IN THE COURT OF APPEAL AT NAIROBI

(CORAM: KARANJA, KIAGE, M'INOTI, KORIR & ODUNGA, JJ.A) CIVIL APPEAL NO. E533 OF 2024

CONSOLIDATED WITH CIVIL APPEAL NO. E169 OF 2024

BETWEEN

SALARIES & REMUNERATION COMMISSION.....APPELLANT

AND

PETER MWANGI GACHUIRI.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

KENYA JUDGES WELFARE ASSOCIATION.....3RD RESPONDENT THE JUDICIAL SERVICE COMMISSION. 4TH RESPONDENT

(*Being appeals against the ruling and judgment of the High Court of Kenya at Nairobi Constitutional and Human Rights Division (E.C. Mwita, P.M. Nyaundi & L.N. Mugambi, JJ.) dated 23rd February 2024 and 24th May 2024 respectively*

in

Petition No. E304 of 2023)

****

JUDGMENT OF THE COURT

1. Before us are two appeals both arising from decisions in Nairobi High Court Constitutional Petition No. E304 of 2023 (the petition). The two appeals are Civil Appeal No. E164 of 2024 and Civil Appeal No. E533 of 2024. The former is an appeal against the ruling dated 23rd February 2024 (the ruling) while the latter is against the final judgement dated 24th May 2024 (the judgment).

2. By a letter dated 12th July 2021 (the impugned letter), the appellant, ***Salaries and Remuneration Commission*** (SRC), a constitutional commission established under Article 230 of the Constitution and operationalised by the ***Salaries and Remuneration Commission Act, 2011***, advised the Head of Public Service in the following terms:

> ***"Prior to the promulgation of the Constitution of Kenya 2010, Constitutional office holders (predecessors to State Officers) were paid remuneration and benefits based on the repealed Constitution of Kenya and the relevant statutes. However, the repealed Constitution and these statutes, which mandated the Executive and other Institutions to set remuneration and benefits for State Officers, ceased to apply upon the promulgation of the Constitution of Kenya 2010 and the operationalisation of the SRC.***
>
> ***It has come to SRC's attention that on 7th July 2011, the Head of Public Service issued circular Ref OP/CAB.56/2A dated 7th July, 2011, which awarded a taxable car allowance of up to a maximum of Kshs 2 Million, for purchase of motor vehicles, to Permanent Secretaries/Accounting Officers, Judges of the High Court, Clerk to the National Assembly and Provincial***
>
> ***Commissioners. This allowance was initially meant to replace the tax exemption on purchase of motor vehicles by the designated officers. The benefit was subsequently reviewed by the Head of Public Service vide circulars OP/CAB.56/2A dated 2nd June, 2015, and OP/CAB.56/2A dated 4th June 2018. The effect of the reviews is that the taxable***

car allowance is now set at a maximum of Kshs 10 million and payable to State Officers, to wit, Principal Secretaries/Accounting Officers or their equivalent, Judges of the High Court, Clerks to the National Assembly and the Senate.

Pursuant to Article 230(4) (a) of the Constitution, any remuneration or benefits for a State Officer can only be set or reviewed by SRC. We note that the taxable car allowance, which is a benefit for State Officers, was conferred in breach of Article 230(4) of the Constitution and without regard to the mandate of the SRC as provided in the Constitution. Besides adversely impacting the affordability and fiscal sustainability of the public wage bill, this has led to inequity and disparity in benefits provided to State Officers in contravention of constitutional principles that guide the award and determination of remuneration and benefits.

Any form of payment outside the remuneration and benefits set and reviewed by SRC contravene Article 230(4)(a) of the Constitution.

The purpose of this letter, therefore, is to request your esteemed office to revoke the circulars in question, to wit, Ref OP/CAB.56/2A dated 7th July, 2011, OP/CAB.56/2A dated 2nd June, 2015, and OP/CAB.56/2A dated 4th June 2018. Kindly note that the applicable remuneration and benefits for State Officers is as set by the SRC."

3. It was this letter that provoked the filing of Nairobi High Court Petition No. E304 of 2023 dated 23rd August 2023. The said petition was filed by the 1st respondent, Peter Mwangi Gachuiri (Gachuiri),

an advocate

of the High Court of Kenya, in the public interest. It was brought against the 2nd respondent, the Attorney General (the AG), as the legal adviser to the national government and the appellant as the 1st and 2nd respondents, respectively. The 3rd respondent, Kenya Judges Welfare Association (KJWA), a duly registered association of Judges, and the 4th respondent, the Judicial Service Commission, (the JSC), a constitutional Commission established under Article 171 of the Constitution, were cited as interested parties.

4. The 1st respondent's case was: that prior to the promulgation of the 2010 Constitution on 27th August 2010, (the effective date), Judges enjoyed a duty-free car grant benefit (the benefit) which they used to purchase motor vehicles for their private use; that the Judges continued to enjoy this benefit even after the effective date; that the impugned letter purported to terminate the benefit which had been renamed "Taxable Car Allowance" in the circular Ref OP/CAB.56/2A dated 7th July 2011 at a time when the SRC had not been constituted; and that the benefit was then reviewed upwards through circulars by the Head of Public Service Reference Nos. OP/CAB.56/2A dated 2nd

June 2015 and OP/CAB.56/2A dated 4th June 2018, and Judges continued to access the benefit.

5. It was contended: that the SRC's action violated Article 160(4) of the Constitution; that the benefit was meant to enable Judges to purchase vehicles which they use on occasions when their official transport is not available, or official vehicles have broken down; that the SRC's action contravened Articles 27, 41, 47(1) and 160 of the Constitution; that the court should apply the principle of harmonization in interpreting the Constitution and consider the benefits that accrued to Judges prior to the effective date, and if the court were to find that this particular benefit existed, it should hold that such a benefit could not be taken away without violating the Constitution; that the court should consider the fact that the change of name from duty-free car grant to taxable car allowance did not constitute a new benefit to Judges, but only a change of name of a benefit that existed, under the ***Constitutional offices (Remuneration) Act*** (the Act), prior to the effective date; and that once this fact is appreciated, the argument that a new benefit had been conferred to Judges dissipates.

6. It was noted that the AG's legal opinion dated 22nd May 2023 to the SRC, which the SRC alluded to as the basis upon which the impugned letter was written, came two years after the letter purporting to terminate the benefit and hence was not only a manifestation of bad faith, but was also intended to sanitize an unconstitutional action. According to Gachuiri, in that opinion, the AG wrongly advised the SRC that the allowance would apply only to Judges appointed before the effective date, which itself was an admission by the AG that the benefit existed prior to the effective date and, therefore, could not be terminated. However, it was his view that the AG misapprehended the benefit as one attached to the person of a Judge rather than to the office of Judge. This interpretation, according to Gachuiri, had a discriminatory effect and amounted to unfair labour practice, violative of Articles 27 and 41 of the Constitution.

