumstances may be confined to the submissions of written representations. It is not equivalent to a "hearing" as that term is ordinarily understood."

174. In the present case, there was no necessity for the JSC to invite each of the affected Judges who had signed the memo before the JSC for an oral hearing. The Petitioner having made her written representations, with other affected Supreme Court judges, we must find that the provisions of Article 47 were not violated in relation to her. The memo referred to of 17th January, 2014 was adequate representation and the JSC was not bound to agree with the views in that memo.

Right to Equality & Freedom from Discrimination.

175. Article 27 of the Constitution enshrines the right to equality and freedom from discrimination in the following terms:

> "27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) ....

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

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6).....”

176. The term “discrimination” has been defined as:

> “...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society” (Andrews v. Law Society of British Columbia [1989] I SCR 143, as per McIntyre J.).

177. The Court in Peter K. Waweru v Republic [2006] eKLR defined discrimination as follows:

> “...Discrimination means affording different treatment to different persons attributable wholly or mainly to their respective descriptions....Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex....A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”.

178. Further, in Willis v. The United Kingdom, No. 36042/97, ECHR 2002 – IV and Okpisz v. Germany, No. 59140/00, 25th October 2005, the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations.

179. The principle of equality and non-discrimination has its underpinnings in various international instruments which now form part of our laws by dint of Article 2(5) and (6) of the Constitution. For instance, the United Nations Universal Declaration on Human Rights (UDHR) provides at Article 1 that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

180. Article 7 of the UDHR further states that:

> “ All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

181. Article 2 of the African Charter on Human and People's Rights also stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, or sex. Article 28 goes on to state that:

> "Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."

182. It is thus evident that both the Constitution of Kenya and international and regional instruments to which Kenya is a party, recognize the principle of equality of persons and prohibit discrimination on the basis of "race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

183. The Petitioner asserts that the Respondents' action of purporting to retire her from the Judiciary at the age of seventy years, discriminated against her and deprived her of equal protection and equal benefit of the law to the fullest extent. In particular, her complaint is that many judges including the Hon. Mr. Justice Onyango Otieno served for a full term of seventy-four years before retiring. Thus, the Respondents' action of purporting to retire her before serving her term as saved under Section 31(1) of the Sixth Schedule, is discriminatory.

184. The Respondents contend that the decision communicated by the Circular was based on an erroneous understanding of the Constitution, and therefore they had an obligation to correct the situation by issuing the Memo. As such, although retired Justice Onyango Otieno had benefitted from that error, the Petitioner could not now take advantage of the said error to remain in office.

185. As we understand the Respondents' arguments, the JSC was required to make a decision based on an interpretation of the Constitution. They concede that they had to rescind the first 'erroneous' decision in order to comply with the Constitution, as required under Article 3.

186. As earlier pointed out, it is trite that where fundamental rights and freedoms are alleged to have been violated, a party seeking to invoke the Court's jurisdiction under Article 22, so as to enforce the Bill of Rights, must identify the sections or provisions, and demonstrate how they are violated in relation to him (see Anarita Karimi case).

187. In our understanding, one can only found a claim for discrimination if in the ordinary circumstances, she has been accorded some differential treatment or different standards have been applied to her as opposed to another person in similar circumstances. Such discrimination must be brought within the grounds stipulated under Article 27 (4) of the Constitution. In this regard, the Petitioner has not for instance demonstrated that since the Memo, any other judge in a similar situation as herself, has not been issued with a retirement notice; or that there is a judge who is beyond 70 years and still serving, but has not been served with a retirement notice.

188. The second difficulty we have in comprehending the basis of the Petitioner's complaint is that Justice Onyango Otieno whom she cited as having been allowed to serve until 74 years, did so on the basis of what the Respondents say is 'an error' now admitted and belatedly 'corrected' by them. We must however quickly add a rider: at this point we are not judging the JSC's alleged error but merely taking the subjective explanation offered at its face value. The question as to the correct age of retirement of judges in office on the effective date will be determined at the end of this judgment.

Protection of the Right to Property

189. The Petitioner called to her aid Article 40 of the Constitution regarding the right to acquire and own property of any description. She claims in her Petition that the length of term of service or the tenure has a direct correlation to the computation of pension. She claims to have a vested right in respect of her salary and pension to be computed, taking into account her tenure of seventy four years. Her position is that the said vested and contingent right is proprietary in nature and is protected under Article 40. She further asserts that she has security of tenure which cannot be truncated on anyone's whim, other than in accordance with the Constitution.

190. In response to her contention, the Respondents claimed that the office of a judge is a public office created under the Constitution and is not a chose in action, and it thus does not confer or vest proprietary interest upon the holder of the same. In this regard the Respondents cited the Hon. Justice Amraphael Mbogholi Msagha v. Chief Justice of the Republic of Kenya & 7 Others, [2006] eKLR (Mbogholi case).

191. We agree with the Respondents that the office of judge is not property strictly so called. We take guidance from and accept the position taken in the Mbogholi case and the Phillipines case of Commission on Elections v. Conrado Cruz, et al., G.R. No. 186616, November 20, 2009. In the Mbogholi case, the court said:

> " The colonial judge held office not at the pleasure of the Crown, but so long as he was of good behaviour or conduct in terms of the unwritten constitution, code and ethics of that high office. Where a judge fell short of that standard he was removed not at will, but in accordance with the determination of a tribunal comprised of his peers. His office did not therefore constitute a "property".
>
> In his submissions to us, professor Muigai was on the point when he said that a judge is but one of the constitutional office holders and the intention of the Constitution and Parliament was to accord him dignity of office to enable him perform his duties and that the security is not intended to be for life when Section 62 limits it to an age prescribed by Parliament and is currently under the Judicature Act (Cap 8) limited to 74 years of age. Besides section 62 (3) of the Constitution recognizes the possibility of removal of a judge from office for misbehaviour or inability (due to infirmity of mind or body).
>
> In modern day constitutional law, therefore, the office of judge is not regarded as a "Property" in which we or any one has a proprietary interest in the sense of physical object like land, domesticated animals, machines or other proprietary rights or even intellectual property. The office of judge is more of a calling, of the "priestly caste" (as Bishop C.J. said in the Barnwell case), a privilege which is held in high esteem by society and in which every holder of that office is beckoned and called upon to discharge the functions of that office in accordance with the highest and noblest ethics and standards be-fitting to the office.
>
> We therefore find and hold that the office of judge is not a "property" in terms of section 75 (1) of the Constitution, which can be compulsorily acquired and be subjected to fair and prompt compensation in terms of the provisions of the Land Acquisition Act, Chapter 295 Laws of Kenya."

And in the Conrado Cruz case (supra), the Court held as follows:

> " A public office is not a property right. As the Constitution expressly states, a [P]ublic office is a public trust. No one has a vested right to any public office, much less a vested right to an expectancy of holding a public office. In Cornejo v. Gabriel, decided in 1920, the Court already ruled:
>
> Again, for this petition to come under the due process of law prohibition, it would be necessary to consider an office a property. It is, however, well settled x x x that a public office is not property within the sense of the constitutional guaranties of due process of law, but is a public trust or agency x x x The basic idea of the government x x x is that of a popular representative government, the officers being mere agents and not rulers of the people, one where no one man or set of men has a proprietary or contractual right to an office, but where every officer accepts office pursuant to the provisions of the law and holds the office as a trust for the people he represents."

Article 1 and 159 in our considered view embody the above propositions: the judge occupies office as a delegate of the people's sovereign judicial authority. Besides under the former and current Constitution there is provision for a process of removal on stipulated grounds (See also Mong'are Case).

192. With regard to the question of vested rights to pension based on the seventy four years retirement age, it seems to us that the Petitioner is asserting that these accrued at the time of appointment and are, and were, not subject to variation at any point in time. We do not find this argument convincing in light of the fact that the retirement age was set in statute in Section 9 of the Judicature Act, and could be altered at any time at the discretion of Parliament pursuant to Section 62(1) of the repealed Constitution. Indeed, from the history to be demonstrated herein on security of tenure, the age of retirement was indeed varied through several amendments.

193. Of interest at this stage, however, is the determination of the allegation that the Petitioner's pension amounts to a proprietary interest capable of being protected under Article 40 of the Constitution and whether the Respondents have violated that right.

194. The protection of the right to property is provided for under Article 40 of the Constitution which states:

> " 40 (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property;
>
> Of any description; and
>
> In any part if Kenya.
>
> (2) Parliament shall not enact a law that permits the State or any person –
> to arbitrarily deprive a person of property of any description or of any interest in, or right over any property of any description, or
>
> to limit or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
>
> (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description.....
>
> ***(4)....."***

195. It is clear that Article 40 protects property of any nature. Is pension a form of property? To answer that question, we must first understand the legal meaning of the word 'property'. One of the definitions for "property" is found in Black's Law Dictionary, Sixth Edition page 1215, is:

> " The word is commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal. Everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest."

196. The same Dictionary at page 1218 defines a property right as follows:

> " A generic term which refers to any right to specific property whether it is personal or real property, tangible or intangible..."

197. The Constitution at Article 260 defines property as follows:

> " Property includes any vested or contingent right to or interest in or arising from-
>
> (a) land, or permanent fixtures on, or improvements to, land
>
> (b) goods or personal property;
>
> (c) intellectual property; or
>
> (d) money, choses in action or negotiable instruments."

198. Given the above definition, our understanding is that Article 40(1) of the Constitution protects generally any property that is capable of being owned by a person.

199. Black's Law Dictionary, Sixth Edition at page 1134 defines "Pension" in the following terms:

> " Retirement benefit paid regularly (normally, monthly), with the amount of such based generally on length of employment and amount of wages or salary of pensioner. Deferred compensation for services rendered."

200. The Pensions Act, Cap 189 has no definition of the word "pension". However, the Pensions Increase Act, Cap 190, defines "pension" as:

> " ...any pension or other benefit payable by way of periodical payments but does not include any gratuity or any other sum payable otherwise than by way of periodical payments...."

201. In the case of Director of Pensions v. Cockar (2000) 1EA 38 Shah, JA in determining the status of pension made the following statement regarding the question of pension as property:

> " Property includes chose in action, money or pension. No person who is eligible for pension can be deprived of his pension at the whim of the director of pensions. Once pension becomes due, the director has no choice but to pay the pension"

It therefore follows that pension is property capable of being owned by the Petitioner.

202. Having reflected upon her claim that if her pension is not determined at 74 years it would amount to a violation of her right to property, we consider it stretched because, under the Pensions Act as we have already stated, pension is only paid upon retirement in accordance with the pensionable years served

and the provisions governing pension. Indeed, Section 32 of the Sixth Schedule to the Constitution 2010 which is headed: 'Pensions, gratuities and other benefits' provides that:

> "The law applicable to pensions in respect of holders of constitutional offices under the former Constitution shall be either the law that was in force at the date on which those benefits were granted or by law in force at a later date that is not less favourable to the pension."

203. Looking at the above provision, we are clear that pension is to be paid in accordance with the law applicable either on the appointment date or the date when the officer becomes pensionable, or based on a subsequent law that is more favourable to the officer. This is not to say that the quantum of pension accrues on the appointment date as argued by the Petitioner. What would the situation be if an officer dies or is otherwise removed, having only served a portion of his tenure; is his estate entitled to the pension calculated on the entire tenure that could have been served? By description, pension is earned on the basis of pensionable salary for the years worked. In certain instances, pension is lost when a pensionable officer loses office through means other than retirement, for instance in consequence of conviction for an offence.

204. We have considered the Petitioner's submissions on this point. We are generally in agreement with her that she is entitled to pension upon retirement. The right to pension is only protected in so far as that right is in consonance with the retirement age provided by the Constitution. Once the court determines the Petitioner's retirement age, her pension rights will fall in line with that decision. We therefore reject the proposition that the Petitioner has a vested right to 74 years of tenure and contingent rights including pension. (See definition of "vested right" in Wawasee property Owners et. Al v Wawasee Real Estate & DNR 11CADDNAR 88 (2007) – as fixed and no longer open to "doubt or controversy".)

Right to Fair Labour Practices

205. The Petitioner submits that the truncation of her tenure from seventy four to seventy years amounts to a forfeiture of her right to receive full pension. This, she says, violates the fair labour practices principle under Article 41(2)(b) of the Constitution, namely the right to reasonable working conditions.

