REPUBLIS OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Petition 146 of 2011

DENNIS MOGAMBI MONG'ARE.....PETITIONER

V E R S U S

THE ATTORNEY GENERAL.....1ST RESPONDENT

MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS.....2ND RESPONDENT

JUDGES AND MAGISTRATES VETTING BOARD.....3RD RESPONDENT

THE JUDICIAL SERVICE COMMISSSION.....4TH RESPONDENT

J U D G M E N T

Introduction

1. The petition before this court raises critical questions regarding the judiciary in Kenya and the constitutional and legislative provisions aimed at restoring public confidence in the judicial arm of government. It concerns the constitutionality of section 23 of the Sixth Schedule to the Constitution and the Vetting of Judges and Magistrates Act, 2011. Unless otherwise stated the Constitution referred to in this judgment is the one promulgated on 27th August 2010.

2. The Petition dated 26th August 2011, is lodged by **DENNIS MOGAMBI MONG'ARE**. He is an Advocate of the High Court and he institutes this Petition in the public interest as he is concerned that the Vetting of Judges and Magistrates Act, 2011 shall violate, infringe or threaten the fundamental rights and freedoms of judges and magistrates.

3. The Petition is filed against the **ATTORNEY GENERAL**, **THE MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS, THE JUDGES AND MAGISTRATES VETTING BOARD** and **THE JUDICIAL SERVICE COMMISSION.**

4. The Petition also involves six interested parties who were granted leave to participate in the proceedings pursuant to orders of Justice Lenaola and ourselves on the 2nd of September and the 13th of October 2011 respectively. These are the **PARTY OF INDEPENDENT CANDIDATES OF KENYA (PICK),** the **INTERNATIONAL COMMISSION OF JURISTS (KENYA CHAPTER) (ICJ-K),** the **LAW SOCIETY OF KENYA (LSK), KENYANS FOR PEACE WITH TRUTH AND JUSTICE**

(KPTJ), AFRICAN CENTRE FOR OPEN GOVERNANCE (AfriCOG) and **KENYA MAGISTRATES AND JUDGES ASSOCIATION (KMJA)**

The Petition

5. The Petitioner seeks various declarations and orders relating to the constitutionality of the **Vetting of Judges and Magistrates Act, 2011** ("the VJMA"). There are 15 prayers in the Petition, running from (a)-(o), which can for convenience be consolidated as follows:

i) A declaration that the rights of judges and magistrates under **Articles 19, 20, 22, 23, 24, 25, 27, 28, 29, 47** and **50** of the Constitution have been denied, infringed, violated and/or threatened (Prayers (a)-(k) of the Petition).

ii) A declaration that **sections 2 to 4** and **17 to 23** of the VJMA are inconsistent with Articles19(1), (2) and (3), 20(1), 21(1), 22(1) and (2), 23(3), 24(2) (a) (b) and (c), 25(a) and (c), 27(1),(2),(4) and (5), 28, 47(1) and (2), and 50(1) and (2) of the Constitution and are to that extent illegal, null and void (Prayer (l) of the Petition).

iii) An order for compensation of all judges and magistrates who have been or will be or are likely to be affected by the VJMAtaking into account their contract with the former Constitution and the period the judge or magistrate will have served according to the constitution (Prayer (n) of the Petition).

iv) An injunction to restrain the respondents from doing anything prejudicial to the judges and magistrates pending the hearing of the Petition (Prayer (o) of the Petition).

6. The Petition is supported by the affidavit of the Petitioner sworn on 26th August, 2011 in which he depones, among other things, as follows:

Para 3: *That I am informed by my Advocates on record which information I verily believe to be correct that Section 2, 3, 4,17,18,19, 20, 21, 22, 23 of the* **Vetting of Judges and Magistrates Act, 2011** *contravenes Article 19(1), (2), (3), 20(1), 21(1), 22(1),(2), 23(3), 24(2)(a)(b)(c), 25(a)(c), 27(1),(2),(4), (5),28,47(1) (2), 50(1) (2) of the Constitution.*

Para 4: *That I have every reason to believe that unless this conflict of the constitutional provisions is resolved, the Judges and Magistrates may be condemned without following the due process.*

Para 6: *That Section 23(1) of the Sixth Schedule donated power to Parliament to make law but it was the duty of Parliament to enact a law that is in accord with Article 19(1), (2),3), 24(2) (a) (b) (c), 25(a) (c), 27(1),(2),(4),(5),28,47(1) (2), 50(1) (2) of the Constitution.*

Para 7: *That theVetting Boards are just about to be constituted and may commence operations to the prejudice of judges and magistrates who may be condemned unheard contrary to the rules of natural justice.*

7. Simultaneously with the Petition, the Petitioner filed a Notice of Motion dated 26th August 2011 in which he sought orders '***restraining the Respondents, their agents, servants or whosoever from suspending, sending on leave or doing anything prejudicial to the Judges and Magistrates serving before the effective date, pending the hearing and determination of this Petition.'***

We directed that the substantive issues raised in the Petition should be argued and the Notice of Motion was consequently abandoned.

The Response to the Petition

The Respondents

8. **behalf, the 3rd Respondent filed an affidavit in opposition sworn by the Chairperson of the Judges and Magistrates Vetting Board ("the Board"), SHARAD SADASHIV RAO, on the 11th of October 2011.**The Petition was opposed by the 1st, 2nd and 3rd Respondents. On their

9. Mr Rao depones that only judges and magistrates who agree to be vetted shall be the subject of the process under the VJMA. He avers that the VJMA provides sufficient safeguards to the judges and magistrates as it specifically provides that the Board shall comply with the rules of natural justice and the judges and magistrates will be availed of any complaints or submissions made against them and shall have the fullest opportunity to answer them. He also asserts that the Board will treat all judges and magistrates appearing before them with dignity. He adds that the vetting process affords judges and magistrates a mechanism whereby they are cleared of any suspicion or wrong doing and their integrity safeguarded.