7. The 1st respondent maintained that the petition was properly before the trial court since there was no employer-employee relationship that could bring the petition within the ambit of Article 162(2) of the Constitution. According to him, the petition was brought under Articles 22 and 258 of the Constitution and on the basis of Articles 3(1), 22,

258, 165(3) (b) and(d) of the Constitution, the High Court was the proper forum to hear the petition. It was pointed out that at the time of the impugned letter, the benefit had already accrued to the persons holding the position of Judge and could not be taken away without violating Article 160(4) of the Constitution. The action by the SRC was, therefore, contended to be an infringement of the independence of the Judiciary as safeguarded by Article 160 of the Constitution. He sought the following reliefs:

1) ***A declaration that the taxable car allowance for purchase of motor vehicles for Judges as it existed at the end of June, 2021 constituted a benefit payable to and in respect of Judges which cannot be reviewed to the disadvantage of judges.***
2) ***A declaration that the appellant's letter dated 12/07/2021 purporting to scrap the taxable car allowance for purchase of motor vehicles for Judges as confirmed in the Circular by the Head of Public Service dated 4/06/2018 contravenes Article 160(4) of the Constitution and the same is therefore invalid.***
3) ***A declaration that by purporting to scrap the Taxable Allowance for purchase of motor vehicle, the appellant threatens the independence of the Judiciary which is protected under Article 160 of the Constitution.***
4) ***A declaration that the 2nd respondent in giving his opinion to the appellant, post facto, which opinion was sought to sanitize an***

unconstitutional and unlawful decision already taken in 2021 by the appellant in violation of Article 160(4) of the Constitution, the 2nd respondent failed in his constitutional obligation to promote, protect and uphold the rule of law and protect the public interest within the meaning of Article 156(6) of the Constitution.

5) ***A declaration that the 2nd respondent's opinion restricting the benefit of the Allowance for Purchase of Motor vehicles to only Judges who were appointed before the promulgation of the Constitution violates the right to freedom from discrimination and the right to fair labour practices of Judges appointed after the promulgation of the Constitution contrary to Articles 27 and 41 of the Constitution.***
6) ***An order compelling the national government offices namely the Attorney General, the National Treasury and the Head of Public Service to forthwith process and pay, and to continue processing and paying, the Car Grant to Judges as had been the position prior to the appellant's unconstitutional and unlawful advice that resulted in the withdrawal of the same.***
7) ***Costs of the Petition be provided for.***

8. The AG, in opposing the petition, filed a notice of preliminary objection and grounds of opposition. The preliminary objection was two-pronged: first, that since the gravamen of the petition is the revocation of a benefit arising out of the employer-employee relationship between Judges and the state, the petition was filed in violation of the doctrine

of constitutional avoidance; and second, that the petition violated the provisions of Article 162(2)(a) of the Constitution and to that extent, the proper forum was the Employment and Labour Relations Court (ELRC).

9. The grounds of opposition were to the effect that the petition: was brought in bad faith; sought to usurp the constitutional mandate conferred on the SRC by Article 230(4)(a) of the Constitution; and sought to obstruct the purposes, values and principles of the Constitution and negate good governance.

10. The appellant, SRC, opposed the petition through a replying affidavit sworn on 12th October 2023 by its Chief Executive Officer, Ms. Anne R. Gitau in which she set out a historical background of the duty-free car grant benefit (the benefit) for Judges and how section 104 of the retired Constitution provided for remuneration and benefits for a certain group of public officers. In particular, reference was made to section 2 of the Act which authorised the President to set remuneration and allowances for the officers. It was deposed that section 13(2) of the ***Income Tax Act*** allowed the Minister for Finance to grant tax exemption and it was on that basis that Judges, among other

constitutional officer holders, were exempted from paying tax when purchasing vehicles. In her view, it was the unstructured manner in which remuneration of state and public officers was done under the retired Constitution that informed the establishment of the SRC whose constitutional mandate is to set and regularly review the remuneration and benefits of all state officers, including Judges.

11. According to SRC, Judges appointed under the retired constitutional order were sworn afresh into office under the 2010 Constitution and the shift on the remuneration and benefits of state officers, including Judges, having resulted in the automatic repeal of the Act, all state officers are now subject to the new constitutional order without qualification or exception. Even if the Act has not been repealed, it was urged that with the current Constitution in place, the mandate to set and review salaries and benefits for Judges was transferred to the SRC and no power can be exercised under that Act with regard to the benefit.

12. It was deposed that the genesis of the dispute was the letter dated 7th July 2011 in which the Office of the President wrote to accounting officers granting taxable car allowances. This letter, according to SRC,

was intended to circumvent the Constitution and its mandate and could not confer a benefit or vary any remuneration or benefit in respect of state officers under the current constitutional order. In purporting to do so, the Head of Public Service violated Article 230(4)(a) of the Constitution which, by dint of section 7(2) of the Sixth Schedule to the Constitution, prevails over the provisions of the Act. Since the SRC was, pursuant to section 25(2) of Part 6 of the Sixth Schedule to the Constitution, to be constituted within nine months after the effective date, SRC argued that it was already vested with the mandate to set and regularly review the remuneration and benefits of state officers. However, pending its establishment, the remuneration and benefits of state officers, including Judges, set under the Act, only applied subject to the provisions of Article 210 of the Constitution, and that a benefit conferred prior to the promulgation of the Constitution cannot transform into an allowance.

13. The SRC maintained that the promulgation of the current Constitution set a new order and scheme of governance thereby restricting the exercise of public power. It argued that it is the only organ mandated to set and review remuneration and benefits and asserted that Judges

are subject to remuneration and benefits prescription policy that applies to all other state officers and that under Article 210(3) of the Constitution, there can be no grant of permanent and special tax exemptions to Judges *qua* Judges, or cushion them against tax. It averred that at the time it undertook the review of Judges' remuneration and benefits in 2014, 2017 and 2018, it was not made aware of any additional remuneration or benefit available to Judges and only became aware of the circulars conferring the benefit in 2021. It, however, only learnt of the existence of the benefit from JSC in 2023. While admitting the revocation of the benefit, it insisted that the Head of Public Service merely communicated its decision that the allowance had been terminated in July 2021.

14. According to the SRC, the benefit adversely impacted the affordability and fiscal sustainability of the public wage bill; resulting in inequity, disparity in benefits to state officers and, therefore, had to be revoked. It maintained that the benefit amounted to double compensation in view of the fact that Judges have official transport, in form of motor vehicles purchased and maintained by the government for use by the state officer; or official transport in form of motor vehicle

reimbursements, car maintenance allowance and mileage reimbursement; or commuter/transport allowance for those without official transport. The SRC has also set a car loan benefit at an interest of 3% per annum for all State officers, including Judges. On the claim that other state officers receive car grant, the SRC responded that members of Parliament and county assemblies are provided with official transport in the form of motor vehicle reimbursement, car maintenance and mileage claims to ensure that they can purchase and maintain cars for official use due to the nature of their responsibilities. The SRC revealed that on 1st July 2011, the Ministry of Finance recommended that the Judiciary establish a car loan scheme where individual Judges would own and maintain their own vehicles. On the possible challenges regarding vehicle repairs and delays in issuing official vehicles to new Judges on appointment, the SRC argued that it advised the JSC on 17th May 2019 to facilitate judicial officers to perform their duties within the prevailing transport policy that conforms to prudent financial management and further advised that JSC could hire and lease vehicles in consultation with the government

agencies as an interim measure while waiting for official vehicles to ensure efficient use of public resources.

15. On the basis of the foregoing, the SRC maintained that the benefit was illegal and could not enjoy protection under Article 160(4) of the Constitution. It further asserted that by dint of Article 249(2) (b) of the Constitution, the SRC is only subject to the Constitution and the law, thus the benefit conferred to state officers on 7th July 2011 by the Head of Public Service and the subsequent reviews of 2015 and 2018 amounted to usurpation of its mandate.

16. Regarding the AG's opinion, the SRC admitted that the opinion was wrong to the extent that it supported payment of the benefit to Judges in office on the effective date.