206. We note that the Petitioner's argument was not buttressed by any authorities or material. We observe in passing, however, that ordinarily, retirement is part and parcel of normal labour practices in aid of sustainable performance through organisational succession.

WHETHER THE JSC'S MEMO OF 27TH MARCH, 2014, WAS IN BREACH OF THE PETITIONER'S LEGITIMATE EXPECTATION TO RETIRE AT THE AGE OF 74 YEARS AS CONVEYED BY THE CIRCULAR OF 24TH MAY, 2011; AND THE ISSUE OF ESTOPPEL

207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:

> "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected

by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker."

208. Lord Diplock also discussed the doctrine of legitimate expectation in the case of Council of Civil Service Unions Minister for the Civil Service [1985] 374 concluding at page 408 thus:

> " To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> .....
>
> by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

209. When is an expectation legitimate? That question was answered by H. W. R. Wade & C. F. Forsyth(supra) at pages 449 to 450, thus:

> " It is not enough that an expectation should exist; it must in addition be legitimate....
>
> First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation.....
>
> Second, clear statutory words, of course, override an expectation howsoever founded.....
>
> Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy....
>
> Fourth, there is no artificial restriction on the material on which a legitimate expectation rests, may be based. Thus a legitimate expectation can be founded upon an unincorporated treaty, but it is seldom that the terms of the treaty will be sufficiently precise or known to the individual concerned.
>
> Fifth, the individual seeking protection of the expectation must themselves deal fairly with the public authority. Thus taxpayers seeking clearance for their proposals must make full disclosure before the Revenue's assurances will be binding. The assurance must itself be clear, unequivocal and unambiguous.

Sixth, consideration of the expectation may be beyond the jurisdiction of the court. For instance, when it would involve questioning proceedings in Parliament contrary to the law of parliamentary privilege." (Emphasis added)

210. The learned authors stressed the importance of the promise being intra vires by stating at pages 450 to 451 that:

> " An expectation whose fulfilment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice." (Emphasis added)

211. In order to successfully rely on the doctrine of legitimate expectation there is need to demonstrate that the promise was made by an authorised public officer; was reasonable; and was within the law. Any promise made outside the law cannot be legitimate and thus cannot give rise to any expectation. It is also necessary that an applicant places all the facts before the public authority before the assurance was given to him or her.

212. The Supreme Court, in the CCK case dwelt at length on the principle of legitimate expectation stating at paragraphs 264 and 265 that:

> " (264) In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.
>
> (265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation."

213. The Supreme Court at paragraph 269 then laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

> " (269) The emerging principles may be succinctly set out as follows:

a. there must be an express, clear and unambiguous promise given by a public authority;

b. the expectation itself must be reasonable;

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution."

214. There are two main reasons why legitimate expectation is protected and has an important role in public law. First, the protection is required by fairness. Abuse of power leads to unfairness and public bodies

can only treat people fairly if they are made to keep their promises by a concept that is recognised by the law. Abuse of power can only be rectified by protecting legitimate expectations.

215. Secondly, legitimate expectations should be protected in order to maintain trust between public bodies and those they are expected to serve. Wade and Forsyth (supra) at page 447 observe: "Good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected officials will not be believed and government becomes a choice between chaos and coercion."

216. Here in Kenya, Nyamu, J (as he then was) explained the basis of the doctrine in the case of Keroche Industries Ltd v Kenya Revenue Authority and others (2007) eKLR as follows:

> " Legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher interest beneficial to all...which is, the value of the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation....public authorities must be held to their practices and promises by the Courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

217. Related to the doctrine of legitimate expectation is estoppel. Wade and Forsyth (supra) have at page 281 of their book warned that:

The doctrine of estoppel must be prevented not only from enlarging the powers of public authorities illegitimately ... it must also be prevented from cramping the proper exercise of their discretion."

218. The authors also state that estoppel, like the doctrine of legitimate expectation, cannot be allowed to perpetuate an illegality; "[as] it clearly conflicts with the basic rule that no estoppel can give the authority power which it does not possess."

219. Equally, it is clear that a public agency cannot be stopped from doing what is lawful. The doctrines of estoppel and legitimate expectation can only bear fruit if the promise issues from an authorised office or officer, and the assurance is in compliance with the law. Anything done outside the law cannot receive protection in public law. It would indeed be against public policy to uphold a promise that is in breach of the laws of the land.

220. Having established the applicable law, we now turn to consider whether the doctrine of legitimate expectation and or estoppel can come to the aid of the Petitioner.

221. It is the Petitioner's averment that she was appointed as a High Court Judge under the repealed constitution on 2nd June, 2000. Section 9 of the Judicature Act enacted pursuant to Section 62(1) of the repealed Constitution required a judge to vacate office at the age of 74 years. According to the Petitioner, until the 2010 Constitution was promulgated she had served the Judiciary for ten years in reliance on the above provisions.

222. Her position is that through the Circular issued after the effective date the JSC formally communicated and confirmed to her and all judges appointed prior to the effective date in clear, explicit and unequivocal terms that her retirement age of 74 years had been saved pursuant to section 31(1) of the Sixth Schedule of the Constitution.

223. She contends that the subsequent JSC Memo sought to unilaterally retract and resile from its earlier constitutional and legal position, and without giving any reasons, arbitrarily changed her retirement age to 70 years.

224. The Petitioner's case is that the actions of the JSC of arbitrarily, unconstitutionally and illegally curtailing, limiting and reducing the retirement age of judges appointed prior to the effective date to the age of 70 years violates her legitimate expectations. She therefore asserts that the JSC cannot approbate and reprobate as reflected in the two communications.

225. The Respondents' answer to the Petitioner's claim to legitimate expectation is that the Petitioner cannot rely on the doctrine for the simple reason that she applied and was interviewed for the position of DCJ with full knowledge and acquiescence that she would retire at 70 years. Thus, the Petitioner should not be allowed to approbate and reprobate in respect of her retirement age.

226. Moreover, the Respondents assert that the position of the Deputy Chief Justice of the Judiciary is a creature of the 2010 Constitution, and therefore, Section 31(1) of the Sixth Schedule of the Constitution is inapplicable to that office.

227. The Respondents admit that the JSC's Circular was erroneous and contrary to the provisions of the Constitution, and therefore of no effect. Therefore the Petitioner cannot rely on the said letter in support of her Petition as in any event the said erroneous resolution cannot oust the supremacy of the Constitution on the question of the retirement age; nor can it form the basis of a claim of infringement of her constitutional right.

228. The Respondents' submission on the common law doctrine of estoppel is that it has no application where a provision of an Act of Parliament or the Constitution is at play. In support of this contention the statement at paragraph 1515 of the 4th Edition of Halsbury's Laws of England is cited to the effect that:

> "The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has on grounds of general public policy enacted it to be invalid, or to give the court jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties, contracting out its provisions".

229. Concerning the interview, the Petitioner produced the verbatim record of her interview by the JSC for the post of Deputy Chief Justice, showing that she was not questioned regarding the retirement age. Further, that an advertisement cannot override constitutional provisions.

230. On the assertion by the Respondents that the position of the Deputy Chief Justice was a creature of the 2010 Constitution, the Petitioner postulated that tenure attaches to the person of a judge and not to the judicial office that the judge serves in.

231. It is her case that by virtue of Section 31 (1) of the Sixth Schedule to the Constitution, her tenure setting retirement at the age of 74, and guaranteed to her by the former Constitution at the time of her appointment in the year 2000, was saved irrespective of the court or office that she occupies as a judge.

232. The Petitioner relied on the already cited Supreme Court decision in CCK Case in support of her argument that the second decision of the Respondents breached her legitimate expectation. On the other hand, the Respondents also relied on the same authority and the case of Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited [2004] 2 KLR 530 to contend that legitimate expectation cannot override the law and the Constitution.

233. Considering the submissions and material before this Court, we concur with the Petitioner that the question of her retirement age did not arise in her interview for the office of the Deputy Chief Justice. That puts paid to Ms. Amadi's contrary averment on that question.

234. It is not easy from the material placed before us to discern why the critical question of the retirement age applicable to the Petitioner did not arise at the interview for the position of DCJ. Whatever the reasons for that failure on the part of the Petitioner and the JSC, it is an undisputed fact that the advertisement to which the Petitioner responded clearly indicated the retirement age for the office of DCJ to be 70 years. Was that statement an indication that the JSC had changed its policy on the applicable retirement age?

235. We ask the above question mindful of the fact that one of the key planks of the Petitioner's claim is that the JSC had given her an assurance, through the Circular, that she would retire at 74 years. Equally, the Petitioner was not any run-of-the-mill candidate, but at the time a senior judge of the Court of Appeal. In addition, the verbatim record she produced shows that she was given an opportunity to raise any questions but she declined. On these facts, is it plausible that the Petitioner still held onto the promise in the Circular that she would retire at 74 years?

236. It is a truism that, the giver of a promise that results in a legitimate expectation is required to afford the receiver of the promise an opportunity to be heard before withdrawing that promise. We repeat here our earlier observations on the Petitioner's complaint based on a right to hearing under Article 47. The impression we get from the Petitioner's pleadings and submissions is that the JSC did not give her a chance to have her say before retracting the Circular. The evidence before this Court, however, shows otherwise as demonstrated below.

237. The letter already cited dated 17th April 2014 which was signed by the Petitioner, and also by Supreme Court Justices Dr. Phillip Tunoi, Mohammed Ibrahim and Prof. Jackton Ojwang, was addressed to the Secretary of the JSC. From the cited letter, it is clear that the Petitioner and the other affected judges of the Supreme Court by a special memorandum of 17th January, 2014, gave their views to the Chief Justice – who is the Chairman of the JSC – prior to the JSC's retraction of the Circular through its Memo. Evidently, therefore, the JSC acted lawfully insofar as they gave the Petitioner and others an opportunity to be heard before reviewing its position on the retirement age of judges who were in office on the effective date.

238. There remains two unanswered but important questions as to whether: (a) the contents of the Circular or subsequent Memo amounted to a misinterpretation of the Constitution regarding the question of the retirement age of judges in office on the effective date; and (b) Whether the JSC was competent to make directions on when and how a judge may sit.

239. We shall return to these questions as we deal with the mandate of the JSC.

WHETHER THE JSC HAS ANY MANDATE OR ROLE IN THE REGULATION OF SITTINGS OF JUDGES; AND WHETHER THE ADVERTISEMENT OF A VACANCY IN THE OFFICE OF DEPUTY CHIEF JUSTICE WAS LAWFUL?

240. In this regard, the Petitioner contends, firstly that the advertisement of a vacancy in her office published in the local dailies on 6th September, 2015, was done in breach of the provisions of Paragraph 3(1) of the First Schedule of the Judicial Service Act, 2011 (the JSA) as the vacancy had not been gazetted by the Chief Justice. Secondly, she complains that the JSC had no mandate to resolve, as it did, on 4th September, 2015 that: "all judges who have attained the age of seventy(70) years and above will not preside over any court proceedings."

241. We now address the role of the JSC in relation to the Petitioner's complaints.

242. Commissions and Independent offices, including the JSC, are provided for under Chapter 15 (Articles 248-254) of the Constitution. The JSC is established under Article 171 and has its functions set out under Article 172 of the Constitution and Section 13 of JSA.

243. The core mandates of the JSC are spelt out in Article 172 (1) as follows:

> " The Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and shall -
>
> recommend to the President persons for appointment as judges;
>
> review and make recommendations on the conditions of service of-
>
> i. judges and judicial officers, other than their remuneration; and
>
> ii. the staff of the judiciary
>
> appoint receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates and other judicial officers and other staff of the judiciary, in the manner prescribed by an Act of Parliament;
>
> prepare and implement programmes for the continuing education and training of judges and judicial officers; and
>
> advise the national government on improving the efficiency of the administration of justice."

244. Clearly, the JSC's mandate above is two-pronged. It is recommendatory and advisory under sub-Articles (1)(a)(b) and (e). This means that JSC's actions thereunder are given effect by the recipient of the advice or recommendation. On the second prong, the JSC has an executory mandate under sub-Articles (1)(c) and (d), which means the JSC acts to implement its own decisions and related policies.