The Interested Parties

10. The LSK, ICJ-K, KPTJ and AfriCOG opposed the Petition through their respective counsel. The LSK filed an affidavit sworn by its Secretary, **APOLLO MBOYA** on the 11th of October 2011 while ICJ-K filed grounds of opposition dated the 10th of October 2011. PICK filed an Answer in Support of the Petition and a Verifying Affidavit sworn by the party leader **JOHN HARUN MWAU** on the 10th of October 2011.

11. KMJA was represented in these proceedings but did not file any affidavits or written submissions while the 4th Respondent, the JSC, filed written submissions.

Preliminary Proceedings

12. When this matter came up for directions before Justice Lenaola on 2nd September 2011, he referred the matter to the Chief Justice under the provisions of **Article 165(4)** of the Constitution since it raises a substantial question of law. On 5th September 2011, the Chief Justice constituted a three judge bench to hear the matter and directed that it be heard on a day-to-day basis until concluded. The matter was canvassed before us on the 13th, 14th and 17th of October 2011 and judgment reserved thereafter.

The Submissions

Submissions in Support of the Petition

13. The arguments in support of the Petition fall into two distinct limbs. The first limb as urged by Dr. Khaminwa is that Section 23 of the Sixth Schedule and the entire vetting process is unconstitutional. The arguments in this regard can be summarized as follows: Section 23 of the Sixth Schedule directly contradicts the provisions regarding the independence of the judiciary entrenched in article 160 and undermines the security of tenure of judges enacted in Article 167. The provisions of Section 23 of the Sixth Schedule are discriminatory as they require vetting of those judges appointed before 27th August, 2010 but not those appointed under the Constitution. Section 23 offends the principle of separation of powers by permitting Parliament to enact legislation for the removal of judges. Dr Khaminwa referred us to the case of ***Liyanage and Another v R*** **(1966)1 All ER 650** where the Privy Council held that under the Constitution of Ceylon there was a separation of powers, and the power of the judicature, while the Constitution stood, could not be usurped or infringed by the executive or the legislature. He further submitted that provisions for removal of judges should be in the body of the Constitution as was the case in the former Constitution and as provided under Article 168 of the Constitution. Section 23 of the Sixth Schedule violates the provisions of Article 25(a) and (c) of the Constitution which protects an individual from torture and cruel, inhuman and degrading treatment. Dr Khaminwa asserted that under Article 25 of the Constitution, the right to a fair trial cannot be limited. Section 23 of the Sixth Schedule, he submitted, was in conflict with the rest of the Constitution and in accordance with the provisions of Article 2(4), the supremacy clause, it should be declared null and void. In his view, the reference to '***Any law'*** in Article 2(4) includes any part of the Schedule to the Constitution that was in conflict with the

body of the Constitution.

14. Counsel contended that various universally recognized principles are violated by the vetting process. In respect of the principle of **legitimate expectation,** Dr Khaminwa submitted that the expectation by the judges that they would serve on the bench until they attained the age of 70 years was violated. In this respect the judges had acquired vested rights which could not be wished away by the vetting process. He relied on **Lasok and Lasok, Law and Institutions of the European Union, 7th Edition, Butterworths at page 188** as persuasive authority for this submission.

15. Dr Khaminwa submitted that the principles of fairness and proportionality were not adhered to. He contended that the vetting process was not certain and did not operate in a fair manner and appears to operate retrospectively as judges would be vetted for matters that happened before the Constitution came into force. He argued that the composition of the Board under the VJMA was questionable and therefore liable to violate the judges' and magistrates' right to a fair trial. Should there be any shortcomings in the judiciary, he argued, these could be addressed through existing mechanisms such as the JSC. He further argued that the Chief Justice had the capacity to discipline any errant judicial officer.

16. The second limb of the argument for the Petitioner, which is diametrically opposed to the first, is that **while the vetting process is constitutional, the consequential legislation is unconstitutional.** Mr. Ondieki who appeared with Dr. Khaminwa for the Petitioner, submitted that while the Petitioner was not opposed to the vetting of judges and magistrates as such, certain provisions of the VJMA were unconstitutional in several respects.

17. He submitted that the VJMA denied judges and magistrates a right of appeal; it failed to specifically state the rights of the judges and magistrates that it was limiting in violation of the provisions of Article 24(2) of the Constitution which requires that an Act limiting any fundamental right or freedom should specifically state the intention to limit the right and the nature and extent of such limitation. In this respect, sections 14, 18, 20, 22 and 23 of the Act should be struck out as being unconstitutional.

18. Mr Ondieki took issue with the requirement that a judge or magistrate who is aggrieved by the decision of the Vetting Board should seek a review of the decision before the same panel that carried out the vetting and that the decision of the panel was final. He also attacked the limitation of the period for vetting of judges and the period of one month provided for a judge or magistrate to respond under the Act as too short and not reasonable.

19. Counsel further argued that the provisions of section 23 of the VJMA were unconstitutional and were in breach of the principle of judicial independence provided in Article 160 of the Constitution. This principle, he argued, was also contained in the Bangalore Principles which were internationally accepted principles on judicial independence and thus general principles of international law. Counsel further referred to the provisions of international human rights treaties to which Kenya is a party such as the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights which underpin the independence of the judiciary.