17. On its part, the 3rd respondent, KJWA, contended that the petition did not violate Article 162 (2)(a) of the Constitution since the crux of the petition was not a dispute arising out of an employer-employee relationship, but one arising out of various violations of the provisions of the Constitution. It averred: that the taxable car allowance is one of the benefits that Judges have been enjoying and was in place before

the effective date; that the benefit was preserved by sections 6 and 32 of the Sixth Schedule to the current Constitution, thus the SRC cannot vary or terminate the benefit to the disadvantage of the Judges as this would amount to a violation of Article 160(4) of the Constitution; that the benefit was revoked without taking into account the principle of transparency and fairness in that Judges were neither consulted nor given notice of the intended revocation; that the effect of the revocation is that Judges appointed prior to the effective date would continue to enjoy the benefit while those appointed after the effective date would not, resulting into unfair discrimination, a violation of Articles 27 and 41 of the Constitution; that the purported scrapping of the benefit is a threat to the independence of the Judiciary; that the AG's opinion failed in its constitutional obligation to uphold the rule of law and protect public interest; and that the SRC acted in bad faith and malice by arbitrarily terminating the benefit without any prior consultations.

18. The 4th respondent, the JSC, in supporting the petition averred: that the impugned letter violated the provisions of Articles 47(1), 160(4) and 172(1) of the Constitution, is invalid and should be declared null and void; that the retired Constitution provided for remuneration of certain

constitutional office holders, including Judges, whose salaries and benefits were to be prescribed by or under the Act and under section

104 (5) of the retired Constitution, salaries and benefits of the constitutional office holders were to be a charge on the Consolidated Fund, while section 104(3) provided that the salary payable to those constitutional office holders and their terms of service were not to be altered to their disadvantage; that section 2 of the Act as read together with the Schedule to the Act, prescribed the salary scale that the different constitutional office holders were entitled to; and that the Act, which has not been repealed, also allowed the President to grant other benefits to the constitutional office holders as he deemed fit.

19. JSC's position was: that Article 172 of the current Constitution sets out its mandate while Article 160 affirms the independence of the Judiciary; that since it is clear, pursuant to Articles 171(1), 172(1), 172(1) (b) and 172(1) (e) of the Constitution that the JSC is to set terms and conditions of service for Judges and judicial officers other than their remuneration, the constitutional intent is clear that the SRC is to only review remuneration of Judges and other judicial officers; that pursuant to Article 160(4) of the Constitution and

section 6 of the Sixth

Schedule to the Constitution, the benefit of a duty-free car grant that existed prior to the effective date was a benefit to Judges and was changed to taxable car allowance to conform with the current Constitution even before the SRC was established; that section 6 of the Sixth Schedule to the Constitution retained all rights, duties and obligations of the government, however arising, which were to continue as obligations under the new Constitution; that for that reason, the benefit has been enjoyed by Judges under both the repealed Constitution and the current Constitution; that transitional clause in section 32 of the Sixth Schedule to the Constitution safeguards the interest of constitutional officeholders appointed under the retired Constitution, including terms of their pensions, gratuities and other benefits and mirrors what existed under section 104(3) of the retired Constitution, thus the decision by the SRC to withdraw the benefit is a violation of Article 160(4) and an interference with the independence of the Judiciary.

20. Regarding the AG's opinion dated 22nd May 2023 to the SRC, the JSC took the position that it was correct to the extent only, that the allowance was a benefit available to Judges before the effective date.

The suggestion that the benefit could be paid only to Judges appointed before the effective date was, however, erroneous. Similarly, the SRC's decision to terminate the benefit violated the Judges' legitimate expectation to continue enjoying a benefit attached to their office. JSC rejected the contention by the SRC that it conducted stakeholders' engagement with the Judiciary in line with Article 259 (11) of the Constitution and regulations 12 and 13(2) of the ***Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations***.

21. In response to the Preliminary Objection, the JSC took the view that the dispute did not stem from an employer-employee relationship, and that the petition raised fundamental issues on the interpretation of the Constitution. It contended that section 104 of the retired Constitution was the framework on which the benefit was anchored; the salaries and benefits paid to constitutional office holders then was a charge on the Consolidated Fund and was, thus constitutionally protected as were other terms of service for Judges. Since the current Constitution gave the Judiciary special recognition and introduced new features such as vetting of Judges, removal of the Chief Justice and changed

the retirement age for Judges, the JSC contended that if the intention of the framers of the Constitution was to remove any benefits paid to Judges prior to the effective date, such an intention would have found its place in the Constitution. It reiterated that Article 160(3) of the current Constitution replicates section 104(2) of the repealed Constitution that remuneration and benefits of Judges is a charge on the Consolidated Fund, while Article 160(4) is clear that remuneration and benefits for Judges cannot be altered to their disadvantage, just as was section 104(3) of the retired Constitution. It maintained that Article 172(6) is meant to promote the independence of the Judiciary and to review and make recommendations on conditions of service within the Judiciary, other than remuneration. Therefore, it has the sole mandate to review conditions of service in the Judiciary, while the SRC is left with review of remuneration, but not benefits. This, the JSC argues, was intended to avoid a clash of mandate between the two organs. It is its case that if the action by the SRC is upheld, it would also introduce discrimination and unfair labour practices, a violation of Articles 27 and 41 of the Constitution, since section 104 of the retired Constitution set the framework for the benefit, so that salaries

and benefits paid to constitutional office holders were a charge on the Consolidated Fund and are not pegged on the date of appointment but the constitutional office held.

22. Before the petition could be heard, the appellant, vide an application dated 14th December 2023 sought the recusal of the trial Judges, due to what SRC termed as conflict of interest and institutional bias. In the alternative, SRC sought, in the spirit of Article 159 of the Constitution, that the dispute be referred to mediation before a panel of 3 retired Judges from the Commonwealth, to be appointed by the President, or 3 arbitrators to be appointed by the Chartered Institute of Arbitrators.

23. The application was based on the ground that since the issues revolve around a financial benefit for all Judges, Judges in the country have a direct pecuniary interest in the outcome of the petition and should not, therefore, sit on the petition. It was on that basis that the SRC formed the view that there was a clear case of conflict of interest as Judges were likely to issue a subjective and biased judgment that promotes their pecuniary interest. The application was supported by the Attorney General (AG) whose view was that the withdrawal of the allowance affected Judges appointed after the impugned decision and since the

petition sought to confer a benefit to Judges appointed after 2021, two of whom were sitting on the bench, the application was well grounded.

24. In opposing the application, Gachuiri took the view: that the petition was a public interest litigation filed in defence of the Constitution and he had the right under Articles 258(1) and 160(4) to defend the Constitution and, pursuant to Article 165(3) thereof, to seek the High Court's interpretation on whether the decision by SRC contravenes the Constitution hence no case for recusal sought had been made out; that the petition was certified as raising substantial questions of law and once a matter is certified under Article 165(4), it must be heard by an uneven bench of Judges appointed by the Chief Justice; that the application for recusal of the bench and all Judges to allow another body to hear the petition, if allowed, would contravene the Constitution; that paragraph 21(3)(a) of the ***Judicial Service (Code of Conduct and Ethics) Regulations 2020*** (***the Code***) appreciates that under the doctrine of necessity, a Judge may not recuse himself or herself from a matter if there is no other Judge to hear the case; and that if the bench recused itself from the petition, no other Judge would hear the petition given the position taken by SRC.