245. The Court of Appeal in the case of Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR,had occasion to discuss the status of the JSC as follows:-;

> " ....A commission is included in the definition of a "state organ" in Article 260. More relevantly, JSC as a state organ is bound by national values and principles of governance entrenched in article 10 and as provided by article 20(1) is also bound by the Bill of Rights.
>
> JSC is not part of the national executive as defined in article 130(1). Thus, although JSC is not a substructure of the national executive to which sovereign power is delegated, it is nevertheless subject to the Constitution and the law and like other independent commissions and independent offices, has the duty to protect the sovereignty of the people (see article 249(1)(a)."

246. In addition, pursuant to Article 248, the provisions of Chapter 15 of the Constitution apply to the JSC "except to the extent that this Constitution provides otherwise". Accordingly, Articles 249 and 252 as to the objects and authority, and general functions and powers of Chapter 15 Commissions, must be read in tandem with JSC's specific mandate as stipulated in Article 172(1).

247. To operationalize the JSC's constitutional mandate as stipulated above, Parliament enacted the JSA, 2011, which makes provision for: the administration of the Judiciary, the powers and functions of the JSC, financial matters, procedures for appointment and removal of Judges, and the discipline of

judicial officers and staff, among other matters. These objects of the Act are captured in its preamble as follows:

> " An Act of Parliament to make provision for judicial services and administration of the Judiciary; to make further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff; to provide for the regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes."

248. Section 3 of the Act sets out the objects and purposes of the JSA in the following terms:

> " 3 The object and purpose of this Act is to, among other things, ensure that the Commission and the Judiciary shall –
>
> be the organs of management of judicial services and, in that behalf, shall uphold, sustain and facilitate a Judiciary that is independent, impartial and subject only to the provisions of the Constitution and the law;
>
> facilitate the conduct of a judicial process designed to render justice to all;
>
> be accountable to the people of Kenya;
>
> facilitate a judicial process that is committed to the expeditious determination of disputes;
>
> facilitate a judicial process that is committed to the just resolution of disputes;
>
> Support and sustain a judicial process that is committed to the protection of the people and of their human rights;
>
> Promote and sustain fair procedures in its functioning and in the operations of the judicial process, and in particular, be guided in all cases in which it has the responsibility of taking a decision affecting a judicial officer of any rank or its own employee, by the rules of natural justice;
>
> be the administrative manifestation of the judiciary's autonomy and inherent power to protect and regulate its own process, achieving these objects through application of principles set out in the constitution and other laws;
>
> facilitate accessibility of judicial services to all Kenyans
>
> facilitate the promotion of gender equity in the judiciary and the protection of vulnerable children in the administration of justice;
>
> be guided in their internal affairs, and in the discharge of their mandates by considerations of social and gender equity of discrimination; and
>
> apply modern technology in their operations."

249. The objects clause of the JSA appears to be dense and clumsily drafted. It improperly intertwines and fuses the roles of the Judiciary and the JSC, two very different kinds of organs, each with their own objects, roles and role-specific principles of governance. One consequence is that the facilitative facets of JSC and the core principles of the organisation of the Judiciary are conflated, portending role conflict between the two bodies.

250. Looking at the provisions of both the Constitution and the JSA as set out above and hereafter, we take the view that the JSA creates the impression that the Judiciary and JSC are one and the same body,

and their administration and management functions are conjoined in every regard. This is seen in the following ways.

251. First, the JSC clearly has the broad constitutional function to "promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice...." The JSA, on its part, by fusing the roles of JSC and the Judiciary seeks to confer on the JSC operational and managerial facets that rightfully belong to the Judiciary. For example the JSA attempts to intertwine the two bodies by making both: "the organs of management of judicial services" (Section 3(a)); and "the administrative manifestation of the Judiciary's autonomy and inherent power to protect and regulate its own process..." (Section 3(h)).

252. Secondly, the CRJ is constitutionally the Chief Administrator of the Judiciary (Article 161(2(c)), and is empowered by the JSA to "be responsible for the overall administration and management of the Judiciary" (Section 8(a)); and "...responsible for the efficient management of the day-to-day operations and administration of human resources in the judicial service"(Section 8(e)); nonetheless, Section 14 JSA has the intrusive and conflicting provision that: "...the Commission may hire such experts or consultants, or delegate such of its functions as are necessary for the day to day management of the judicial service to subcommittees or to the secretariat" (Emphasis added)

253. It is not in doubt, however, that in order to carry out its functions effectively, the JSC must appreciate the needs of the Judiciary and the protection of the sovereignty of the people of Kenya as it is accountable to them. In that regard therefore, it must be constantly appraised of the status of the administration of justice for the benefit of the people.

254. For instance, the JSC is constitutionally tasked under Article 172 with the responsibility of recommending to the President persons suitable for appointment as judges. The object is to ensure effective and efficient delivery of justice to all people.

255. On the role of the JSC in relation to vacancies in the office of a judge, it is important to note that the JSC conducts its business through meetings and resolutions by dint of Section 22(7) of JSA. All questions arising are determined by consensus but in absence of consensus, by a majority of members present and voting. In the event of a vacancy in the office of a judge, the provisions of Part II of the First Schedule of the JSA are triggered into operation.

256. The Petitioner complains that the advertisement of a vacancy in the office of DCJ is unlawful and seeks an order of certiorari quashing the same. Paragraph 3(1) of Part II of First Schedule of the JSA provides as follows regarding vacancies:

> " 3(1) Where a vacancy occurs or exists in the office of a judge, the Chief Justice shall within 14 days place a notice thereof in the Gazette and the Commission (JSC) shall thereafter:
>
> Post a notice on its website;
>
> Send notice of the vacancy to the Law Society of Kenya and any other Lawyers' professional associations and
>
> Circulate the notice in any other appropriate manner."

257. We note from the availed affidavits of the Petitioner, that she was served with a retirement notice dated 1st September, 2015 by the Secretary of the JSC. She says that an advertisement of the impending vacancy then appeared in the Standard Newspaper on 6th September, 2015. We have seen the said

newspaper advertisement prepared in the name of Anne Amadi, as Secretary to the JSC. It has the following titular wordings :

> " VACANCY IN THE OFFICE OF DEPUTY CHIEF JUSTICE SUPREME COURT JUDGE OF THE REPUBLIC OF KENYA
>
> The Office of the Deputy Chief Justice of the Republic of Kenya will fall vacant from the 16th January, 2016..."
>
> (Emphasis added)

258. As indicated earlier, Paragraph 3(1) of Part II of First Schedule to the JSA envisages compliance with the following: a situation where a vacancy "occurs or exists"; issuance of a Gazette Notice by the Chief Justice within fourteen days of the occurrence of the vacancy; and action by the JSC only after the Chief Justice has acted on the vacancy. On the materials availed to us none of these conditions were complied with in this case.

259. Section 30 of the JSA on which Paragraph 3(1) is anchored, requires that the process of recruitment of judges be "transparent", commencing with gazettement by the Chief Justice, not the JSC, when a vacancy occurs or exists. As there was non-compliance with all these requirements, the said advertisement was unlawful and invalid, and we so find.

260. As earlier stated, the role of the JSC is promotional and facilitative of the Judiciary in the administration of justice. In defining the word "facilitate", Odunga J, in Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR cited with approval the decision in Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC). Ngcobo, J delivering the leading majority judgment expressed himself thus:

> " The key words in this phrase are 'facilitate' ... To 'facilitate' means to 'make easy or easier', 'promote' or 'help forward'."

261. The Collins Thesaurus gives the following synonyms for the word "facilitate":

> " further...promote, ease, speed up, pave the way for, fast-track, expedite, ...smooth the path of, assist the progress of...."

The Collins Thesaurus also supplies words with a meaning opposite to "facilitate". These are:

> " prevent, delay, frustrate, handicap, restrain, thwart... obstruct, impede...."

262. As for the word "promote", the alternatives given are:

> " help, back, support, ...aid...forward, champion, encourage, advance, work for, urge, boost ...recommend, assist, advocate, nurture, push for, popularise..."

So that to 'facilitate' and to 'promote 'both carry the sense of giving assistance, advocating and championing another.

263. Applying the above definitions in this case, we find that JSC's role is to inter alia'make it easy or easier', 'promote' 'help forward' the independence and accountability of the Judiciary, and the efficient, effective and transparent administration of justice. This is the mandate given to JSC: essentially as supportive in nature, in contrast to an executive mandate. This fits hand in glove with the fact that

the Judiciary has its own comprehensive administrative structures established under the Constitution, including: the Chief Justice and Head of the Judiciary (Article 161(2)(a)); Deputy Chief Justice and Deputy Head of the Judiciary (Article 161(2)(b)); the Chief Registrar of the Judiciary as Chief Administrator and Accounting Officer of the Judiciary (Art 161(2)(c)); the President of the Court of Appeal (Article 164(2)); the Principal Judge of the High Court (Article 165(2)); the Chief Kadhi (Article 170(1)); and any Registrars appointed by JSC under (Article 161(3)), and other "judicial officers" and "judicial staff" as indicated in Article 161(1).

264. Part II of the JSA, 2011 provides for the Administration of the Judiciary, setting out the functions of the Chief Justice; Deputy Chief Justice and the Chief Registrar of the Judiciary (CRJ). Section 5(1) of the Act provides that the Chief Justice is the head of the Judiciary, and Section 8 (1) of the Act provides that in addition to the functions conferred by Article 161 of the Constitution, the Chief Registrar "shall in particular – be responsible for the overall administration and management of the Judiciary;"

265. Therefore, it can be re-stated that the Chief Justice is the Head of the Judiciary which is a State organ as provided under Article 1 of the Constitution, while the Chief Registrar of the Judiciary is the Chief Administrator and Accounting Officer of the Judiciary. Further, and in accordance with the Constitution and the JSA, the CRJ is responsible for the overall administration and management of the Judiciary.

266. The JSC on the other hand is also defined as a State organ under Article 260 of the Constitution. In addition, it is a body corporate with perpetual succession and a seal (Article 253). The JSC chairperson is the Chief Justice, and the CRJ is the Chief Executive Officer and Secretary to the Commission (Articles 171(3) and 250(12)(b)).

267. We are therefore of the considered view that the Constitution anticipates the Judiciary and the JSC are to exist as two distinct, separate and independent organs of State performing different constitutional functions, with JSC playing a facilitative role supportive of the Judiciary. The presence of the Chief Justice and the Chief Registrar of the Judiciary on the JSC, enables a seamless flow of organ- relevant information between the two independent bodies. (See Advisory Opinion Reference No. 2 of 2014 The National Land Commission v. the Attorney General and 7 Others).

268. When judges 'sit' or 'preside' over proceedings, they exercise the important and core aspect of their judicial responsibility of presiding over their courts and cases. This is a function in respect of which judges are not, and cannot be, subject to the control or direction of any person or authority. It is a sacrosanct authority solely exercised by courts. The only exception is insofar as that function may involve certain administrative facets, is in respect of the role of the Chief Justice as Head of the Judiciary. He is lawfully entitled to issue directions of an administrative nature. Accordingly, and in the same vein, the JSC cannot and does not exercise judicial or administrative authority over judges' sittings. Indeed, judges who double up as members of the JSC, cannot purport to exercise their judicial authority when dealing with matters within the mandate of the JSC.

269. Therefore, concerning the Petitioner's complaint herein, we are of the firm view that the JSC cannot interfere with the judicial authority vested in a judge. Article 160 (1) provides that:

'In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.'

270. In the circumstances, the JSC lacks authority to direct when a judge may or may not sit or preside over proceedings. Under Section 5(2)(c) of the JSA that is a matter within the exclusive domain of the head of the Judiciary to "...exercise general directions and control over the Judiciary". Evidently

the impugned directions of the JSC flowed from its purported determination of the retirement age of judges in office on the effective date. We have exhaustively dealt with that issue in our judgement in Petition No. 244 of 2014, concluding that the purported determination was ultra vires of the JSC's mandate.

271. In light of the foregoing, we conclude that the Petitioner's complaints alleging JSC's incompetence to direct her to proceed on terminal leave and thus to stop sitting, and regarding the illegality of the advertisement of the vacancy of her office, have merit.

THE NATURE AND FUNCTION OF TRANSITIONAL AND CONSEQUENTIAL PROVISIONS IN THE CONSTITUTION

272. Article 262 of the Constitution provides as follows:

> " The transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date."

And by dint of Article 264, the former Constitution was repealed "subject to the Sixth Schedule." The transitional and consequential provisions are located in the Sixth Schedule of the Constitution.