20. We were referred to the case of ***The Attorney General of Trinidad & Tobago & Another v Mcleod*** **(1984)1 All ER 694** which supports the proposition that the enactment of a law that was inconsistent with the constitution did not deprive anyone of the protection of the law as long as the judicial system afforded access to the courts.

21. Mr. Ombati on behalf of the **PICK**tookthe position that the body contemplated for the vetting of judges and magistrates was the JSC. He referred us to the ***Final Report of the Committee of Experts on Constitutional Review, 2010*** at page 147-148 in support of this contention. He argued that the Committee of Experts was of the view that the JSC would be the proper body to carry out the task of vetting. He urged us to strike out those parts of the VJMA that referred to a body other than the JSC. In his view, the VJMA was unconstitutional because it was directed at a specific group, that is, it intended to remove all

the judges and magistrates appointed before the coming into effect of the Constitution.

22. Mr. Ombati further argued that Section 23 of the Sixth Schedule allowed Parliament to come up with a law that allowed vetting of judges retrospectively, but setting up a different body to carry out the vetting conflicted with Article 171 of the Constitution and violated the principle of separation of powers. He relied in this regard on the case of ***Bribery Commissioner v Ranasinghe (*1965) AC I72**. Mr Ombati also referred to ***Gachiengo v R* (2000) 1 EA 67** to support the argument that any law that was in violation of the principle of separation of power was unconstitutional and null and void. He urged the court to find, as the Constitutional Court of South Africa did in the case of the ***Justice Alliance of South Africa v President of the Republic of South Africa & Minister for Justice & Constitutional Affairs* (2011) ZACC 23, 47-49,** that the VJMA was unconstitutional but give an order that suspends the declaration of invalidity to allow time for the relevant authority to correct the defect in the legislation.

23. While not expressly supporting the Petition, the **KMJA** position as presented by Mr. Mwenesi echoed that of the Petitioner with regard to the constitutionality of the VJMA. He questioned whether judges going through the vetting process would be accorded justice as provided under Article 48 of the Constitution. He also questioned the composition of the Vetting Board in light of the provisions of the Bangalore Principles particularly, **Principle 15(a),** which, he submitted, provides that the vetting of judges should be carried out by judges and that the body carrying out the vetting should not be composed of members of the executive or the legislature.

24. He further submitted that the VJMA violated Article 27 by providing an avenue of appeal from decisions of the Vetting Board for magistrates but none for judges, yet the right of appeal is also provided for in the Bangalore Principles. The VJMA was unfair and took away judicial independence. While conceding that the vetting process is a constitutionally founded process, Mr. Mwenesi submitted that there was a legitimate apprehension as to whether the process would observe the provisions of Article 28 of the Constitution protecting the right to human dignity.

Submissions in Opposition to the Petition

25. Mr Mutua, appearing for the **LSK** raised the issue of the jurisdiction of the Court to entertain the Petition. He argued that the people of Kenya had insulated the vetting process from attack by way of a court process. Section 23 of the Sixth Schedule, he argued, insulates the VJMA from a constitutional challenge based on the provisions of Articles 160, 167 and 168 of the Constitution which provides for the procedure of removal of judges and judicial officers.

26. He further argued that due to the importance of the process of vetting of judges and magistrates, the people of Kenya specifically ousted the jurisdiction of the court in matters relating to either the process of vetting or the decision of the Vetting Board.

27. He submitted that the reasons why a decision was made to subject judges to the vetting process was clear in view of the historical context that led to the provisions for vetting. The VJMA could not have made provision for appeal as this would have been contrary to the constitutional provisions set out in Section 23 of the Sixth Schedule. As to the contention that it was the JSC that should carry out the vetting, Articles 168 to 172 of the Constitution did not apply to the process of vetting.

28. Counsel for the 1st -3rd Respondents, Mr Onyiso, reiterated the contents of the affidavit of Sharad Rao, the chairperson of the Board and supported the submission made by counsel for the LSK. In his view, there was no discrimination between the judges appointed under the former Constitution and the ones appointed after the Constitution came into force. In respect of the latter, the judges underwent a rigorous vetting procedure.

29. He further submitted that the vetting process was underpinned by the national values enacted in Article 10, particularly those relating to good governance, integrity and transparency and the provisions

of Chapter 6 on Leadership and Integrity. The intention behind the entire process of vetting was to promote public confidence in the judiciary and it should be seen in this light. As a consequence, the expectations of judges and magistrates are only legitimate as long as they enjoy the trust and confidence of the public.

30. Mr Onyiso urged us to find that the VJMA has all the elements of fairness and due process. In his view, the right of appeal is a statutory right granted by legislation and where Parliament thinks otherwise, it cannot be said that there is a breach of fundamental rights and freedoms.

31. While the Petitioner had not sought any orders against the 4th Respondent, Mr Issa for the JSC sought to clarify the JSC position with regard to its role in the vetting process, particularly in light of the contention that it was the JSC which should carry out the vetting. He referred us to the provisions of the Judicial Service Act and the VJMA which were enacted on the same day as Act No. 1 and 2 of 2011 respectively. In neither Act, he submitted, was the JSC given a role in the vetting process. The JSC has a limited mandate in Section 9 of the Act in which it is one of the bodies which can nominate a person to sit on the panel appointing the members of the Vetting Board. Had Parliament intended that the JSC should carry out the vetting, it could have so provided at section 13 of the VJMA.

32. As to whether the removal of judges under Article 168 and vetting under the VJMA were in conflict, Mr Issa submitted that the vetting process was for a limited period, intended to last for a year. The VJMA provided that the Vetting Board would stand dissolved 30 days after completion of its work.