25. On whether the bench should refer the matter to mediation, Gachuiri's position was: that mediation being court mandated and subject to the supervision by the court, the court cannot supervise a matter it cannot hear; that should the parties disagree during mediation, they would have nowhere to go to and in any case, parties cannot also be forced to go to mediation; and that Judges should not abdicate their duty to deal with issues such as those presented in the petition.

26. KJWA associated itself with the position taken by Gachuiri and urged the court to dismiss the application.

27. JSC also associated itself with the petitioner's position and added: that the contention that all Judges are inherently conflicted and cannot objectively hear the petition was not legally correct; that adopting the SRC's position would mean that any of SRC's decisions cannot be challenged in a court of law and this would go against the values and principles of the Constitution that all persons including commissions, are subject to the Constitution; that there can be no issue of conflict of interest that would disqualify all Judges in the country from hearing the petition, given that Judges have previously heard cases involving colleagues, including during the vetting process; that where a litigant

challenges a decision of a constitutional organ, the court has power to check the constitutionality of that decision, Article 73 notwithstanding; and that the application was a request to the court to subvert the Constitution by refusing to hear the petition presented before it for resolution.

28. Regarding the alternative request for mediation/arbitration, JSC argued that mediation is not viable because the dispute requires interpretation of the Constitution under Article 165(3) which is not a matter amenable for mediation. Similarly, disputes before the Court cannot be sent to the President for him to appoint a panel from the Commonwealth to hear a litigant's dispute that has been submitted to court for resolution.

29. In their ruling, the learned Judges found: that at the core of the petition was the interpretation of the Constitution, namely, whether the impugned decision (by SRC to stop the allowance) violates Article 160(4) of the Constitution; that where the issue before the Court is on the interpretation of the Constitution, the mandate to determine the question falls on the High Court by virtue of Article 165(3) (d) of the Constitution; that the people of Kenya placed judicial authority on the

courts which are to discharge this mandate in accordance with the Constitution and the law only; that determining the constitutionality of the decision by SRC to terminate the allowance and the "constitutionality of taxable car allowance for purchase of vehicles for Judges" called for interpretation of the Constitution which is the core mandate of the court in particular and Judges in general at different levels of the hierarchical structure of the courts within the Judiciary; that any suggestion that the bench and indeed any other Judge(s) in this country could and should not hear the petition was not only strange, but would also cause an injustice since the petition could not be heard and as a result, it would never be known whether the impugned decision violates the Constitution or not; that the court will not recuse itself where it will create an unconstitutional moment by refusing to hear a litigant's case because the opposite party apprehends bias; and that the trial court had a constitutional duty to sit in the petition and do justice in accordance with the Constitution and the individual Judge's oath of office.

30. On mediation, it was found by the trial court: that the suggestion put forward by SRC is not without challenges, since under the Court

Annexed Mediation, where parties do not settle the dispute before the mediator, the matter is remitted back to the court for hearing in the usual manner; that both mediation and arbitration do not deal with legal issues, let alone constitutional ones; that in mediation, parties must be willing to take one of the two modes for resolving their dispute hence they cannot be forced to do so by the court; that the request to send parties to the President, the head of the executive, to appoint a panel of Judges from outside the country to deal with what is purely a function of the Judiciary to interpret the Constitution, if allowed, would amount to not only dereliction of duty, but also an extra juridical manoeuvre that is constitutionally unacceptable; that it was not also clear, to the court, the source of power the panel of mediators or arbitrators would exercise to interpret the Constitution and the jurisprudential value of such interpretation, if any; that the court had the ability to disabuse its mind of any irrelevant personal beliefs and do justice as required of it by the Constitution for the benefit of all parties before it; and that the court, as the custodian of the Constitution, has the ultimate mandate to interpret the Constitution and resolve the dispute parties present before it.

31. The court dismissed the application.

32. After the dismissal of the said application, the trial court identified the following issues as falling for determination in the petition:

> ***1. Whether the court had jurisdiction.***
> ***2. Whether the taxable car allowance is a benefit to Judges.***
> ***3. Depending on the answer to issue 2 above, whether termination of the allowance contravened Article 160(4) of the Constitution.***

33. On the issue of jurisdiction, the trial court found: that from a reading of the Constitution and section 12 of the Employment and Labour Relations Court Act (the ELRC Act), the core jurisdiction of the ELRC is to determine disputes that arise out of the employer-employee relationship; that the jurisdiction of the High Court as donated by Article 165(3) of the Constitution is, *inter alia,* to hear among others, any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of this Constitution and whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; that the import of Article 165(3), is to authorise the High Court to

decide all matters other than those reserved for other courts as contemplated in Article 162(2) and as restricted by Article 165(6); that the sweep of the constitutional authorisation given to the High Court cannot be lightly taken and should not be easily given up; that since the petition, in the main, challenged the constitutionality of the SRC's action to terminate the benefit, the issues raised in the petition could not be traced to employer-employee relationship; that the case was not against the Judiciary as the employer of Judges, but centred on whether the SRC's action was inconsistent with, or in contravention of, the Constitution; and that the issues raised in the petition fell within the ambit of Article 165(3)(d)(ii) of the Constitution and, therefore, the court had jurisdiction.

34. The court also dealt with the competency of the petition arising from the failure to attach some documents referred to in the supporting affidavit contrary to section 64 and 65 of the ***Evidence Act*** as well as the failure to disclose the source of information in the affidavit in contravention of Order 19 rule 3 of the ***Civil Procedure Rules***. Citing rule 11(1) and (2) of the ***Constitutional and Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure***

Rules, 2013 (Mutunga Rules), the court found that it is not mandatory that a petition be supported by an affidavit except where a party relies on the documents. From the petition and the responses, the court was of the view that the facts of the case as pleaded and responded to were not disputed and citing Articles 22(3)(d) and 159(2)(d) of the Constitution, found that the petition, as pleaded, raised clear constitutional issues for determination and was, thus, competent.

35. The AG's contention that the opinion dated 22nd May 2023 was privileged communication under sections 134 and 137 of the ***Evidence Act*** and section 6 of the ***Access to Information Act***, was found to have no merit due to the fact: that the AG is a public office which advises all government institutions and state organs and was not representing the SRC in the proceedings; that the nature of that opinion was to enable the SRC determine the legality of the action it had taken; and that the SRC as the recipient, placed the same document before the court, thus there was no dispute to the existent of the opinion or its contents.

36. On the issue whether the allowance was a benefit to Judges, the trial court, while adverting to principles of constitutional interpretation,

found: that the office of Judge was one of the constitutional offices under the repealed Constitution; that Parliament enacted ***Constitutional Offices (Remuneration) Act*** whose objective was to fix salaries and allowances of persons holding certain constitutional offices; that section 2(1) of the Act states that the salaries to be paid to the holders of those offices specified in the first column of the Schedule to the Act, being the offices mentioned in section 104 of the Constitution, were, with effect from the 1st July, 2008, to be at the annual salary scales specified in relation to those offices in the second column of that Schedule; that there was a proviso to the section that where a salary scale is specified, the holder of the office was to be paid such salary, within the scale, as the President would determine having regard to seniority and difference in skills, workloads and accountabilities attached to the office; that the holders of the offices specified in the first column of the Schedule, (including all Judges), were to be paid such allowances as would be determined from time to time by the President; that section 4 stated that nothing contained in the Act was to preclude the payment to the holder of the offices specified in the first column of the Schedule any allowance not

determined in accordance with the Act which he was eligible to receive other than or by virtue of the Act; and that section 104(3) of the repealed Constitution ringfenced Judges' salaries and allowances so that they could not be altered to their disadvantage while in office.