273. Some of the alternatives to the word "transitional" in the Collins Thesaurus are:

> " 1: Changing, passing, fluid, intermediate, unsettled, developmental, transitionary...a transitional period following a decade of civil war....
>
> 2: temporary, working, acting, short-term, interim, fill-in, caretaker, provisional, makeshift, make-do, stopgap, pro tem...a meeting to set up transitional government...."

274. The word "consequential" has the following synonyms in the same Thesaurus:

> " 1: resulting, subsequent, successive, ensuing, indirect, consequent, resultant, sequential, following...The company disclaims any liability for incidental or consequential damages...
>
> 2: important, serious, significant, grave, far-reaching, momentous, weighty, eventful... From a medical standpoint a week is usually not a consequential delay..."

275. Transitional and consequential provisions are limited in time, scope and purpose. They are best understood from the perspective of their function in the Constitution. Counsel for the Petitioner Mr. Oraro, and Mr. Ahmednasir for the Respondents, were in agreement that transitional and consequential provisions are seasonal, and are spent once their purpose is served. However, Mr. Ahmednasir's argument that Section 31 (1) of the Sixth Schedule had the lifespan of a day was opposed by Mr. Oraro. On his part, Mr. Mogeni for the ICJ aptly described transitional and consequential provisions as a "bridge" to facilitate transition from the former Constitution to a new Constitution. Mr. Ahmednasir argued that transitional and consequential provisions do not confer substantive rights.

276. Considering the nature of the transitional and consequential provisions in the Sixth Schedule, we think that Mr. Nyaundi's submission is accurate in asserting that generally speaking, transitional and consequential provisions have different sunset timelines depending on the purpose.

277. We also agree with Mr. Nyaundi's submission regarding the alleged capacity of transitional and consequential provisions to confer substantive rights. He correctly captured and restated the Petitioner's argument to be that her tenure was "saved" by Section 31 (1), and not that the section conferred a substantive right. All the parties generally agreed that transitional and consequential

provisions are as much a part of the Constitution as the substantive clauses are. As to whether the transitional and consequential provisions have an equal standing with the substantive provisions, Mr Oraro submitted that they must be read in harmony with, and as a part of the Constitution.

278. The nature, function and place of transitional and consequential provisions in the Constitution of Kenya 2010 is well set out in the CoE's Report of 2010 as follows:.

> " When a new constitution is introduced, a range of provisions are needed to ensure that the move from the old order to the new order is smooth, and, in particular, that the changes expected by the new constitution are implemented effectively and those institutions that are retained under the new constitution continue to function properly....The "transitional" provisions that do this 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 of the constitution, its provisions will not interfere with permanent provisions of the constitution in the future. In the Harmonized Draft these provisions appeared in Schedule 7".

279. This conception was adopted by Sichale, JA in the Mong'are Case and affirmed in the JMVB Case at the Supreme Court. As Otieno Odek, JA observed in the Mong'are case:

> " The Sixth Schedule is an integral part of the 2010 Constitution and its provisions have the force and effect on the supremacy of the Constitution as ordained in Article 2(1) of the Constitution [...] It is my considered view that the Constitution is one document which contains substantive articles and schedules thereto. The Constitution cannot be severed and dissected into main articles and schedules ..... I hold that each specific schedule and article in the Constitution has an equal footing and equal force of law ..."
>
> (See also Centre for Rights and Awareness & 2 Others vs. John Harun Mwau & others [2012] eKLR; State of South Dakota vs. State of North Carolina – [1940] 192 US 268; Tinyefunza vs. the Attorney General of Constitutional Appeal No. 1 of 1997, [1997] UGCC3).

280. At para 230 of the JMVBCase the Supreme Court noted that:

> " The transition from the old to the current Constitutional order involved various aspects of public – institutional repositioning. Various institutions and public offices were subject to different modes of transitions" (see Sixth Schedule)

281. From the foregoing discussion, it can be stated generally that in their scope, purpose and duration, transitional and consequential provisions are a mechanism limited for ensuring a smooth transition from the old constitutional order to the new.

282. We now turn to examine the place and import of specific transitional and consequential provisions relevant to this Petition. In so doing, we propose to restate briefly the principles of interpretation applicable.

283. With regard to transitional and consequential provisions these are part and parcel of the Constitution (see CREAW Case and Mwau Case)

284. In the Mong'are Case Otieno Odek, JA, delivering the majority decision stated:

> " I adopt and concur with the dicta in Uganda vs. Commissioner of Prisons Exparte Matovu (1966) EA 514 at page 529: Wherein it was stated that there cannot be two constitutions in force at the same time. The Sixth Schedule is an integral part of the 2010 Constitution and its provisions have the force and effect (of) the supremacy of the Constitution as ordained in Article 2 (1) of the Constitution."

285. The Judge further articulated the rules of construction of the transitional and consequential provisions in a Constitution by stating that:

> " A novel submission was to the effect that the Sixth Schedule to the Constitution is a transitional and consequential schedule and the Vetting Board is a transitional mechanism and transitional provisions override and supersede the substantive Articles in the body of the Constitution. It is my considered view that the Constitution is one document which contains substantive Articles and the Schedules thereto. The Constitution cannot be severed and dissected into main Articles and Schedules. The Constitution must be interpreted as one document that has logical flow and consistency in-built within itself and between one Article and another and between all Articles and the Schedules thereof. No single Article or Schedule of the Constitution should be interpreted to override other Articles or Schedules unless expressly stated in the Constitution... There is no express constitutional provision that stipulates that transitional provisions and Schedules in entirety override the substantive Articles in the body of the Constitution.
>
> I hold that each specific Schedule and Article in the Constitution has an equal footing and equal force of law and all Articles in the Constitution as well as all Schedules thereto must be interpreted as one document with logical consistency within the Constitution as a single indivisible document. An apparent conflict, if any, must be given a purposive interpretation to attain and maintain logic, coherence and consistency within the Constitution as a one indivisible document. I am not persuaded in the legal reasoning that in general, transitional provisions override substantive articles in the body of the Constitution. The logical reasoning is that unless expressly stated in the Constitution, all provisions in the Constitution whether transitional or main Articles have an equal footing. To arrive at any other conclusion will be stating that there are two constitutions valid at the same time; one in the Articles and the other in the transitional provisions and Schedules. In law, there can be no two constitutions at the same time."

286. These statements, in our view, settle the controversy in the dicta in the CREAW and Njoya cases(supra), where the respective High Court benches took opposite positions with regard to which provision prevails when there is a conflict between a transitional and consequential clause and substantive provision in the Constitution.

287. Hence the rules of interpretation applicable to constitutional provisions apply mutatis mutandis to transitional and consequential provisions. A harmonious approach will be engaged in, in the event of an apparent conflict between a transitional and consequential provision and a substantive provision in the main body of the Constitution, and guarding against a construction that leads to an anomaly or absurdity.

288. We will shortly delve into an interpretation of the transitional and consequential provisions relied upon by the Petitioner in asserting her right to transit with the tenure of seventy four (74) years she held under the repealed constitution.

WHAT IS THE RETIREMENT AGE OF JUDGES WHO WERE IN OFFICE PRIOR TO THE PROMULGATION OF THE CONSTITUTION 2010?

289. The resolution of this issue is at the heart of this Petition. This part inquires into the question of security of tenure of judges; whether or not the Constitutional provisions related or alleged to be related to the retirement question can be construed to have a retroactive effect; it delves into the meaning and purpose of the oath of office taken by judges under the new Constitution; and it seeks to determine the import of Section 31(1) of the Sixth Schedule in relation to the Constitution and Section 9 of the Judicature Act, and Section 62(1) of the repealed constitution.

290. In order to adequately appreciate the scope and the nuances of this question, we think it appropriate to commence with an appreciation of the historical background touching on the issue of security of tenure of judges in Kenya.

The History of Security of Tenure and Retirement Age of Judges

291. The judicial history of Kenya goes back to 1897 when, under the Native Courts Regulations of August 12, 1897, two classes of Native Courts were established in Kenya: those presided over by a European Officer, for example the High Court; and those presided over by a "native" officer, for example Native Courts proper. Under the Regulations, the High Court for the Protectorate was established and sat at Zanzibar or Mombasa.

292. The High Court was the highest court of appeal from Native Courts and consisted of two senior Judges of the British Court at Zanzibar established by the Zanzibar Order-In-Council, 1897 (see Regulation 7). The Commissioner was the President of the Court. In this period the tenure of Judges of the court is unclear.

293. In 1902, King Edward VII promulgated The East Africa Order-In-Council of 11th August. Under Article 15(1) of the Order, the King established:

> "...a Court of Record styled: 'His Majesty's High Court of East Africa with full jurisdiction, civil and criminal, over all matters in East Africa'."

Every Judge of that court was appointed by His Majesty. Article 17 of the Order provided as follows:

> "(1) There shall be as many judges of the High Court as may from time to time be required
>
> (2) Every Judge shall be appointed by His Majesty, and shall hold office during His pleasure"

Clearly, there was no security of tenure in the office of judge. Further, under Article 17(4), if a judge died or was absent due to, illness or any other reason, the Commissioner could appoint an acting Judge.

294. Under the Statutory Instruments, 1963, the Queen in Council on 4th December, 1963, made the Kenya Independence Order-In-Council 1963. The Order contained in its Schedule 2 what was defined as the "Constitution of Kenya" (the "Independence Constitution").

295. Section 171 of the Independence Constitution established the Supreme Court with unlimited original civil and criminal jurisdiction throughout Kenya. Section 172(1) provided for appointment of the Chief Justice on advice of the Prime Minister; and Supreme Court judges by the Governor General acting on advice of the Prime Minister and Presidents of Regional Assemblies.

296. Under Section 172(4) a vacancy in the office of the Chief Justice could be filled by the Governor-General from among the justices of appeal or puisne judges. Section 173(1) provided for the tenure of judges of the Supreme Court in the following terms:

> " Subject to the provisions of this section, a person holding the office of judge of the Supreme Court shall vacate that office when he attains such age as may be prescribed by Parliament"

297. In addition, Section 173(4) of the Independence Constitution provided for removal of judges, under the advice of the Judicial Committee appointed by the Governor, only on grounds of inability or misbehavior. Further, Section 177 empowered Parliament to establish a Court of Appeal to which, if established, the provisions of Section 173 of the Independence Constitution would apply.

298. The Independence Constitution was based on the standard Lancaster House template for former British colonies. However, from independence in 1963 until 1967, Parliament did not enact a law to prescribe a retirement age for vacation of office by judges. Meanwhile, in 1964 The Constitution (Amendment) Act, No 38, 1964, vested the authority for appointing Judges absolutely in the President of the Republic.

299. The Constitution of Kenya (Amendment) Act, No 14, 1965 then replaced the Supreme Court with the High Court. It also abolished appeals to the Judicial Committee of the Privy Council. Section 7(1)(c) provided as follows:

> " 7(1)(c) Any reference in an existing law to the Supreme Court shall be read and construed as from 12th December, 1964, as if it were a reference to the High Court"

300. In 1967, Parliament for the first time in Kenya's judicial history, prescribed the statutory age at which a Judge would vacate office by enacting the Judicature Act, 1967.Section 9 of that Act read as follows:

> " For the purposes of Section 173(1) of the Constitution, the age at which a person holding the office of judge shall vacate his office shall be sixty-eight years"

Under the Judicature Act, "judge" was defined to mean:

> " ...the Chief Justice or a puisne judge appointed under section 172 of the Constitution"

301. The Constitution of Kenya (Amendment) Act, No 5 of 1969 consolidated all the amendments made to the Constitution since independence. It resulted in the revision of the Constitution published as the 1969 Constitution. On re-publication, Section 62(1) of the Constitution read as follows:

> " Subject to this section, a person holding the office of judge of the High Court shall vacate his office when he attains such age as may be prescribed by Parliament".

302. Under the Statute Law (Miscellaneous Amendments) Act, 1976 (No 6 of 1976), Parliament amended Section 9 of the Judicature Act by increasing the statutory prescribed age for vacation of office of a judge of the High Court from sixty eight (68) to seventy (70) years. Up to this point, the Court of Appeal of Kenya did not exist.

303. Following the break-up of the East African Community in 1977, the Court of Appeal of Kenya was established under The Constitution of Kenya (Amendment) Act, No 13 of 1977. This amendment to the Constitution also made it possible for the Chief Justice to sit as a judge of both the Court of Appeal as – chair of the Appellate court – and simultaneously, as a judge of the High Court.