33. Mr Ndubi on behalf of KPTJ and AfriCOG submitted that the vetting process should be seen in the context leading to the enactment of the Constitution. He submitted that to hold that Section 23 of the Sixth Schedule is not constitutional would be to lose the historical context in which it was enacted. The decision by the people of Kenya that sitting judges should be vetted, he argued, cannot be derogated from as judicial power is exercised on behalf of the people of Kenya. The vetting of judges as set out in Section 23 of the Sixth Schedule is part of the sovereign decision of the people of Kenya.

34. Mr Ndubi further submitted that there would be lack of public confidence in the judiciary if the judges and magistrates were not vetted. In his view, the Petitioner and those supporting the Petition were mistaken in seeing the vetting process as one of removal rather than as a process of determining suitability for office. The vetting process should not be equated to a criminal process. Thus, the intention of Section 23 of the Sixth Schedule and the VJMA is not to do away with the rights of judges but to ensure accountability to the people as required by Article 73(d) and (e) of the Constitution. He further argued that under Article 159, judicial authority is vested in the people of Kenya and the vetting process forms part of the framework that Kenyans have adopted as set out in the Preamble to the Constitution. Judicial independence, he contended, is subject to judicial accountability.

35. Mr Nderitu on behalf of ICJ-K supported Mr Ndubi's submissions. He addressed us on the alleged breaches of the rights of judges and magistrates set out by the Petitioners. With regard to the right to a fair hearing, Mr Nderitu submitted that section 19 of the VJMA meets the threshold of a fair process. This process should not be equated to a criminal trial. It is a special process established by the Constitution. He relied on the case of **Amraphael *Mbogholi Msagha v The Chief Justice of the Republic of Kenya & 7 Others Nairobi HC MISC APP. NO. 1062 of 2004.***

36. As regards the argument that the judges and magistrates being vetted would be subject to torture and cruel, inhuman or degrading treatment, counsel submitted that the Petitioner's allegation were inconsistent with the internationally accepted meaning of these terms.

37. Mr Nderitu also discounted the arguments based on discrimination on the ground that such discrimination, if any, is permitted by the Constitution itself. The VJMA does not create a special class of excluded persons and judicial officers cannot be compared to members of the executive or legislature who are subjected to elections every five years. In his view, this differentiation is also supported by the separation of powers doctrine. He also submitted that the right to human dignity has not been infringed.

38. Mr Nderitu asked us to adopt an interpretation of the Constitution that validated the law in light of the context in which the vetting of judges and magistrates is being carried out. He asked us not to be guided by the justice or injustice of the VJMA but by its constitutionality and in that respect the VJMA conforms to the Constitution.

The Issues for Determination

39. This Petition requires that we interpret several provisions of the VJMA against the provisions of the Constitution. It is important to note that at this stage no judge or magistrate has been subjected to the provisions of the Act. What we are called upon to decide then is whether the provisions of the VJMA are in and of themselves consistent with the provision of Chapter 4 of the Constitution and whether in fact the rights and freedoms of judges and magistrates are violated, threatened or infringed by application of the Act.

40. The matter before us is an action for enforcement of fundamental rights and freedoms. We have therefore found it necessary to deal only with the issues that are directly necessary for determination of whether the Bill of Rights has been violated, infringed or threatened.

41. We have considered the Petition, supporting affidavits and the submissions, written and oral, and have come to the conclusion that we are called upon to determine the following broad and substantive issues:

i) whether this court has jurisdiction to entertain this Petition in light of the provisions of section 23 of the Sixth Schedule;

ii) whether section 23 of the Sixth Schedule is in conflict with the substantive provisions of the Constitution and should therefore be declared null and void;

iii) whether the VJMA violates the principle of separation of powers and independence of the judiciary;

iv) whether the provisions of the VJMA are unconstitutional for violating the provisions of the Bill of Rights.

The Historical Context

42. Before turning our minds to an analysis and determination of the above issues, it is important to set out the context preceding and obtaining at the time this Petition was filed.

43. On the 4th of August, 2010, the people of Kenya voted at a national referendum to approve a new Constitution. The referendum was the culmination of a two-decade search for a new constitutional dispensation in Kenya, a dispensation that is anchored firmly in the sovereignty of the people of Kenya. In accordance with Article 263, the Constitution came into force upon its promulgation on the 27th of August, 2010.

44. In the period during which the agitation for a new constitution took place, the Kenyan judiciary had come under sustained criticism for its perceived failure to uphold the rule of law. The reports of various bodies, official and non official, among them committees comprising judicial officers, highlighted the public perception of the judiciary as a corrupt institution. For instance, the Constitution of Kenya Review Commission in its report titled,

"The People's Choice: The Report of the Constitution of Kenya Review Commission" 2002 at page 52 noted among the concerns with regard to the judiciary that, "***The judiciary rivals politicians and the police for the most criticized sector of Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the most worrying. For lawyers, there is concern about competence and lack of independence."***

45. In July 2010, a month before the adoption of the Constitution, a judiciary-led taskforce in its report titled **Final Report of t*he Task Force on Judicial Reform, 2010*** at page 73 noted that "***….corruption remains one of the greatest challenges to the judiciary. The Task Force received representation that whereas there have been measures to address corruption within the judiciary, the results have been suboptimal as borne out by the number of judicial officers and staff who have been disciplined by the JSC on corruption claims or otherwise faced corruption charges in the courts of law. As a result, corruption remains a major contribution to the Judiciary's institutional decline and low public confidence in the judicial process."***

46. We believe, therefore, that the constitutional provisions with regard to the judiciary must be understood in the light of the public perception of the judiciary in the period preceding the enactment and promulgation of the Constitution. We believe also that, in light of the outcome of the constitutional referendum, the Constitution reflects the wishes and aspiration of Kenyans.