37. The court noted that during the repealed constitutional regime, the government introduced an allowance called duty-free car grant to certain cadre of constitutional office holders, including Judges, who were allowed to buy or import vehicles duty free for private use. It found that there was no contest that Judges enjoyed this benefit up to the effective date, the point of divergence being whether the benefit transitioned to the present Constitution. It was the court's finding, that the benefit transitioned to the new Constitution since, pursuant to sections 6 and 7 of the Sixth Schedule thereto, the Constitution abhors a vacuum. It was noted that the ***Salaries and Remuneration Commission Act*** (SRC Act) came into force on 29th July 2011 and the first Commissioners of the SRC were appointed on 10th January 2012. The court found, on the authority of the decision of Supreme Court in ***Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others*** ***[2014] eKLR*** **(CCK case)** that the Head of Public

Service, aware of sections 6 and 7 of the Sixth Schedule to the Constitution, as well as Articles 160(4) and 210 (3) of the Constitution, and in order to obviate a constitutional vacuum, on 7th July 2011, correctly issued the circular Ref OP.CAB.56/2A, addressed to the Attorney General, Permanent Secretaries/Accounting Officers, Registrar of the High Court and the Secretary of Public Service Commission, thereby legally transitioning the benefit from a duty-free car grant under the retired Constitution to a taxable car allowance, accessible to officers mentioned in the circular, including Judges, to conform with the 2010 Constitution. The court proceeded to find that the argument by the AG and the SRC that the benefit ceased to exist on the effective date and did not transit into the new Constitution, was devoid of merit given that the benefit (to Judges) was ringfenced by section 104(3) of the retired Constitution and could not be taken away to their disadvantage contrary to Article 160(4) of the current Constitution.

38. The learned Judges, based on the persuasive decision of the Supreme Court of Uganda in ***Attorney General of the Republic of Uganda v***

Masalu Musene Wilson & Ors [2008] UGSC 13 (14 October 2008),

concluded that the taxable car allowance is a benefit to Judges attaching to the office of Judge to be enjoyed by the holder of that office on appointment and not to an individual Judge as argued by the AG. This, it held, is because Article 160(2) protects the office of Judge of Superior Courts so that the office cannot be abolished while there is a substantive holder thereof. The benefit, the court held, is enjoyed by virtue of holding the office and, therefore, the benefit is to the office.

39. On the issue whether termination of the benefit contravened Article 160(4) of the Constitution, the learned Judges of the High Court cited various authorities and found: that the scheme of Article 160 of the Constitution is to protect the independence of the Judiciary; that judicial independence means shielding the Judiciary and Judges from external interference by the political branches (Executive and Legislative power) and any other non-judicial actors in the discharge of its mandate to adjudicate on disputes presented before it; that judicial independence is critical for maintaining Judges' impartiality in determining disputes before them, thus promoting the rule of law, democracy and constitutionalism; that for judicial independence to thrive, institutional and individual Judges’ independence must be

secured from both internal and external actors; that for this reason, institutional, legal and operational arrangements are put in place, designed to safeguard this independence; that Article 160 of the Constitution is designed to protect both institutional and individual Judges' independence, a key feature in maintaining the rule of law, a founding value of our nation and a constitutional imperative in a democratic state; that Article 160(2) protects the office of Judge so that the office cannot be abolished while the holder is in office, while Article 160(3) ensures that remuneration and benefits payable to Judges is a charge on the Consolidated Fund; that this guarantees remuneration and benefits payable to the Judge while in office so that Judges' remuneration and benefits are available when due to enable them meet their financial obligations and avoid financial embarrassment; and that in the same vein, Article 160(4) protects remuneration and benefits payable to Judges from arbitrary withdrawal or diminution to the disadvantage of the Judge.

40. As espoused by the Supreme Court in the ***Matter of the Kenya National Human Rights Commission*****, *Sup. Ct. Advisory Opinion***

Reference No. 1 of 2012; [2014] eKLR that constitutional provisions

must be read in harmony, the trial court noted that Article 230(4) which mandates the SRC to set and regularly review the remuneration and benefits must be read alongside Article 160(4) which ringfences benefits to the office of Judge. It found that it was a misapprehension on the part of the SRC to read Article 230(4) in isolation of Article 160(4) where a benefit is already available to the Judges. The court held that the SRC's mandate under Article 230(4) to set and regularly review the remuneration and benefits of Judges, must be rationalised and harmonised with Article 160(4), so that where a benefit has already accrued and is thus ringfenced by Article 160(4), that benefit is beyond the reach of the SRC. While the benefit can be reviewed, this cannot be done in a manner disadvantageous to the Judge. The court concluded that the attempt by the SRC whether as purported by its letter of 12th July 2021, or any other letter to terminate the benefit, is constitutionally impermissible.

41. The trial court while appreciating that the circulars; OP/CAB. 56/2A dated 2nd June 2015 and OP/ CAB.56/2A dated 4th June 2018 were issued after the SRC had been constituted and that by 2018, the SRC had held several engagements with the JSC over the remuneration and

benefits of Judges and Judicial officers, noted that in the letter dated 12th July 2021, the SRC stated that the existence of the three circulars had “come to its attention” and, therefore, it sought their revocation. This letter, the court found, was contradicted by the deposition in the affidavit, since in the letter, the SRC stated that it was aware of the circulars of 2011, 2015 and 2018, and even mentioned the state officers who were accessing the taxable car allowance, including Judges. It was noted that the two circulars (dated 2nd June 2015 and 4th June 2018), were addressed to, “All Principal Secretaries/Accounting Officers; Registrar of the High Court; The Auditor General and the Secretary Public Service Commission”, which the court viewed must have included the accounting officer of the SRC. The court was not persuaded that the SRC only learnt of the existence of the circulars in 2021 since the Judges were accessing the taxable car allowance in 2023. The court therefore held that, although being a recipient of the two latter circulars, the SRC did not protest or assert its mandate in relation to those reviews. It maintained a studious silence and allowed the benefit to accrue and crystallize under Article 160(4) of the Constitution, thus has been accessed by Judges as

reviewed. Based on the decision of in ***Attorney General of the***

Republic of Uganda v Masalu Musene Wilson & Ors [Supra), the

court found that the benefit acquired constitutional protection under Article 160(4) and for that reason, it cannot be taken away as this would amount to a variation of judges' terms and conditions of service to their disadvantage. According to the learned Judges, the SRC's prolonged inaction coupled with the enjoyment of the benefit by Judges for a long period, sanctioned the reviews contained in the two circulars dated 2nd June 2015 and 4th June 2018 and the benefit acquired constitutional protection under Article 160(4) of the Constitution. The High Court, therefore, issued the following orders:

1. ***A declaration that the taxable car allowance for purchase of motor vehicles for private use by Judges that existed prior to 12th July 2021 constituted a benefit payable to and in respect of Judges under Article 160 (4) of the Constitution and cannot be varied or altered to the disadvantage of judges***
2. ***A declaration that the Salaries and Remuneration Commission's letter dated 12th July 2021 purporting to revoke the taxable car allowance contravenes Article 160(4) of the Constitution, is a threat to the independence of the judiciary and is therefore unconstitutional, null and void.***
3. ***An order of certiorari quashing the Salaries and Remuneration Commission's letter dated 12th July***

2021 to the extent that it purported to revoke the Taxable Car allowance for Judges.