304. Parliament further amended Section 9 of the Judicature Act by the Statute Law (Miscellaneous Amendments)(Court of Appeal) Act, No 14 of 1977. The amendment increased the statutory prescribed age for vacation of office by a judge from seventy (70) to seventy-four (74) years. This provision remained in place even after 1988 when Parliament amended the Constitution effectively removing the security of tenure of constitutional office holders including judges, the Attorney-General and the Auditor General. The provision setting out the statutory age for vacation of office remained in place until promulgation of the Constitution, 2010.

305. The Constitution of Kenya (Amendment) Act, No 4 of 1988 repealed, inter alia, Sections 62(3), (4), (5), (6) and (7) of the Constitution, eliminating the requirement of a tribunal process for the removal of judges. These were sections that had secured Judges against removal other than on grounds of misconduct and inability. By that amendment, the security of tenure of judges entirely dissipated. In addition, Section 61(6), was amended to enable the President to fill vacancies of the office of Chief Justice or judges through acting appointments on the advice of the Judicial Service Commission. Such appointment could be revoked by the President, on such advice, and notwithstanding that the judge had attained or surpassed the prescribed age for vacation of office.

306. Owing to popular resistance and the clamour against the above constitutional amendment the government backed down and enacted The Constitution of Kenya (Amendment) Act, No 17 of 1990, reinstating the original constitutional provisions securing tenure for judges, the Attorney-General and the Controller and Auditor-General against removal, except through a tribunal process.

307. Against this background, it is evident that in the past the security of tenure of judges was both tenuous and that the age of vacation of office was not specifically entrenched in the Constitution. It was at the discretion of Parliament, freely exercisable at any time, to determine the age at which judges in Kenya would vacate office. This period of the 90's was marked by increasing political agitation which led to detentions without trial, persecution and politically instigated prosecution of perceived leaders of agitation. The judiciary was perceived as a complicit party to these acts of repression.

308. Given the foregoing, the independence of the judicature was increasingly put to doubt, resulting in loss of confidence by the public. Thus, questions as to how to secure the tenure and independence of judges and reform the Judiciary was a critical concern in the 1990's when the clamour for constitutional change begun in earnest.

309. There was to be a further examination of judges' security of tenure and judicial reforms; this time from the people. As discussed earlier, during the constitutional review process leading to the promulgation of the Constitution 2010, the Kenyan people were emphatic that the judiciary must be reformed. This culminated in the provisions for the process of vetting judges and magistrates appointed before the effective date to determine their suitability to continue serving under the new Constitution.

310. The retirement age of judges was not identified by the CoE as being among the contentious issues emerging from the three existing constitution drafts. In addition to vetting, the people also desired judges retired earlier. As far back as the National Constitutional Conference (NCC) in 2004, the CKRC Draft Constitution, 2004,atClause 195(1) stated that a judge shall retire at the age of seventy, but could opt for early retirement at the age of sixty. The 2005 Wako Draft at Clause 192 also provided for the retirement age of judges at seventy years and did not expressly except any judges.

311. In the Final Report of the Technical Working Group "E" on the Judiciary" issued at the CKRC Plenary of 15th December, 2005 the following is recorded at paragraph 3.12 on "Tenure of Office of Judges":

> " ....As of now, the retirement age for Judges is 74. In a departure from this, and the Draft Constitution's proposal of 60 years, the Committee proposed that 70 years would be an appropriate retiring age for Judges....The Committee took the view that the appropriate age may vary from person to person so that it should be possible to retire voluntarily with full benefits at an early age of sixty years, while it should be compulsory once a person attains the age of 70 when it will be normal for there to be some reduction in mental capacity to perform judicial functions" (Emphasis added)

312. In the same Report under "Explanatory Notes" to The Technical Working Group Draft Report on the provisions adopted for the "Tenure of Office of Judges", is the following explanation:

> " The Committee took the view that the reliving (sic) age was 70 years and that Judges should retire upon retirement (sic) of that age"

313. These historical public reports provide the contextual background that is relevant to interpreting the constitutional provisions relating to the retirement age of judges. But more importantly, the foregoing discussion shows the thinking behind entrenchment of the retirement age in the Constitution: it was intended to secure the tenure of judges once and for all.

The Question of Retroactivity:Whether a constitutional provision can have retroactive or retrospective effect; In particular, whether the age of vacation of office of judges could or can be reduced so as to affect Judges already in office?

314. The Petitioner's contention is that having been appointed a judge prior to promulgation of the Constitution, 2010, the applicable retirement age is 74 years. That age was saved, she urges, by application of the transitional provision of Section 31(1) of the Sixth Schedule, read together with Section 62(1) of the repealed Constitution and Section 9 of the Judicature Act. She further argues that such security is guaranteed against any interference flowing from retrospective application of Article 167(1), because that would be a derogation from her accrued rights. It would lead to divesting her of her legitimate rights duly acquired before the new Constitution came into effect. Indeed, Mr. Oraro argued that it is a violation of judicial independence for the age of retirement to be lowered through such retroactive effect. To which Mr. Omtatah responded by reiterating provisions which not only secure judges' tenure, but also remuneration and judicial independence.

315. Mr. Oraro relied on the Macharia decision which he said held that a person cannot be retroactively deprived of a right he is vested with. Indeed, the Petitioner argued that Article 165(3)(d) empowering the Court to interpret the Constitution does not give it the right to take away or reduce the tenure of a judge.

316. The starting position is that courts will generally presume that statutory enactment applies to the future and not to the past, unless clearly and manifestly so intended by the legislature.

The word "retrospective' with regard to law is defined in Black's Law Dictionary, 6th Edition as:

> " A law which looks backward or contemplates the past, one which is made to affect acts or facts occurring, or rights accruing, before it came into force.

Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.

One that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred."

317. In the case of American States W S Co. v Johnson 31 Cal. App. 2d 606(Cal Ct App. 1939) it was held that:

Retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. The terms 'retrospective ' and 'retroactive' are interchangeable... in California a statute is not invalid merely because it is intended to operate retrospectively. It may, however, be invalid if it deprives one of vested rights which are bound to be respected or protected by the state or if it impairs the obligations of a contract... [ ] it is true that statutes will be construed to operate prospectively rather than retrospectively unless the contrary intention clearly appears"

318. In the US case of Cooper v Watson 290 Minn. 362 (Minn 1971) there is a clear and unambiguous definition of retrospective law, as follows:

> " A retrospective law, in the legal sense is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past. It may also be defined as one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued, or which relates back to and gives to a previous transaction some different legal effect from that which it had under the law when it occurred. Another definition of a retrospective law is one intended to affect transactions which occurred, or rights which accrued, before it became operative, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence."

319. We were also taken through the various statutory interpretation rules against retrospectivity, including those in eminent texts such as F.A.R Bennion on Statutory Interpretation. We note that Bennion, like the foregoing American authorities, is about interpretation of statute in particular, common law based statutory provisions. Nevertheless, from these materials we can draw the meaning of "retrospective effect".

However, regarding the Constitution, all we need recall as earlier pointed out in this judgment, is that the Constitution 2010, has its own clear guiding principles of interpretation contained in Article 259.

320. Further guidance is found in the dicta of the Chief Justice in the JMVB case at para 206, where he stated:

> " This Court has set out construction guidelines, and mainstreamed the interpretation of Kenya's new constitution. In particular, we have observed that the Constitution should be interpreted in a holistic manner: that the country's history has to be taken into consideration; and that a stereotyped recourse to the interpretive rules of the common law, statutes or foreign cases can subvert requisite approaches to the interpretation of the constitution." (See CCK case).

321. A constitution looks forward and backward, and in interpreting it, must be construed as always speaking to the past and the future. As we observed earlier, a Constitution draws from past experiences and seeks to chart out a future even for "unborn generations".

322. It bears restating that the Constitution 2010, was intended to create an entirely new constitutional order; a transformation of momentous import, from a former constitution based on the Lancaster template, to a new era based on the sovereignty of the people. Indeed, it is for and from the people ("the locus of sovereignty"). The three arms of government – the legislature, the executive and the judiciary – are mere delegates and agents of the people's sovereign power (Article 1(1) and (3)).

323. Coming back to retroactivity, we have been referred to the Supreme Court authority on the issue, in the Macharia case(supra) where it was stated as follows:

> " At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation.A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object rendering political goods. In this way, a Constitution may and does embody retrospective provisions or provision with retrospective ingredients." (Emphasis added)

324. The question still arises: what criteria are to be used in determining whether a Constitutional provision applies retroactively? In the Macharia case the Supreme Court had this answer,:

> " However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provision, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the Constitution."

325. From the Macharia case, we draw three principles that should be taken into account when determining if a constitutional provision is, or can be read to have retroactive effect. The first is whether the words and the language used in theprovision are forward looking. The second, is the "whiff test" i.e. whether the provision has even a slight indication or sense that indicates a retrospective orientation; and the third is: does the provision have the effect of divesting an individual of a right legitimately acquired before the provision came into effect?

326. In addition, we must keep in mind the Supreme Court's admonition concerning the need to interpret the Constitution keeping at the fore the history and circumstances of Kenya, as stated by the Chief Justice in the Supreme Court's decision in the JMVB case at para 210:

> " ....Thus in interpreting the constitution, courts must take cognisance of Kenya's unique historical context....the majority in the Court of Appeal had not appreciated the unique historical context in which Kenya's constitution should be interpreted, and relied on foreign jurisprudence"

327. Applying these principles to the present petition, we note that on a plain reading, Article 167(1) does not itself fit into the mold of a provision which has retrospective effect. However, we must also note that Article 167 is not a transitional provision. It is a substantive provision which has effect for, and over, the

long term duration of the Constitution, until otherwise amended in future. Its text and tenor are clear and unambiguous; a judge shall retire on attaining seventy years. It has a forward-looking orientation. However, in resolving the transitional conundrum presented in this issue, Article 167 must be read together with other provisions, as Mr. Nyaundi has urged.

328. On the other hand, we do not consider that a proper retroactive provision in the Constitution affecting the vested rights of a person would be liable to challenge, as every provision in the constitution is "constitutional" and the validity of the constitution cannot be challenged under Article 2(3). Thus, a retrospective provision in a constitution is neither unlawful, alarming nor as absurd as the Petitioner seems to suggest.

329. We note that there are several provisions in the Constitution that are expressly retrospective. This is not surprising because the people, by their sovereign will, intended to usher in a dramatic and large scale change through the 2010 Constitution. What the former Constitution gave could well be taken away under the new Constitution in accordance with the will of the people.

330. A striking example of retroactive provisions is Article 65 (1) and (2) which provides:

> " 65.
>
> (1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.
>
> (2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more.

Section 8 of the Sixth Schedule then makes provision for the transition envisaged in Article 65 in these terms:

> " 8.
>
> (1) On the effective date, any freehold interest in land in Kenya held by a person who is not a citizen shall revert to the Republic of Kenya to be held on behalf of the people of Kenya, and the State shall grant to the person a ninety-nine year lease at a peppercorn rent.
>
> (2) On the effective date, any other interest in land in Kenya greater than a ninety-nine year lease held by a person who is not a citizen shall be converted to a ninety-nine year lease.
>
> (3) The provisions of Article 71 shall not take effect until the legislation contemplated under that Article is enacted.

331. Clearly, the above provisions have the retrospective effect of altering land tenure holding in respect of non-citizens from freehold to leaseholds of 99 years and converting already existing leases from 999 years to 99 years. This is a far reaching change adversely affecting property ownership by non-citizens, no doubt informed by long-held grievances by local people in that regard.

332. Equally, and as an obvious mechanism to address glaring inequities in landholding among citizens, Article 68 empowered Parliament not only to revise existing land laws but also to enact legislation "to prescribe minimum and maximum land holding acreages in respect of private land."

The Bill now pending publication will certainly retrospectively affect the title to land already held by affected land owners whose parcels fall below or above the minimum or maximum acreages.

These two examples are representative of a dramatic shift from the familiar past. Related to these arrangements is the creation of the National Land Commission (NLC) under Article 67, with the mandate, inter alia: "to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress." These provisions, among others, herald a poignant break with the past and represent a promise and commitment to redress injustices and unfair aspects related to land in the past of the nation. During transitions, the break from the past, results in changes that may be felt more keenly by certain communities and parties than others.