47. Article 262 of the Constitution provides that **'The *transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date.'*** Section 23 of the Sixth Schedule to the Constitution provides as follows:-

"23(1) Within one year after the effective date Parliament shall enact legislation which shall operate despite Articles 160, 167 and 168, establishing mechanism and procedures for vetting within a timeline to be determined by 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 Article 10 and 159.

23 (2) A removal, or a process leading to the removal of a judge from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question, in, or review by, any court."

48. Pursuant to these provisions, Parliament enacted the **Vetting of Judges and Magistrates Act, 2011 [Act No. 2 of 2011]**. The VJMA Act came into force on 22nd March, 2011. Section 6 of the Act establishes an independent board to be known as the Judges and Magistrates Vetting Board ("the Board"). At section 13, the VMJA Act provides for the functions of the Board as being, ***'To vet judges and magistrates in accordance with the provisions of the Constitution and this Act.'*** *Under*Section 2 of the Act, the term *'vetting 'is* defined as, **'the *process by which the suitability of a serving judge or magistrate to continue serving in the judiciary is determined in accordance with this Act.'***

49. The Board is being constituted with a view to proceeding with the mandate and functions vested in it by the Constitution and the VJMA.

Findings

Whether this court has jurisdiction to entertain this Petition in light of the provisions of Section 23 of the Sixth Schedule.

50. The first issue for determination is that of jurisdiction. We disagree with the submissions made on behalf of the LSK that we do not have jurisdiction to hear and determine this matter. Article 165 (3) (b) vests in the High Court jurisdiction to '***determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.'*** The Petition before us seeks relief on behalf of judges and magistrates whose rights are allegedly threatened with violation as a result of enactment of the VJMA. We affirm that we have jurisdiction to deal with this Petition and to make a determination as to whether or not rights guaranteed under the Bill of Rights have been violated infringed or threatened.

51. In addition to the enforcement jurisdiction stated above, the High Court under Article 165(3) (d) of the Constitution has jurisdiction to hear any question respecting the interpretation of this Constitution, including determination of any question whether any law is inconsistent with or in contravention of the

Constitution. The matter before us falls squarely within these provisions.

Whether section 23 of the Sixth Schedule is in conflict with the substantive provisions of the Constitution and therefore null and void.

52. Section 23 of the Constitution falls under the Sixth Schedule which contains the Transitional Provisions of the Constitution. It came into force, along with the other provisions of the Constitution, on the 27th of August 2010. The people of Kenya, by voting in favour of the Constitution, made a sovereign decision that all the provisions of the Constitution would form the basis on which they would be governed.

53. The question we must ask ourselves is this: is it open to this court to question the sovereign will of the people and decide that one part of their Constitution is null and void, and not another? We must emphatically say no. The authority conferred upon us by the people of Kenya is to give effect to the whole Constitution. When the people of Kenya voted in favour of the Constitution, they made a decision to make a break with the past and bring in a new constitutional dispensation on the basis of the values and principles set out in the Constitution.

54. The transitional provisions contained in the Sixth Schedule are intended to assist in the transition into the new order, but are limited in time and in operation and are to remain in force for the period provided in order to achieve the aspirations of Kenyans in moving into the new order. These transitional provisions are as much a part of the Constitution and as much an expression of the sovereign will of the people as the main body of the Constitution.

55. Article 1(1) of the Constitution provides that ***"All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."*** This exercise of the 'sovereign' or 'constituent power' of the people was judicially considered in the case of ***Njoya & Others v The Attorney General & Others (No.2)*** **[2004] 1 KLR 261, 278 [5]** where the court stated with regard to the constituent power that ***''it is the power to constitute a frame of Government for a community, and a Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people's sovereignty. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the Government and the power involved in governing."***

56. Our task therefore is to give effect to the sovereign will of the people of Kenya as enacted in the Constitution in so far as they have determined that the judicial arm of government be reconstituted on the basis of the provisions set out in the Constitution, including *Section 23 of* the Sixth Schedule. This section is consistent with and is part of of the Constitution and is an expression of the sovereign will of the people. We declare that Section 23 of the Sixth Schedule of the Constitution is not unconstitutional.

57. We wish to echo the words of Justice Mohammed Ibrahim in ***Re: Harmonised Draft Constitution of Kenya: Bishop Kimani and 2 others v The Attorney General*** **Mombasa HCCP No. 669 of 2009 (Unreported)** where he stated, ***"Courts must be wary to undermine the presumption of Constitutionality of legislation and it must reject any invitation to question or interpret the Constitutionality of the Constitution itself."***

Whether the VJMA Violates the Principle of Separation of Powers and the Independence of the Judiciary

58. The principle of the independence of the judiciary is now entrenched in the Constitution. Article 160 pronounces this principle in clear terms. It is not one for implication from decided cases nor deduction from the structure or framework of the Constitution. Independence of the judiciary is no longer derived from the spirit of the Constitution: it is the letter and the spirit of the Constitution.

59. The independence of the judiciary is founded on the specific grant of judicial authority by the people to the courts and tribunals. The principle of sovereignty of the people of Kenya set out in the Preamble and Chapter One of the Constitution is firmly made the basis of judicial authority by Article 159. This

judicial authority is vested in the courts and tribunals and nowhere else.

60. The Constitution delineates state power between the three co-equal branches; the executive, legislature, and the judiciary. The principle of separation of power means that each branch is able to discharge its constitutional responsibility while ensuring that there is a system of checks and balances to promote good governance, transparency and generally promote the welfare of all Kenyans. (See ***Gachiengo v Republic*** [2000] 1 EA 52).