4 ***An order compelling the Principal Secretary, National Treasury and Economic Planning to forthwith process and pay, and continue to pay, the taxable car allowance to Judges as and when it falls due.***

5 ***No order to costs.***

42. We heard the consolidated appeals on 29th July 2025 when learned counsel, ***Mr. Peter Wanyama***, appeared for the appellant, learned Senior Counsel, ***Mr. Elisha Ongoya***, appeared for the 1st respondent, learned counsel, ***Ms. Kiramana***, held brief for learned counsel, ***Mr. Bitta***, for the 2nd respondent learned counsel, ***Mr. Simiyu Murambi***, appeared for the 3rd respondent and learned counsel, ***Mr. Issa Mansur***, appeared for the 4th respondent. Counsel relied on their respective written submissions which they briefly highlighted.

43. Civil Appeal No. E169 of 2024, against the application seeking recusal, is based on the following grounds that:

1. The learned Judges misdirected themselves in fact and law by disregarding the ethical standards outlined under Article 75 (1), the Judicial Service Code of Conduct and Ethics and Value 2.5 of the Bangalore Principles, which mandate Judges to avoid situations where personal interests conflict with their official duties.

2. ***The Learned Judges misdirected themselves in fact and law by failing to recognize their direct conflict of interest and the presence of institutional bias that undermines the impartiality and fairness enshrined in Article 50 (1) of the Constitution.***
3. ***The learned Judges misdirected themselves by failing to appreciate that there was a reasonable apprehension that their presiding over the case would undermine public confidence in the judiciary.***
4. ***The learned Judges misdirected themselves in fact and law by failing to acknowledge the value of alternative dispute resolution mechanisms espoused under Article 159 of the Constitution, in resolving constitutional matters where there are impartiality and conflict of interest concerns.***
5. ***The learned Judge s overlooked the fact that the peculiar circumstances of the case rendered them direct beneficiaries of the final decree.***

44. Unfortunately, we were unable to trace any submissions filed by the appellant, the SRC, directly on this appeal. However, in his oral address, Mr Wanyama submitted that the question concerning the remuneration of Judges is a very sensitive matter, that all the Judges who heard the petition were appointed post the 2010 Constitution and stood to benefit from the decree; that to sit on the petition was contrary to the ***Bangalore Principles of Judicial Conduct*** (***the Bangalore Principles***) as well as Articles 73 and 232 of the Constitution; that one cannot be a judge in one's own cause; that this was the reason for

suggesting that the dispute ought not to be subjected to litigation because all Judges in the Judiciary would then be conflicted; this was what informed the proposal that the matter be determined outside the parameters of the court system, through negotiation or through a meeting of minds in a meeting between the SRC and the JSC as well as the National Treasury and decide whether or not to enhance the benefit through the SRC as opposed to an imposed court judgment; that that in those circumstances, the Judges of the High Court should have recused themselves and allowed the matter to be determined through other mechanisms acceptable in our constitutional order, pursuant to Article 159 while retaining the structural interdict power, to bring it back in the event of failure of those mechanisms; that from the judgment, it was clear that the court was biased when it held that the SRC ought to have known that Head of Public Service had conferred a benefit without first determining whether the Head of Public Service had the mandate to confer that benefit.

45. The appeal was supported by the 2nd respondent, the AG, who submitted that the learned Judges proceeded to hear a case wherein they had and indeed ended up conferring on themselves a direct

financial benefit. In the AG's view, the learned Judges sat in their own cause contrary to well established codes of judicial conduct and constitutionally prescribed principles on the exercise of judicial authority. In support of this submission, reliance was placed, *inter alia*, on: the decision of Mohamed Ibrahim, JSC in ***Jasbir Singh Rai & 3 others v Tarcholan Singh Rai & 4 others*** ***(2013) eKLR***, (***the Rai Case***) in which the case of ***Sellar v Highland Rly Co.*** was cited, to highlight the importance of preserving the administration of justice from anything which can even, by remote imagination, infer a bias or interest in the Judge; the case of ***R v Bow Street Metropolitan Stipendiary Magistrate and Others Ex Parte Pinochet Ugarte (No. 2)*** ***[1999] 1 All ER 577*** to support the position that where a Judge's conduct may give rise to a suspicion that he is not impartial, the principle applies, notwithstanding the fact that there is no direct pecuniary or proprietary interest in the outcome of the matter; the case of ***R v Gough*** ***[1993] 2 All ER 724, [1993] AC 646*** to submit that a decision cannot stand where the nature of the interest is such that

public confidence in the administration of justice requires that the Judge must withdraw from the case; and the case of ***Metropolitan***

***Properties Co. (FGC) Ltd. v Lannon* [1969] 1 QB 577** to support the

submission that disqualification is imperative even in the absence of a real likelihood of bias if a reasonable and fair-minded person would suspect bias.

46. According to the AG, it was obvious to any ordinary observer that a favourable outcome of the petition would confer a direct benefit to Judges hearing and determining the case.

47. In her oral address, Ms. Kiramana, expounded: that the ethical standards and Judicial Code of Conduct were disregarded in rendering of the ruling for recusal; that their argument in the trial court was that the benefit in question had accrued until the end of June 2021, since the Judges who were in office up to end of June 2021 had already benefited from the taxable car grant; that, however, the Judges appointed after June 2021, were the ones who stood to benefit from the judgment and that the bench comprised of two Judges that were appointed pursuant to Kenya Gazette Notice number 15193 of 5th December 2022; that the two Judges were amongst those who stood to directly benefit from the decree of the court; that since there were Judges who were in office prior to the implementation of the 2010

Constitution as well as those who had already benefited from the allowance, and therefore stood not to be conflicted or could not be seen to be conflicted, the bench should have comprised of those judges; that from the ruling, it is difficult to not argue that the respondents were denied a chance at fair hearing, by being made to appear before a bench that had an interest in the matter. Ms. Kiramana agreed that to the extent that Mr. Wanyama was seeking the recusal of all Judges, she was not supporting that position. Asked by the Court whether she was aware of any constitutional provision that made provision for payment of different allowances to Judges of the same cadre, Ms. Kiramana stated that she was unaware of such provision.

48. We were urged to find merit in the appeal and allow it.

49. In opposition to this appeal, Gachuiri, submitted: on the authority of the case of ***Kibisu v Republic (Petition 3 of 2014) 2018 eKLR*** and

Nathan Obwana v Robert Bisakaya Wanyera & 2 others [2013]

eKLR, that to justify the recusal of a Judge from adjudicating on a matter, the grounds thereon should not be merely apprehensive, but should be factually proven and must pass the test of

reasonableness; that in this case, apprehension was not based on cogent reasons that

could justify the recusal of a Judge; that no factual proof of bias was demonstrated by the appellant that could diminish public confidence in the Judiciary; that pursuant to Article 50 of the Constitution, Judges have a duty to sit and every party in litigation has a right to be heard fairly; and that the appellant did not adduce any scintilla of evidence demonstrating factual elements of bias but only advanced grounds based on apprehension without cogently proving elements of bias in the ruling delivered.

50. The 1st respondent's view was that non-recusal of the Judges did not amount to violation of Article 75(1) of ***the Code*** and value 2.5 of ***the Bangalore Principles*** since the whole petition was anchored on interpretation of a constitutional provision, which the only competent organ to do so is the High Court. If the bench was to have recused itself on the basis of conflict of interest, it was submitted, no other bench could ever be constituted to adjudicate on the matter, a situation that would result into a miscarriage of justice. The 1st respondent relied on the doctrine of necessity as espoused by the Supreme Court in the ***Rai Case***, to submit that the bench had a constitutional duty to adjudge on the petition. The 1st respondent asserted that the argument

advanced by the appellant that the court erred by not applying alternative forms of dispute resolution is void. It was contended that the petition raised a substantial question of law on the interpretation of Article 160(4) of the Constitution, specifically the constitutionality of the taxable car allowance as a benefit payable to judges, thus the High Court is vested with authority to interpret the Constitution pursuant to Article 160(4) of the Constitution.