333. As was stated by Ngcobo, J in the South African case of Bato Star at Pg 73:

> "…. Transformation is a process. …The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution. As was recognised in Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another (2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 7 'The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others.' " (Emphasis added)

334. Before leaving this point we cannot fail to mention one of the most remarkable provisions in Section 24 of the Sixth Schedule. Section 23 provided, despite the provisions of Article 160, 167 and 168 of the Constitution, for the vetting of Judges and Magistrates appointed before the effective date on their fitness to remain in office. The applicable standard was Articles 10 and 159 of the new Constitution – standards not in existence in the former constitution before the effective date. This provision, implemented through the Vetting of Judges and Magistrates Act facilitated the vetting of Judges regarding matters and complaints against them arising before the 2010 Constitution; that is retrospectively. Various legal challenges to the vetting process ended in the Supreme Court which determined that the retrospective process was protected from curial intervention asserting that such was the will of the people.

335. The rationale for vetting was explained in the CoE (2010) Report where that Committee stated that:

> "…On careful consideration of the options suggested in submissions, the Committee of Experts decided that wholesale reappointment of the Judiciary was not appropriate. Instead, the Committee of Experts decided that some forms of vetting of current Judges should take place as was done in Bosnia-Herzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe 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 (para 6.4.4.1)."

336. Similarly, another or extraordinary retrospective provision is the unusual measure requiring vacation of office by the erstwhile Chief Justice within 6 months of the effective date. These measures are reflective of the fact that the people of Kenya were prepared to take unusual steps in determining the kind of government and public officers they desired, notwithstanding the adverse effects it would have on certain people or on certain rights.

In our view therefore, the Petitioner's case cannot succeed merely on the principle that a vested right cannot be taken away under any circumstance. Where a constitutional provision has a clear retroactive orientation the court cannot read an exemption into it unless the provision embraces such principle in respect of a given right.

337. The next question, therefore, is: under what transitional provision of the 2010 Constitution, did the Petitioner transit – or exit from – the old constitutional order and emerge into the present constitutional dispensation? We will return to this point when dealing with Sections 23 of and 31 of the Sixth Schedule.

Security of Tenure vis-a-vis the Petitioner's Appointment to a New Office under the Constitution 2010

338. Having already discussed security of tenure by setting out how it emerged and developed in Kenya's legal history, we now turn to the Petitioner's contentions concerning her appointment to the office of DCJ. These are as summarized below.

339. First, she argues that on a proper interpretation of the Constitution, her security of tenure was preserved in the new constitutional dispensation. That this was effected via the transitional provision of Section31(1) of the Sixth Schedule. She argues that the provision, properly read, enabled her to "continue to hold office for the unexpired period" of her term. Thus, any attempt to reduce her secured retirement age by application of Article 167(1) would amount to an unconstitutional diminution of her term.

340. Secondly, she argues that a judge's tenure is personal in that it is attached to and inseparable from the person of a judge. In this respect, she posits, tenure is essentially continuous with her service in the office of judge from the time of her first appointment. Since there is only one designation of a judge – a judge of a superior court - her secured tenure as such judge continues unaffected by her appointment to any superior Court of higher rank or status.

341. Thirdly, and closely connected to the above point, she argues that her appointment under the Constitution 2010 to the Court of Appeal and subsequently to the Supreme Court as Deputy Chief Justice and Vice President of the Supreme Court, did not affect her tenure. She contends that the only office under the new Constitution to which a tenure is not personal is that of the Chief Justice which carries a tenure of ten years and a mandatory retirement age of seventy years.

342. We affirm the general principles, accepted internationally, which are summarized as follows: that judges should have security of tenure to enable them serve fearlessly and confidently without worrying about the possibility of being victimized for their exercise of judicial functions; and that the guarantee of judicial independence should normally be effected domestically through constitutional or other legal provisions. However, it would be remiss of us not to state that security of tenure is primarily tied to judicial independence and intended for the benefit of the people a judge serves.

343. Some of the international instruments which highlight these principles include: The United Nations Basic Principles on the Independence of the Judiciary 1985. This instrument calls on member states to

guarantee judicial independence domestically through constitutional and legal provisions. The same principles are found in the Recommendation on the Respect and Strengthening of the Independence of the Judiciary (ACHPR, 19th Session, 03/26 of 4th April, 1996) which call on African states to meet certain minimum standards to guarantee independence of the judiciary.

344. We note that there is some interface between security of tenure and mandatory retirement age. Security is about a guarantee, while tenure is about the limit of service imposed by the mandatory age for vacation of office. Under the repealed constitution, the office of judge could not be abolished while there was a substantive holder of the office (Section 60(4)), and a judge was to vacate office when he attained an age prescribed by Parliament (Section 62(1). These guarantees are contained in Article 160 of the Constitution even as the age limit is set in Article 167(1).

345. From the historical background we have earlier provided, it is clear that what a judge was constitutionally guaranteed under the former constitution was security of tenure of office, in that a judge could not be removed from office except for inability or misconduct through a tribunal established under section 62(3) and (4). There was no constitutional provision for voluntary retirement or resignation by a judge. However, the office of judge was to be vacated on a date prescribed by Parliament in a statute. It could be raised or lowered by Parliament, but the office could also not be abolished. Once a judge attained the statutory age prescribed for vacating office, he could not continue holding such office as of right and the security of tenure terminated.

346. We now consider the effect of the creation of the new office of DCJ and Vice President of the Supreme Court on security of tenure of the Petitioner.

347. We note that under the repealed Constitution, the Judicature existed as merely a system of lower courts and two superior courts, namely, the High Court and the Court of Appeal. The Chief Justice was a judge in both superior courts (Sections 60(2) and 64(2)), thus headed both. He had no deputy and there was no provision concerning administrative arrangements for the old "Judicature". The Judicature was neither established as an arm of government, nor was it expressly stated to be imbued with exclusive judicial authority or independence. Under Section 61(2) of the repealed constitution, the JSC was responsible for advising the President on judicial appointments to the superior courts. It was also responsible for appointment, discipline and removal of other judicial officers (Sec 69(1)).

348. The new Judiciary was designed as a fully-fledged arm of government directly endowed with the peoples' sovereign judicial authority (Article 1). It is expressly stated to be independent and not subject to control or direction from any quarter (Article 160(1)); a comprehensive judiciary administrative and governance structure was established, as described earlier. Fundamentally, the 2010 Constitution established: a new Judiciary anchored on a new paradigm with written principles for exercise of judicial authority, a new Court of Appeal and High Court each with their own constitutional heads; and the Supreme Court was an entirely new creature.

349. We note that under Section 33 of the Sixth Schedule provision was made for succession of institutions. That section reads as follows:

> "An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name." (Emphasis added)

The section expressly indicates that the institutions under the new Constitution are established under the Constitution. Upon establishment, they became the legal successors of the institutions or offices established under the former constitution, whether known by the same name or otherwise. Our

understanding of this provision is that the institutions and offices under the Constitution 2010 took the place of the former institutions and offices. The former were re-stablished, reorganized or recreated while the new offices had new objects, purposes and principles of the new Constitution, so as to fit and gel into the new order. As regards the institution of the Judiciary, we do not accept that the old was abolished, rather that it was re-established to succeed the old, and new courts and offices created within it. The changes render the old and present Judiciary dissimilar.

350. The various new offices were expressly created in the (new) Judiciary under the new constitutional order. In respect of the recreated office of Chief Justice who is also judge and president of the new Supreme Court a specific maximum term of ten years was assigned to its holder under Article 167(2); the holder must retire at the age of seventy, but can opt to retire early at the age of 65 under Article 167(1) and (2). Clearly, therefore, a judge or other person who is appointed as Chief Justice under the Constitution 2010, cannot serve beyond the age of seventy.

351. The office of Deputy Chief Justice is an entirely new office under the Constitution 2010. Its holder is recommended by the JSC for appointment as both a judge and Vice-President of the Supreme Court and the Deputy Chief Justice. The office is therefore coterminous with and inseparable from the administrative and judicial roles of Deputy Head of the Judiciary (Article 161(2)(b)) and Vice-President of the Supreme Court (Article 163(1)(ii)). It is an office supportive of that of the Chief Justice, and has no express term limits. Like that of the Chief Justice, the DCJ's office falls under the "New appointments" part of the transitional provisions partly in the sense that both the CJ and the DCJ are judges of the Supreme Court created in the 2010 Constitution.

352. Section 29(1) of the Sixth Schedule provides:

> " 29.
>
> (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalised within one year."

The first holder of that office was Lady Justice (retired) Nancy Barasa. We take judicial notice of the fact that she was appointed in office "in consequence of the coming into force of th[e] Constitution" 2010, within one year of the effective date. As a new office the DCJ's office had the tripartite roles of a judge of the new Supreme Court, Deputy President of the Supreme Court and Deputy Chief Justice, and was subject to the applicable provisions for holders of new offices under the new Constitutional provisions.

Despite the foregoing, the Petitioner argues that tenure transited under Section 31(1) of the Sixth Schedule, and she therefore cannot be retired before the age of 74 years. That argument, in our view, leads to the non sequitur that she is also holding the new office of Judge of the Supreme Court under the repealed constitution by implicit operation of two different constitutions in place at the same time. It is this demonstrable anomaly that renders impossible the proposition that the Petitioner's transition into the new Constitution occurred under Section 31(1), with regard to the office of judge of the Supreme Court

353. Even if for argument's sake we were to accept that tenure attaches to the person, this too would lead to a further absurdity in the even that such person, who was a judge on the effective date, was occupying the office of the Chief Justice. Would such person be heard to argue, upon attaining seventy years, that he would remain in office nonetheless in spite of the clear prescription of Article167(2)?

354. Additionally, if the Chief Justice were to retire from office, the Constitution requires that the deputy would act as the Chief Justice. A person acting in such capacity should be one who qualifies to hold the CJ's office. In terms of the requirements of Article 167(1) & (2) no judge who is above seventy years can act in that capacity. In this case, the Petitioner could not act in the office of Chief Justice for the reason that by 16th January 2016 she would not qualify for appointment as a Chief Justice because of the age factor. This further exemplifies the absurdity of the Petitioner's argument as to carrying over her retirement age under the Section 9 of the Judicature Act, via Section 31(1) of the Sixth Schedule.

355. We conclude that it is erroneous for the Petitioner to maintain that she would continue to serve under the terms of the repealed Constitution because as we have indicated already there can never be two constitutions in force simultaneously. See Uganda v. Commissioner of Prisons ex-parte Matovu (1966) EA 514. The second reason is the act of taking oath under the new Constitution.

356. We now turn to consider the oath of office and, in detail, Section 31(1) of the Sixth Schedule.

The Oath Ascribed to by Judges under the Constitution 2010

357. Black's Law Dictionary 6th Edition at page 1071 defines oath of office as follows:

> " various declarations of promises, made by persons who are about to enter upon the duties of a public office. An oath of office is required, by Federal and State Constitutions, and by various statutes, to be made by major and minor officials"

358. In her replying affidavit sworn on 16th September, 2015 at paragraph 10, the Chief Registrar of the Judiciary deposed that after the effective date all serving judges took the oath of office and swore to defend the Constitution. This, she said, was an acknowledgement that they held office under the new Constitution and were bound by its provisions.

359. In her supplementary affidavit the Petitioner averred that she took the oath to uphold and protect the whole Constitution including the Sixth Schedule; that this did not affect her tenure as a judge. This point, was reiterated by her advocate, Mr Oraro.

360. Article 74 provides:

> " Before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe the oath or affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament".

361. The oath ascribed to by Judges under the Third Schedule states as follows:

> " OATHS FOR THE CHIEF JUSTICE /PRESIDENT OF THE SUPREME COURT, JUDGES OF THE SUPREME COURT, JUDGES OF THE COURT OF APPEAL AND JUDGES OF THE HIGH COURT
>
> I, ..., (The Chief Justice/President of the Supreme Court, a judge of the Supreme Court, a judge of the Court of Appeal, a judge of the High Court) do (swear in the name of the Almighty God)/(solemnly affirm) to diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to

upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it. (So help me God.)"

362. Section 13 of the Sixth Schedule provides for the Oath of allegiance to the Constitution as follows:

> " On the effective date, the President and any State officer or other person who had, before the effective date, taken and subscribed an oath or affirmation of office under the former Constitution, or who is required to take and subscribe an oath or affirmation of office under this Constitution, shall take and subscribe the appropriate oath or affirmation under this Constitution."