61. The principles of independence of the judiciary and separation of powers are now internationally recognized and find expression in a number of international instruments, among them the 1985 ***United Nations Basic Principles on the Independence of the Judiciary*** (endorsed by the United Nations General Assembly Resolutions 40/32 of 29.11.1985 and 40/146 of 13.12.1985). These principles call on member states to guarantee judicial independence domestically through constitutional and legal provisions.

62. In 1996, the Africa Commission on Human and Peoples Rights adopted a ***Recommendation on the Respect and Strengthening of the Independence of the Judiciary*** (ACHPR, 19th Session, 03/26 – 04/04/1996) calling on African states to meet certain minimum standards to guarantee independence of the judiciary.

63. The Latimer House Guidelines for the Commonwealth on Good Practice Governing Relations Between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights have influenced and informed the framework of our government as set out in the Constitution. The specific provisions of Chapter Ten of the Constitution dealing with the Judiciary and enabling legislation such as the Judicial Service Act, 2011 have maintained fidelity to these international principles.

64. It was argued that Section 23 of the Sixth Schedule and the VJMA violate the principle of separation of powers and judicial independence. We were referred to the case of ***Liyanage and Others v R*** **(1966) ALL E R 650** with regard to the principle of separation of powers to the effect that the power of the judicature could not be usurped or infringed, while the constitution stood, by the executive or the legislature. The question one would need to ask is whether the present circumstances relating to the vetting of judges and magistrates amount to a violation of the principle of separation of powers similar to that confronting the judiciary in the ***Liyanage*** case. With respect, the circumstances are totally different. In that case, the challenge was to an Act of Parliament which took away judicial discretion completely with regard to the sentence to be imposed on an identified group of accused persons, compelled the courts to impose a specific term of imprisonment, and to also impose a compulsory forfeiture of property.

65. Our view is that the present circumstances are radically different from those obtaining in the above case. Section 23(1) is clear that Parliament shall enact legislation for establishing mechanisms and procedures for vetting of judges and magistrates, *"which shall operate despite Article 160, 167 and 168."*

66. We have held that Section 23 of the Sixth Schedule is part of the Constitution and as such the vetting procedures are a constitutionally mandated derogation from the provisions regarding the independence of the judiciary. It follows therefore that the principle of separation of powers must yield to the dictates of the Constitution.

Whether the provisions of the VJMA are unconstitutional for violating the provisions of the Bill of Rights

67. The Petitioner has urged us to find that the VJMA is unconstitutional as it violates the rights of judges and Magistrates guaranteed under the Constitution. He singles out Sections 2-4 and 17-23 of the Act as violating the rights contained in Articles **19-25 27, 28, 29, 47** and **50** of the Constitution. Before we embark on this exercise, we think it is proper to summarise the provisions of the VJMA.

Sections 2 to 4 of the VJMA

68. Section 2 of the Act is the interpretation section while section 3 deals with the objects of the VJMA Act. It provides that ***"The object and purpose of this Act is to establish mechanisms and procedures for the vetting of judges and magistrates pursuant to the requirements of section 23 of the Sixth Schedule to the Constitution."***

69. Section 4 which is also attacked as being in violation of the rights of judges provides that ***"For the avoidance of doubt, the provisions of this Act shall apply only to persons who were serving as judges or magistrates and who were in office on or before the effective date.'***

70. We do not see anything in these provisions that is in conflict with the provisions of the Constitution. The provisions have been enacted in conformity with the provisions of Section 23 of the Sixth Schedule. Having found that Section 23 of the Sixth Schedule is not in conflict with the Constitution, it follows that these sections of the VMJA in which Parliament has enacted provisions that echo the constitutional provisions are valid.

Section 17 to 23 of VJMA

71. Sections 17 to 23 of the VJMA have also been impugned. Their implementation, it is argued, will subject judges and magistrates to torture, cruel and degrading treatment contrary to Article 25 (a), has derogated from their right to a fair trial contrary to the provisions of Article 25(b), will violate their rights to non-discrimination under Article 27, will deny them the right to human dignity under Article 28, the right to freedom and security of the person under Article 29, the right to fair administrative action under Article 47 and the right to a fair trial contrary to Article 50.

72. Sections 17 to 23 fall under Part III of the VMJA Act titled 'VETTING PROCEDURES.' Section 17 (1) empowers the chairperson of the Judges and Magistrates Vetting Board to constitute three panels of three members each to work concurrently in order to facilitate the expeditious disposal of matters. The panels are, under section 17(2), to be constituted of at least a non-citizen serving or retired judge, a lawyer and a non-lawyer.

73. Section 18 sets out the matters that the panels are to consider in vetting a judicial officer. These are:

(a) whether the judge or magistrate meets the constitutional criteria for appointment as a judge of the superior courts or as a magistrate;

(b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and diligence;

(c) any pending or concluded criminal cases before a court of law against the judge or magistrate;

(d) any recommendations for prosecution of the judge or magistrate by the Attorney-General or the Kenya Anti-Corruption Commission; and

(e) pending complaints or other relevant information received from any person or body.

74. Section 18(2) enumerates the matters to be taken into account in the vetting process while considering the matters set out in section 17. Such matters shall include professional competence including intellectual capacity, legal judgment, diligence, substantive and procedural knowledge of the law, organizational and administrative skills, written and oral communication skills, integrity and fairness.