51. Mr. Ongoya, in his oral address, drew our attention to the fact that both the certificate of urgency in support of the recusal application and the grounds of the application alleged that the Judges presiding over the case, along with all other Judges in the Republic of Kenya, have a direct pecuniary interest in this matter. Therefore, the position by the appellant and the 2nd respondent was that all Judges in the Republic of Kenya, including the Judges of this Court, have a direct interest in this matter. That position, learned counsel posited, introduces the paradox of monumental proportions when the appellant files an appeal before this Court. Learned Counsel referred to Regulation No. 21 paragraph 3(a) of ***the Code*** which expressly provides that a Judge may not recuse himself or herself if no other Judge can deal with the case,

and argued that Judges have an obligation to comply with ***the Code***. Regarding the alternative prayer, learned counsel submitted that the proposal for the court to down its tools on the interpretation of the Constitution and send the file to the President of the Republic of Kenya, for him to look for eminent Judges from elsewhere in the Commonwealth, was a queer invocation of judicial authority. In his view, the mere fact that the matter involved a benefit to the Judges did not necessarily disqualify them from sitting since the SRC itself sets and reviews remuneration to public officers including itself without being accused of conflict of interest. Parliament, it was submitted, similarly makes laws some of which are beneficial to itself.

52. We were urged to dismiss this appeal.

53. In opposing the appeal, the 3rd respondent, the KJWA, cited value 2.5 of ***the Bangalore Principles***, as well as regulation 21(3) of the ***Judicial Service (Code of Conduct and Ethics) Regulations 2020*** and submitted: that the first limb of the regulation embodies the doctrine of necessity as elucidated by the Supreme Court in ***Shollei &***

Another v Judicial Service Commission & Another [2016] KESC

11.

54. It was KJWA's view: that the above provisions underscore not only the Judge's duty to recuse themselves when impartiality is genuinely in question, but also affirms the countervailing doctrine, the "duty to sit"; and that a Judge must not abdicate their responsibility to hear and determine matters without compelling cause, particularly where their recusal may occasion injustice or procedural paralysis; that the appellant's assertions regarding a direct conflict of interest and the pervasive presence of institutional bias are not only misconceived but are utterly devoid of any substantiating legal or factual foundation; that these claims, posited to have fatally compromised the fundamental elements of impartiality and fairness in the proceedings, are speculative, unmeritorious and an attempt to circumvent the judicial process and leave the 1st respondent without a remedy; that it is a cardinal and deeply entrenched principle of the common law, universally recognized in all democratic jurisdictions, that courts must vigilantly and resolutely safeguard their independence from any form of undue influence or interference and to resist readily acceding to unmeritorious and frivolous recusal applications; that while the sacrosanct principle that "justice must not only be done but must

manifestly and undoubtedly be seen to be done" as famously articulated in ***R v Sussex Justices, Ex parte Mc Carthy* [1924] 1 KB 256** is paramount, it does not imply that Judges should recuse themselves on the basis of every fanciful, subjective, or unsubstantiated apprehension of bias; that recusal is an extraordinary measure, reserved only for circumstances where there is an extremely good reason to believe that a Judge cannot impartially preside over a matter; that the appellant did not adduce any cogent, objective, or compelling evidence that rises to the exacting standard required to demonstrate actual or apprehended bias that would genuinely compromise the fairness or impartiality of the proceedings; that no reasonable apprehension of bias arose in the adjudication of the matter by the High Court, and thus, there existed no basis to conclude that public confidence in the Judiciary was or could be undermined; that the appellant failed the test in the ***Rai Case***, where the Supreme Court adopted the well-established objective test for bias as whether a reasonable and well-informed observer, having considered all the relevant facts, would conclude that there is a real possibility of bias and reaffirmed the doctrine of necessity, noting that judges, by virtue

of their oath to uphold the Constitution, may still be required to hear matters even where perceptions of bias arise, particularly where no alternative forum exists; and that merely alleging that Judges stand to benefit from the final decree amounts to a general and unsubstantiated apprehension, which does not satisfy the established legal test for bias or warrant judicial recusal.

55. It was further submitted: that the appellant demonstrably failed to adduce any cogent and concrete reasons to substantiate the existence of genuine impartiality concerns or a conflict of interest that would justify the referral of this matter to an Alternative Dispute Resolution process; that more fundamentally, the nature of the Petition itself dictated its adjudication by the High Court pursuant to Article 165(3)(d) of the Constitution; that the petition directly touched on the interpretation of Article 160(4) of the Constitution, which directly addresses the constitutionality of the taxable car allowance as a benefit payable to Judges; that owing to the profound constitutional nature of the said provision and the far-reaching implications of its interpretation for the independence of the Judiciary and public finance, the High Court was not merely the right court but was the only

constitutionally mandated and indispensable forum to interpret issues at hand; and that the referral of a matter of such profound constitutional significance, particularly one involving the interpretation of a specific constitutional provision concerning judicial remuneration, to either arbitration or mediation would have constituted a grave dereliction of the High Court's jurisdiction and a fundamental violation of the strict provisions of Articles 22(1) and (2) and 165(3)(d) of the Constitution that vest in the High Court jurisdiction to interpret the constitution.

56. According to KJWA, alternative dispute resolution mechanisms, while highly valuable for resolving commercial disputes, family matters, and other civil disagreements, are generally ill-suited for the authoritative interpretation and pronouncement on constitutional questions which requires a public, transparent, and binding declaration of law by a duly constituted judicial body, with the benefit of precedent and the possibility of appeal to superior courts, a power lacking in arbitration or mediation.

57. The appeal was similarly opposed by the 4th respondent, the JSC, according to whom the applicable test in determining bias, which the

appellant failed to meet, is the objective test, and the facts constituting bias and conflict of interest must be specifically proven. Mere apprehension of bias and conjecture, it was submitted, is not sufficient for recusal of a Judge. It was noted that it was ironical for the appellant to seek recusal of all the Judges then proceed to file this appeal before this Court. In JSC's view, the recusal of the learned Judges would have led to a miscarriage of justice. Referring to principle 2.5 of the ***Bangalore Principles*** and regulation 21(3) of ***the Code*** on situations where a Judge may not recuse himself or herself as well as the Supreme Court decision in the ***Rai Case***, it was submitted that the doctrine of necessity militated against the recusal of the Judges. Reliance was placed on ***Shollei & Another v Judicial Service Commission & Another*** (supra) and ***Galaxy Paints Co. Ltd v Falcon Guards Limited [2018] KESC 42*** in stressing the duty to sit.

58. On the ADR mechanism proposed by the appellant, the JSC submitted that the High Court has a special mandate which cannot be delegated to any other forum in the entire governance structure. The said proposal, it was submitted, undermined the doctrine of separation of powers and was tantamount to subverting the

provisions of the

Constitution. It was submitted that by dint of Article 165(3)(d)(ii) of the Constitution, the High Court had the jurisdiction to hear and determine the petition as it touched on the interpretation of the Constitution and the powers of the appellant and whether the appellant's action violated Articles 160(4), 172 and 230 of the Constitution. In support of its submission the 4th respondent cited the case of ***William Odhiambo Ramogi & 3 Others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] KEHC 10266*** and asserted that the High Court properly applied the law and the principles governing recusal to the set of facts before it in dismissing the appellant's Notice of Motion dated 14th December 2023.