363. The CoE Report of 2009 explains the significance of the requirement for taking the oath. Firstly, this requirement for the oath was contained in all the three drafts of the constitution. Secondly, the following rationale was outlined in para 6.4.2 of the COE Report:

> " Para 6.4.2: a new oath is to mark a new beginning that the Constitution represents and to highlight the fact that all these office holders are committed to adhering to the set of values that the new constitution represents...we propose that...once the new constitution comes into force....all office holders discussed....(MPs, members of the Executive, Judges, etc) should be required ....and to mark a fresh start that a new Constitution is intended to represent, renew their oaths" (emphasis added).

364. In view of the above, the submissions, and what the Constitution itself states concerning the oath to be undertaken under Section 13 of the Sixth Schedule, we find the following to hold:

the taking of the fresh oath was to mark a fresh start;

the oath was significant to the extent that the person taking it was aligning himself/herself to the Constitution 2010;

the judges undertook to uphold, observe, protect, defend and honour the Constitution 2010.

365. We further find that in taking the oath the Judges were pledging their allegiance to the Constitution. Equally, the statement of loyalty to the Constitution affirmsthe independence of the Judiciary. In the South African case of Justice Alliance of South African V President of the Republic of south Africa & others 53/11 CCT 54/11 ,CCT 62/11)[2011] ZACC 23; 2011(5)SA 388 (CC);2011(10) BCLR 1017 (CC) (29 July 2011) the following was observed in regard to an oath:

> " ...the requirement of judicial independence is further underscored by the oath or solemn affirmation taken by all judges when entering office. Judges undertake to uphold and protect the Constitution and administer justice without fear, favour or prejudice."

366. In the Mong'are case, Otieno-Odek JA, stated as follows concerning the oath ascribed to by the Judges & Magistrates; at paragraph 42 of his judgement:

> " The severance of the old Constitutional order and the tenure of the judges who were in office on the effective date was transited by the Provisions of Section 13 of the sixth Schedule relating to the Oath of Allegiance to the 2010 Constitution. The serving Judges took an oath of allegiance to the 2010 Constitution and this effectively transited them from the old Constitution and their continuity to serve in office was made subject to the new Constitutional order which contains Section 23 (1) of the Sixth Schedule to the Constitution – a Section that requires vetting for suitability to continue to serve. The

individual Judges who were serving on the effective date took an oath of allegiance to the new constitutional order and cannot turn around and impugn the constitutional order to which they swore to uphold. A Judge cannot abjure the allegiance which he owes to the Constitution and one cannot approbate and reprobate. The oath of allegiance taken by the serving judges was not a child's play or an empty rhetoric ceremony. It had substantive legal consequences, it severed and cut off the umbilical cord that linked the judges from the old Constitutional order and subject to vetting, the Oath of Allegiance ushered the judges into the new constitutional order .....In a lay man's language, you cannot take the marriage vows and still claim to be single, your status changes and the past is cast with annals of history. The Oath of Allegiance is a constitutional estoppel to the Judges and Art 2 (3) of the Constitution binds them to uphold the new Constitutional order and its values." (Emphasis added)

367. We are in agreement with this finding by the learned Judge of Appeal. Our finding therefore is that the Oath of Allegiance taken by the judges on the effective date bound them to the new Constitution which they swore to uphold. In conclusion, we are not persuaded that the appointment of the Petitioner to the Supreme Court and taking of the Oath had no effect on her retirement age.

Constitutionality of Section 9 of the Judicature Act

368. According to the Petitioner, she was appointed as a judge under the repealed Constitution, and her retirement age is therefore as stipulated under Section 62(1) of the repealed constitution as read together with Section 9 of the Judicature Act. Mr. Ahmednasir, responded by contending that Section 62(1) was not saved under the current constitution and further that Section 9 of the Judicature Act is unconstitutional being in conflict with Article 167 (1) of the Constitution. He therefore urged the court to declare Section 9 unconstitutional and void.

369. Before us therefore is an issue involving the interpretation of a section of statute vis-a-vis the Constitution. In this regard, the general presumption is that every Act of Parliament is constitutional and the burden of proof to the contrary lies on any person who alleges otherwise. See Ndyanabo Case.

370. The question of interpretation was well articulated by the Constitutional Court of Uganda in Advocates Coalition for Development of Environment & Others v. Attorney General & Another [2014] 3 EA where it was stated inter alia that:

> "
>
> "i. The widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters. In certain context, a liberal interpretation of the constitutional provision may be called for.
>
> ii. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore, should be given a dynamic progressive and liberal flexible interpretation, keeping in mind the ideals of the people and their social economic and political-cultural values so as to extend fully the benefit of the right to those it is intended for. (South Dakota vs. North Carolina, 192, US 2681940 LED 448.)
>
> iii....
>
> iv....

v....

vi. The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent or in contravention of the Constitution is null and void to the extent of the inconsistency. (Article 2(1) and (2) of the Uganda Constitution, 1995)..."

371. The repealed Constitution at Section 62 (1) provided that:

> " Subject to this section a Judge of the High Court shall vacate his office when he attains such age as may be prescribed by Parliament."

372. In compliance with this provision, Parliament enacted the Judicature Act (Cap 8 laws of Kenya) Section 9 of the said Act provides:

> " For purposes of section 62 (1) of the Constitution, the age at which a person holding the office of a Judge shall vacate his office shall be seventy-four years."

373. Article 167 (1) of the Constitution provides thus:

> " A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years."

374. The foregoing raises the question whether in light of the Constitution 2010 Section 9 of the Judicature Act is constitutional. Section 7 (1) of the Sixth Schedule provides that:

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

375. Section 9 of the Judicature Act being one of the laws that were in force immediately before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution 2010.

376. In the CCK Case (supra) the Supreme Court had occasion to interpret Section 7 of the Sixth Schedule of the Constitution. It stated that:

> " ....(iv) In construing any pre-constitution legislation, a court of law must do so, taking into account necessary alterations, adaptations, qualifications and expectations, to bring it into conformity with the Constitution.
>
> (v) Where it is not possible to construe an existing law in accordance with (iv) above, so as to bring it into conformity with the Constitution, that is to say, where a law cannot be conditioned through legal intervention without usurping the role of Parliament such a law is invalid for all purposes"

377. Our reading of Section 9 of the Judicature Act against Article 167 (1) of the Constitution clearly shows that the said section is not in conformity with the Constitution. Section 62(1) was not expressed to have been extended under the transitional provisions of Section 3 of the Sixth Schedule. In addition, in Article 167(1) – to which Section 9 is to be conformed – the people directly decreed the age of seventy as that on which "...a judge shall retire...". Accordingly, Section 9 of the Judicature Act is bereft of its

constitutional anchor and cannot in fact be brought into conformity with the new Constitution, and falls afoul of Article 2 (4) of the Constitution 2010 which declares that:

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

378. Having considered the wording of Section 9 of the Judicature Act, and its declared purpose with regard to the repealed constitution, we conclude by holding that it cannot be brought into conformity with Article 167(1) of the Constitution. Such an attempt in our considered view amounts to fitting a square peg into a round hole. We therefore hold and declare that Section 9 of the Judicature Act is altogether void.

The Import of Section 31 of the Sixth Schedule of the Constitution on the retirement age of Judges

379. Section 31 is a transitional provision for "Existing offices" as at the effective date. Section 31(1) reads as follows:

> " Existing offices.
>
> 31. (1) Unless this Schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person." (Emphasis added)

380. We start by setting out below a few examples of "Existing Offices" under the repealed constitution, which were retained in and intended to be transited into the new constitutional dispensation, but had no specific transitory mechanism in the transition clauses in the Sixth Schedule:

a. the Speaker and Deputy Speaker of the National Assembly established under Sections 37 and 38 of the repealed constitution: retained in Article 106 of the Constitution.

b. the Clerk of the National Assembly established pursuant to section 45A (2) of the repealed constitution: retained videArticle 128(1).

c. the Parliamentary Service Commission (PSC) established under section 45B of the repealed constitution; retained vide Article 127.

d. the Interim Independent Constitutional Dispute Resolution Court established under section 60A of the repealed constitution. That Court had a term of twenty-four months from the commencement of section 60A and was to stand dissolved three months after the promulgation of the new Constitution pursuant to section 60A(11) of the repealed constitution.

e. the Public Service Commission established under Section 106 of the repealed constitution See: Section 31(1) of the Public Service Commission Act No. 13 of 2012: retained under Article 233 of the Constitution.

f. the Committee of Experts established under the Constitution of Kenya Review Act Cap 3A and Section 60(1) of the repealed constitution. It was provided that the Committee of Experts would stand dissolved forty five days after the promulgation of the new constitution or non-ratification of the new constitution, whichever was earlier.

381. It is critical to note that Section 31(1) refers to "the unexpired period ... of the term of the person." The commissioners of the Parliamentary Service Commission for example, held office on a term of three

years, and therefore if any Commissioner's term had not expired on the effective date, he continued to serve "under this Constitution" for the remaining period of his term under Section 31(1).

382. Mr. Oraro submitted that the JSC's purported retirement of the Petitioner at seventy years is unconstitutional. He stated that the Petitioners had assumed office as a judge under the provisions of Section 62 (1) of the repealed Constitution which guaranteed them retirement at seventy-four years and her tenure was saved pursuant to Section 31(1).

383. And that requiring her to retire under Article 167(1) violates her rights vested and accrued prior to the promulgation of the Constitution.

384. It was the Respondents' case that the Petitioner ought to retire at the age of seventy years as stipulated under Article 167 (1). They further asserted that the purpose of Section 31(1) of the Sixth Schedule was to transit officers from the repealed Constitution to the new Constitution and that the said clause does not survive the effective date as it expired after achieving its purpose.

385. Mr. Oraro's contention was that the term of office referred to in Section 31(1) was the "unexpired term of the Petitioner's tenure", which unexpired period was transferred by dint of Section 31(1) of the Sixth Schedule. Mr Ahmednasir countered that Section 31(1) could not confer a substantive right, and secondly, that it made reference to continued service under "this Constitution".

386. In this regard, we note the use of the words "the unexpired term" in relation to the National Assembly (Section 10); the Commissioners of the Kenya Human Rights and Equality Commission (Section 26(1)) and its Chairperson (Section 26(2)); and the Interim Independent Electoral Commission and Boundaries Commission (Sections 27 and 28). These were offices held on fixed terms. In contrast, Section 23 (on the Judiciary) merely refers to vetting on suitability "to continue to serve", rather than to "unexpired term".

387. In interpreting the Constitution, we are well guided by the principles of interpretation already discussed elsewhere in this judgment: Section 31 of the Sixth Schedule has the same force as any other provision of the Constitution. It cannot be segregated and read in isolation from other provisions of the Constitution. See the cases of: Mong'are; CREAW; Dakota; and Tinyefunza; discussed in regard to interpretation and also Article 259.

388. The key words in Section 31(1) are those underlined as follows:

> " Unless this Schedule provides otherwise....a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of that person" (Emphasis added)

Accordingly, if there are other provisions in the Schedule which have a contrary effect, Section 31(1) would obviously not apply. Such application is expressly excluded by the wording of the Section. Clearly, the provision is a catch-all provision applicable in a wholesale and unqualified manner to any and sundry constitutional offices not specifically provided for and in addition are officers serving on a periodic term, hence, the reference to "the unexpired period, if any, of the term of that person".

389. This provision would therefore not also apply by virtue of the exclusion to the National Assembly (Section 10); Commissioners and the Chairperson of the Kenya Human Rights and Equality Commission (Section 26); and the Interim Independent Electoral Commission (Section 27). These are specifically provided for. Ditto, the offices of A-G, the CJ and the Auditor-General by dint of Sections 24 and 31 (7).

390. Upon reflection,, it appears to us that firstly there is a clear distinction between the words "term" and "tenure". The distinction is evident in both the former constitution and the new Constitution. The word "term" is used in reference to an office held for a specific pre-determined period of time in years. Its termination is not dependent on a retirement age or an age set for the vacation of office but rather ends by effluxion of the specified time period in years: for example the President (Article 142(1)); Members of Parliament (Article 102 as read with Articles 101(1) and 103(1)(f))); DPP (Article157(5)); Controller of Budget (Article 228(3)); Auditor-General Article 229(3)); Commissioners of Chapter Fifteen commissions (Article 250(6)(a)); Chief Justice (Article 167(2)) etc.