75. At Section 19, the vetting procedure is set out. The Board is required to***'consider information gathered in the course of personal interviews with the affected judges and magistrates as well as their records.'*** The information obtained by the Board during personal interviews and records of the judge or magistrate being vetted shall be confidential, and the judge or magistrate to be vetted shall be given sufficient notice. Under Section 19(4), the notice to be given to the judge or magistrate to be vetted *'shall*

include a summary of complaints, if any, against the judge or magistrate.' Section 19(5) provides that the hearing by the Board ***'shall not be conducted in public, unless the concerned judge or magistrate requests a public hearing.'*** Section 19(6) provides that the rules of natural justice shall apply to the Board's proceedings.

76. Section 20 provides the order in which the vetting will proceed, starting with the Court of Appeal Judges and ending with magistrates. Section 21(1) requires that the Board communicates in writing its decision on the suitability of a judge or magistrate to continue serving in the Judiciary within thirty days of the determination, giving reasons for its decision.

77. Section 22 (1) permits a judge or magistrate dissatisfied with the decision of the Board to apply for review by the same panel within seven days of being informed of the final determination. Such review shall be allowed only if based on the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the judge or magistrate at the time the determination or finding sought to be reviewed was made, provided that such lack of knowledge on the part of the judge or magistrate was not due to lack of due diligence. Review is also permitted if there is some mistake or error apparent on the face of the record. Section 22(3) provides that the decision of the Board shall be final.

Violations of the Constitution and the Bill of Rights

78. We have set out at some length the provisions of the VJMA in light of the importance of the matter and the sustained attack on the VJMA as violating fundamental rights of the judges and magistrates. The questions that we would seek to answer with regard to the provisions of the Act are these:

i) Are the provisions in regard to vetting of judges and magistrates discriminatory and therefore contrary to Article 27?

ii) Does the vetting process subject the judges to inhuman and degrading treatment and violate their right to inherent dignity contrary to Article 28?

iii) Are the judges and magistrates denied a right to a fair hearing under Article 50?

iv) Are judges and magistrates denied access to the High Court under Article 22 of the Constitution?

Are the provisions in regard to vetting of judges and magistrates discriminatory and therefore contrary to Article 27?

79. Article 27 of the Constitution provides that every person is equal before the law, has the right to equal protection and benefit of law. Article 27(1) prohibits discrimination by the state on account of sex, race, pregnancy status, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

80. The key argument urged on behalf of the Petitioner is that the judges and magistrates appointed prior to the promulgation of the Constitution face discrimination as they are required to undergo the vetting process to determine their suitability to continue in office.

81. The Petitioner has also argued that judges and magistrates are treated differently in that section 23(2) of the Sixth Schedule protects the vetting process that results in the removal of a judge from court scrutiny but not that relating to removal of a magistrate.

82. We do not however, find any discrimination between judges and magistrates. There is no right of appeal provided under the VJMA for magistrates who are removed as a result of vetting. The import of section 23(2) referred to is to shield the vetting process from the application of Article 168(8) which provides for an appeal to the Supreme Court by a judge who has been removed from office. We find and hold that both judges and magistrates are treated equally in terms of appeals in that both categories of judicial officers have no right of appeal.

83. We also do not see how Article 27 is infringed. All judges and magistrates appointed prior to the coming into force of the Constitution are all treated equally and have the same rights under the VJMA.

84. While judges appointed under the former Constitution are required to undergo vetting, judges and magistrates appointed under the Constitution must undergo a process that complies with the dictates of Article 10 of the Constitution and ensures compliance of prospective judicial officers with the provisions of Chapter 6 of the Constitution. In fact the relevant considerations which the Board must take into account in determining the suitability of judges and magistrates under section 18 of the VMJA are the same considerations applied by the JSC in considering the suitability of nominees for judgeship under section 13 of the First Schedule to the Judicial Service Act, 2011.

85. We also hold that in so far as the vetting process is constitutionally ordained, it cannot be subjected to the test of discrimination nor do we find in the provisions of the VJMA an infringement of Article 27.

Does the vetting process subject the judges and magistrates to inhuman and degrading treatment and is their right to inherent dignity violated?

86. Torture and cruel, inhuman and degrading treatment are terms that have acquired a specific meaning in law. They do not refer to general discomfort or inconvenience arising out of the application of the ordinary legal process particularly where such a process has the imprimatur of the Constitution. In the case of ***Republic v Minister For Home Affairs and Others ex parte Sitamze Nairobi*** **HCCC NO. 1652 OF 2004 [2008] 2 EA 323,** Justice Nyamu, citing various authorities expressed himself as follows, ***'The provisions of section 74(1) of the Constitution of Kenya are echoed in article 7 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. …… Torture means 'infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matters of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. It is a deliberate inhuman treatment causing very serious and cruel suffering. "Inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.'***

87. With the greatest respect to the Petitioner, we do not see how the vetting process as provided for under the VJMA and sanctioned by the Constitution would even remotely approach the definition of torture, cruel, inhuman and degrading treatment and amount to a violation of the provisions of Article 25.

88. On the contrary, the VJMA provides that the information gathered from interviews with judges or magistrates shall be confidential. The hearings shall not be public unless the judicial officers choose to have a public hearing. Whether or not to participate in the vetting process is a matter of election by the individual judge or magistrate. Furthermore, section 24 of the VJMA preserves the right to terminal benefits for those who elect not to go through the proceedings and those who are found unsuitable for service.

89. The provisions we have cited above protect the judicial officers given their position. We are constrained to hold that the right to have the inherent dignity of the judicial officers protected and respected under Article 28 of the Constitution is not violated, infringed or threatened by application of the VJMA.

Are the judges and magistrates denied a right to a fair hearing under Article 50(1) and (2) and will the process be carried out in a manner that violates the rules of natural justice?

90. We must state from the outset that a judicial officer undergoing vetting under the VJMA is not an "accused person" as contemplated by Article 50(2) of the Constitution and in our view that Article has no application to the circumstances of the vetting process. The vetting process is a process *sui generis*

required by the Constitution to determine *"suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values set out in Articles 10 and 159."*

91. Article 50(1) protects the right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In our view, this provision captures the essence of the rules of natural justice and embeds them in our Constitution. See also the case of ***R v The Honourable Chief Justice and Others exp Justice Moijo Ole Keiwua*** Nairobi JR Misc Civil App. No. 1298 of 2004 (unreported).

92. Section 19 of the Act provides that the judge or magistrate shall be given notice with regard to the vetting which notice shall include a summary of the complaints, if any, against the judge or magistrate. The rules of natural justice shall also, according to the Act, apply to the proceedings.

93. We have studied the VJMA and we are satisfied that it meets the threshold of what constitutes a fair process. The requirements for notice and for the complaints to be communicated to the judge or magistrate, the opportunity to be heard, the requirement that the rules of natural justice which include the right to legal representation be followed in the vetting process are all clearly intended to safeguard the rights of the judicial officers to be vetted. In the circumstances, we are unable to find anything in the VJMA that violates the right of judges and magistrates to a fair hearing, and we do not find anything in the VJMA that derogates from Article 50(1).

94. We also note that the Board is empowered under section 33(1) to regulate its own procedure and make regulations generally for the better carrying into effect of the provisions of the VJMA. We have no doubt that these rules, once enacted, will supplement the general rules of natural justice.

95. The Petitioner argues that the right to a fair hearing is violated by the failure to provide a right to appeal. The right to appeal, however, is a right granted by law, and there are many instances in which the right to appeal is limited. The right to a fair trial does not include an inherent right of appeal to a higher court or tribunal. Indeed, this fact is recognized in the Constitution at Article 50(2)(q) which provides that, ***'Every accused person has the right to a fair trial, which includes the right- (q) if convicted, to appeal to, or apply for review by, a higher court <u>as prescribed by law</u>.'*** *(Emphasis ours).*

96. The VJMA does not prescribe a right of appeal and neither does Section 23 of the Sixth Schedule. The right of appeal for judges who are removed to appeal to the Supreme Court provided under Article 168(8) is circumscribed by section 23(2) of the Sixth Schedule which provides that a removal or a process leading to the removal of a judge, from office by virtue of that section shall not be subject to question in, or review by any court. In our view, therefore, the Constitution itself has foreclosed the avenue for appeal to a higher court and we cannot imply such a right in light of such clear provisions.

97. Section 23 of the VJMA, which provides for the time frame within which the vetting is to take place, is attacked as being insufficient for the vetting process. This attack, in our view, has no merit. Section 23(1) provides as follows: ***'The vetting process once commenced shall not exceed a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year.***

(2) Subject to subsection (1) –

(a) the vetting of the Judges of the Court of Appeal and the High Court shall be finalised within three months;

(b) the vetting of magistrates shall be finalised within six months; and

(c) all the requests for reviews granted under section 22 shall be considered after the vetting of all judges and magistrates under paragraphs (a) and (b) and shall be finalised within one month.'

98. We hold that the time frame provided by the VJMA gives judicial officers the expectation that their matter will be dealt with expeditiously and without undue delay. This is the hallmark of a sound judicial process and cannot be faulted. With respect to the Petitioner, the concern with regard to the period for vetting being too short is speculative and calls on this court to make decisions on apprehensions that are not grounded in reality.

99. The VJMA has provision for constitution of three panels to carry out the vetting. It would be speculative at this point in time to argue that the number of reviews to be presented before the panels will be so many as to make it impossible for the panels to complete the review within the expected timeframe. That eventuality, we believe, can best be addressed when and if it arises, especially in light of the specific provision that the Board can apply for extension of time within which to complete its work.

Whether the right of access to the court under Article 22 has been violated.

100. Article 22 and 23 of the Constitution provide an independent right to move the High Court where the fundamental rights and freedoms under Chapter 4 of the Constitution are violated, infringed or threatened. It is an independent right and is enforceable by the court granting appropriate relief including the reliefs set out in Article 23(3).

101. In our view, our finding that we have jurisdiction to determine this matter at paragraphs 50 and 51 disposed of this issue. It therefore follows that the right of access to this court has not been denied to any judge or magistrate. Further, we note that the process contemplated under the VJMA is yet to commence and we therefore decline to consider whether in fact any judge or magistrate who is the subject of those proceedings can move this court.

Conclusion

102. For the reasons stated above, we find that this Petition lacks merit and is hereby dismissed.

103. We are of the view that this is a matter that was of great public interest, both to the general public who are the consumers of justice, but also to the judicial officers who will be subjected to the vetting process. We therefore make no order as to costs.

104. We appreciate that the vetting process will cause some anxiety to the judicial officers serving before the effective date who will be subjected to the process. However, we believe that the outcome of the process will not only be beneficial to the country and the judiciary, but also to individual judges and magistrates. As a country, we have chosen to be guided by certain values and principles, among them accountability and integrity.

105. This process will help to underpin these values with respect to the judiciary and restore the judiciary to its respected place as the arbiter of justice in Kenya. We believe that rather than undermining judicial independence, the process, which is limited in time, will enable the judiciary operate with confidence in its central role of upholding the rule of law in Kenya, free from the shackles that have reduced it to a timid player in government due to the widespread perceptions of incompetence and corruption.

106. Finally, we are grateful to all the counsel who appeared before us for their industry and well researched arguments.

DATED and DELIVERED at NAIROBI this 18th day November 2011

Mumbi Ngugi
Judge

D. S. Majanja

Judge

G.V. Odunga
Judge