391. On the other hand, where the word "tenure" is used, it refers to an office held for an unspecified duration from the appointment date and ending upon attainment of a specified age: for example, under the former constitution, the office of Judge; and under the current Constitution, the word 'tenure' is used in the headnote to Article 167 in reference to Judges. This term is not used for Chapter Fifteen Commissions. Instead Article 250(6) refers to "a single term of six years" unrenewable.

392. Secondly, despite these differences officers, serving under tenure such as judges, and those serving for a fixed term, could and do enjoy "security of tenure". In both cases "tenure" refers loosely to the incumbency of an office from which removal is not permissible except by a tribunal on specified grounds such as misconduct or incapacity. Hence security of tenure is not necessarily based on the length of period allowed for incumbency.

393. Accordingly, in interpreting Section 31(1) we conclude that reference therein to "the unexpired period, if any, of the term of the person" cannot apply to Judges who were in office on the effective date, because they served until a certain retirement age and not on a fixed term in years. As we have observed before, Section 23 used the terms "to continue to serve" rather than "unexpired period of term". Additionally we note that transited officers were under Section 31(1) to continue to serve "under the Constitution".

394. In our view, had it been the intention, nothing would have been easier than for the drafters to specifically refer to judges in Section 31(1), particularly, in light of the fact that questions regarding judges' continuation in service and retirement age had featured prominently during the constitution-making process. Moreover, we do note that under Section 23, every judge was technically liable for removal, and if Section 31(1) applied to judges as proposed by the Petitioner, no judge would have been removable as provided for in Section 23. This is because the provisions of Section 23 would stand neutralised by Section 31(1), in such case.

395. Which provision then applies to the transition of judges in office on the effective date? We propose in answering the questions to consider some of the provisions in the Sixth Schedule that "provide otherwise" than in Section 31(1) in relation to this Petition. The rule applicable being that the constitutional provisions must be read as a whole, and harmoniously, with none destroying the other. See JMVB Case.

396. Section 31(1) contains a general provision that is qualified by the subsequent sub-sections (2)-(7) thereof. Section 31(2) and (3) are to the effect that a public office established by law could, despite the provisions of sub-section (2), be abolished or the incumbent officer removed from office despite the transition provided for in sub-section (2). With regard to Judges for example, these provisions meant that they could not validly challenge their removal under Section 23(2). Thus Sections 31(2) and (3) clearly maintain consistency with Sections 23 and 31(1), properly read.

397. Section 31(2) clearly excludes the Attorney-General, Auditor-General and the Chief Justice from its application as their transition is expressly provided for in Sections 31(7) and 24, respectively. Section 31(7) also excludes the application of Section 31(1) to the offices of the Attorney-General and Auditor-

General. In effect, therefore, Section 31(1) and (2) could not apply to the Attorney-General, Auditor-General and the Chief Justice.

398. Section 31(4) caters for the eligibility for appointment or reappointment of persons who held and vacated offices under the former constitution, provided they qualify and such office was retained or established.

399. Section 31(5) and (6) provide for the performance of the functions of the Director of Public Prosecutions and the Controller of Budget, pending the appointment of the substantive office holders.

400. Section 31(7) provides that the AG and Auditor General continue in office for a period of not more than twelve months, "despite sub-section (1)".

Section 31, we perceive that: Section 31(1) provides for transition of constitutional offices held on fixed terms and also not otherwise provided for in the Schedule. Section 31(2) appears broader and provides for the transition of persons holding a public office, including judges, but excluding the Attorney-General, Auditor-General and the Chief Justice. However, under the two provisions the transited offices are to be held "under this Constitution".PARAGRAPH 402.

Section 31(2) provides:

> " (2) Subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution." (Emphasis added)

403. For the avoidance of doubt, a "public officer" referred to in Section 31(2) means a person holding or acting in an office in the public service and includes Judges under Section 123 of the repealed constitution. Similarly, the definition of "public officer" under Article 260 of the current Constitution is: a state officer or any other person who holds a state office, and includes Judges.

404. To our mind the express reference in Section 31(2) to the offices of the AG, Auditor General and Chief Justice – the only other offices which had security of tenure as did judges, under the former constitution – implies that these provisions could have applied to the excluded offices (AG and Auditor General), but for the exceptions therein. Secondly, that following the ejusdem generis rule this provision applies to judges, as they had security of tenure under the repealed constitution.

405. For completeness we have scrutinized in more detail other provisions in the Schedule that "provide otherwise" outside Section 31.The first is Section 23 (1) which provides:

> " 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." (Emphasis added)

406. By virtue of Section 23(1) only those Judges who were successfully vetted would continue to serve in the new Judiciary. And by dint of Sections 23(2) and 31(3) any judges removed could not challenge their removal. Section 23 also provides that the process of vetting would go on "despite" or regardless of Articles 160, 167, 168 of the Constitution. This reference to the new constitutional provisions is telling as Article 167 provides for the age of retirement at seventy years. Clearly, provisions of Article 167 are expressly applied to the judges in office on the effective date.

407. It must be recalled that on the effective date, the only judges in office were those appointed under the former Constitution. Had the intention been to save their tenure under the former constitution as argued by the Petitioner, reference in Section 23 would have been made to Section 62(1) of the repealed constitution, and Section 9 of the Judicature Act. But at any rate, the life of Section 62 was not extended by Section 3 of the Sixth Schedule, as we have observed and neither is Article 167 suspended under Section 3(2) of the Sixth Schedule. We pause here to note that Section 23(1) gives the first hint that Article 167, though not inherently retrospective, assumed a retrospective application to judges in office on the effective date by virtue of certain transitional provisions such as Section 23(1).

408. The second provision is Section 24 (1) which provides:

> " 24.
>
> (1) The Chief Justice in office immediately before the effective date shall, within six months after the effective date, vacate office and may choose either—
>
> (a) to retire from the judiciary; or
>
> (b) subject to the process of vetting under section 23, to continue to serve on the Court of Appeal."

This section is the reason behind the exclusion of the Chief Justice from the application of Section 31(2).

409. The Chief Justice under the repealed constitution was also a judge of both the High Court and the Court of Appeal hence a constitutional office holder. If Section 31(1) is read as proposed by the Petitioners, then it would be in direct conflict with and make nonsense of Article 167, Sections 23, 24 and Section 31 (2)-(7) of the Sixth Schedule, resulting in absurdity. Secondly, such interpretation obscures the intent and defeats the purposes of Section 31(1) on the transition of offices held on fixed terms and not provided for, thus contrary to good governance. Moreover, like Section 31(2) the offices transited are to be held "under this Constitution".

410. Additionally, it would result in the retention of judges past seventy years of age who despite their seniority would never be eligible for the position of Chief Justice by virtue of Article 167(2), which specifically limits his or her age and term of office.

411. The purpose of Section 31(2) was to transition into the new constitutional order, all public officers who were not serving under a fixed period of a term, including judges. We cannot accept the conflation of Section 31(1) of the Sixth Schedule with the repealed Section 62 of the former Constitution as proposed by Mr Oraro, on the basis of pension rights. Section 32 clearly saves the pension benefits of judges and other constitutional office holders in office on the effective date based on the law of pension. Article 167, repealed Section 62 of the former constitution. Neither Section 31(1) nor even Section 32 can be read in a manner that "revives" a repealed section of the former constitution. Similarly, we cannot accept the argument that a judge's tenure attaches to the person of a judge rather than the office: Article 167(2) and (3) in respect of the Chief Justice rebut such a notion. We agree with Mr. Nyaundi that Article 167(1) must be read together with Section 31 to discern its full import regarding the transition of the Petitioner.

412. We conclude therefore that the provisions applicable for the transition of judges serving before the effective date are Sections 31(2) and thereafter 23 of the Sixth Schedule. Section 31(2) states inter alia that the transited officers "so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution". (Emphasis added)

413. The import of the emphasized words in Section 31(2) with regard to the Petitioner is this: that Article 167(1) assumed a retrospective colour that in a sense blotted out all vestiges of her tenure under the former constitution. Under this provision there can be no dispute that the retirement age of Judges in office on the effective date is seventy years. Once the transition is effected, Section 31(2) is spent and Article 167(1) continues to apply prospectively.

414. In this regard Section 31(2) is a true sunset clause as far as Judges are concerned. On the effective date, it transited Judges in office into the new dispensation. This transition and fresh start was symbolized by the taking of the oath provided for in Section 13. Their next hurdle was vetting under Section 23, despite Section 31(2), which more or less confirmed for successful judges that they would continue in service under the new Constitution. Such is the scheme of things as we understand it.

415. In so finding we are bolstered by the words of Rawal J, Vice-President of the Supreme Court and DCJ, who in acknowledging the effect of Section 31(2) on the transition of judges in office on the effective date in the JMVB case (supra) stated:

> "...Judges were among persons who were in office on the effective date. We have found their continuation to hold office was subject to vetting and being found suitable to continue serving. Section 31 (2) provides that such public officers would be deemed to have been appointed to that office under the Constitution 2010." (Emphasis added).

416. Considering the nature of transitional clauses, we do not believe that it was the intention of the framers of the Constitution to have those provisions remain in force until the last serving judge attained seventy four years. It would have been more rational in such a case to have an express provision in the body of the Constitution saving the former retirement age, or excluding the serving judges from application of Article 167(1).

417. Equally, and by analogy, it is also our view that Section 6 of the Sixth Schedule must be read with emphasis on the words: "except to the extent that this Constitution expressly provides to the contrary" and in harmony with other provisions. As we have already explained, judges were catered for by Sections 23, 24 and 31(2), thus Section 6 providing for the extension of state obligations cannot be used to stake a claim on a retirement age of seventy four years. As well, the accrued pension under the repealed constitution stands saved under Section 32 of the Sixth Schedule.

418. In conclusion we find and hold that the Petitioner, like other judges serving on the effective date, transited into the new Constitution on the effective date under Section 31(2); and post-vetting, that they serve on the terms thereunder, including Article 167(1), which states that a judge shall retire from office on attaining the age of seventy years.

Disposition

419In light of all the foregoing we answer each of the prayers sought by the Petitioner as follows:

1. Prayers (a) and (b) are dismissed, this Court having found that the retirement age of a judge serving on the promulgation date of the Constitution 2010, is seventy years.

2. Prayer (c) is allowed. We hereby declare that the Judicial Service Commission has no constitutional and or statutory role in the allocation of judicial duties to individual judges or to direct which judges will preside or sit in judicial proceedings.

3. Prayer (d) was not argued and the Petitioner is still in office. The same is dismissed.

4. Prayer (e) is granted. An order of certiorari is hereby issued calling up and forthwith quashing the retirement notice dated 1st September, 2015 authored by the Secretary of the Judicial Service Commission to the Petitioner, for having originated from a State organ which has no mandate to issue a retirement notice to the Petitioner.

5. Prayer (f) is granted. An order of certiorari is hereby issued calling up and forthwith quashing the Respondents' decision to advertise, notify the public, and announce a vacancy in the office of the Deputy Chief Justice and Vice President of the Supreme Court of Kenya published in the Standard Newspaper on Sunday of 6th September, 2015, on the grounds that:

a. It was based on an unlawful retirement notice to the Petitioner;

b. It was made in violation of the Judicial Service Act.6. For the avoidance of doubt the Judiciary is at liberty to issue a retirement notice upon the Petitioner in accordance with the applicable laws.

COSTS

420 In light of the nature of this matter and the outcome, we order that each party shall bear their own costs.

421. Orders Accordingly.

Signed and Dated at Nairobi this on 11th day of December, 2015.

R. MWONGO

PRINCIPAL JUDGE

W. KORIR

JUDGE

C. MEOLI

JUDGE

H.ONG'UDI

JUDGE

C. KARIUKI

JUDGE

In the presence of:

SUBPARA 1.

Messrs. Kilukumi & Okoth also holding brief for Mr. Oraro for the Petitioner.

SUBPARA 2.

Messrs. Ahmednasir & Kanjama for the Respondents.

SUBPARA 3.

Mr. Okiya Omtatah in person as 1st Interested Party.

SUBPARA 4.

Mr. Ahmednasir holding brief for Messrs. Nyaundi and Mogeni for 1st Amicus ICJ.

SUBPARA 5.

Dr Khaminwa for 2nd Amicus Kituo Cha Sheria.