59. At the plenary hearing, Mr. Issa associate himself with the submissions by Mr. Ongoya and Mr. Simiyu and added: that what was being sought before the High Court was an unconstitutional attempt for a mediation in the interpretation of the Constitution; that there is no provision under our constitutional order for any organ other than the High Court to interpret and determine whether anything done under the Constitution can be done; that it was

curious that SRC suggested that

after that mediation by those termed as eminent people, their decision would be brought back to the High Court for adoption and enforcement by the same Judges who were accused of being conflicted; and that none of the Judges, either in the High Court or in the Court of Appeal, or even the Supreme Court are conflicted because their rights are constitutionally protected.

60. We were urged to dismiss the appeal with costs

61. Since the outcome of Civil Appeal No. E169 of 2024 may inform the manner in which Civil Appeal No. E533 of 2024 is dealt with, we intend to dispose of the former before embarking on the latter should that course become necessary. In our view, the issues for our determination in this appeal (Civil Appeal No. E169 of 2024) are: whether the High Court bench in particular and the serving Judges in general ought to recuse themselves from hearing the petition; and whether the petition should have been referred to mediation.

62. In the application that was placed before the trial court, what was expressly sought was that: the Judges of the bench as empanelled by the Chief Justice be pleased to recuse themselves from hearing the

matter due to the direct underlying conflict of interest and institutional bias; that in the alternative, based on the principles in Article 159 of the Constitution, the court should stay the proceedings and refer the dispute to mediation by a panel comprising 3 retired Judges of apex courts from the commonwealth appointed by the President of the Republic of Kenya or 3 mediators to be appointed by the Chartered Institute of Arbitrators Kenya. We must point out that the manner in which the application was drawn was itself problematic. Since it was drawn in the alternative one must presume that upon the issuance of the first order the alternative prayer would fall by the wayside. The effect of that would be that only the three Judges hearing the petition would be disqualified from hearing the petition. However, a consideration of the grounds upon which the application was brought clearly reveals that the intention was to bar all sitting Judges from hearing the petition. In other words, the appellant's position was that the petition which sought interpretation of the provisions of the Constitution should not be heard by the empanelled bench of the High Court or any other court comprising of the sitting judges. Of course, we must point out that the AG took a slightly different view.

63. The basis upon which the trial court and the serving Judges were being called upon to recuse themselves was that the petition revolved around benefits accruing to Judges. It was contended that in those circumstances, there was perception that the Judges would not be impartial in their determination since they had an interest in the outcome of the petition.

64. In our view the issues raised in the petition must be distinguished from cases where an allegation is made that a Judge has pecuniary interest in the outcome of the case, for example, where one of the parties to the dispute is financially associated to the Judge or the Judge has a financial interest in the subject matter of the dispute. However, it is not in all instances that Judges would be required to disqualify themselves in matters merely because there is some financial element, however remote, connecting the Judge to a party. The financial interest, in our view, must be one that is directly connected to the cause of action before the Judge. For example, it is in the public knowledge that the Judiciary mortgage is administered by the Kenya Commercial Bank, a banking institution in this country. It would be unreasonable, in our view, to allege that by that mere fact, Judges

ought not to hear cases in which the said bank is a party. The standard for recusal of a Judge is the one set out by the Constitutional Court of South Africa in the case of the ***President of the Republic of South Africa & others v South African Rugby Football Union (Case No 16/1998) 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) (Surf case)***,

where the said court stated at paragraph 48 that:

> ***"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."***

This is the Constitutional duty common to all judicial officers. If they deviate, the independence

of the judiciary would be undermined and in turn the Constitution itself.

65. In this case, the Judges were not parties to the petition. That however is not the issue since, as was held in ***Galaxy Paints Company Ltd. v Falcon Guards Ltd.*** **[1999] 2 EA 83,** in which the case of ***R v Bow Street Metropolitan Stipendiary Magistrate and Others Ex Parte Pinochet Ugarte (No. 2) [1999] 1 All ER 577 at 586*** was cited:

> ***"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial. For example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be a judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."***

66. The litigation was not about a claim for money by Judges. This was not a case where Judges were suing for payment of a set sum of money owed to them by the appellant. It was a petition brought by a public- spirited litigant seeking to enforce the provisions of the Constitution underpinning the independence of the Judiciary as enshrined in Article 160(4) of the Constitution. Whereas a determination upholding the petition would no doubt uphold the car grant as a benefit accruing to Judges, that consequential accrual was not what Gachuiri sought to be determined. There is a myriad of cases where the court's determination may have the consequential effect of bestowing financial benefit to Judges, such as in tax issues, but it does not necessarily follow that in such cases Judges must abdicate their constitutional mandate of interpreting the Constitution. While we appreciate the fact that a case such as this poses a challenge to the Court, the fact must remain that the Constitution, the supreme law, vests all judicial power of the people in the Judiciary and whether the dispute involves the interests of the Judiciary or individual judicial officers or not, it is only the Judiciary which is vested with judicial power to resolve it. That is how the people of Kenya, in their wisdom, determined. However, the

Judiciary must resolve the dispute in the name of the people and in conformity with law and with the values, norms and aspirations of the people as expressed in the Constitution.

67. As the East African Court of Justice appreciated in the case of

***Attorney General v Anyang' Nyong'o and Others* [2007] 1 EA 12**

that:

68. In this case, as we have stated above, the effect of granting the application would have been that the courts of this country would have been deprived of the jurisdiction to deal with the dispute. Can the institution constitutionally tasked with interpreting the supreme law of the land wash its hands from doing so, thus leaving the litigants with no recourse? All authorities point to the contrary. Value 2.5 of ***the Bangalore Principles***, provides as follows:

A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

Such proceedings include, but are not limited to, instances where:

> ***(a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;***
> ***(b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or***
> ***(c) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;***

69. In the same vein, regulation 21(3) of the ***Judicial Service (Code of Conduct and Ethics) Regulations 2020*** states that:

A judge may not recuse himself or herself if—

a) no other judge can deal with the case; or
b) because of urgent circumstances, failure to act could lead to a serious miscarriage of justice;
c) the merits of the application for recusal have been considered by a plural bench of judges,

and recusal held to be unnecessary. [Emphasis added].

70. The above provisions are the basis upon which the doctrine of necessity is based. That doctrine was relied upon by ***Mohamed Ibrahim, JSC*** in the ***Rai Case*** in which the learned Judge held that:

71. To our mind the circumstances which the learned Judge had in mind are very much alive in the instant case. If the application by the appellant were to be upheld, no Judge in this country would touch the petition and appeals arising therefrom. The doctrine must, if for no other reason, be invoked in such circumstances in order that miscarriage of justice is avoided. The foregoing highlights the duty to sit as was emphasised by the Supreme Court in ***Shollei & Another v***

Judicial Service Commission & Another to (supra) the effect that:

> ***"every judge has a duty to sit, in a matter which he has a duty to sit; recusal should not be used to cripple a judge from sitting to hear a matter and the duty to sit is buttressed by the fact that every judge takes an oath."***

72. The mandate of the Judges is to mediate between man and man, and man and state. They cannot run away from their constitutional mandate and hand it over to a third body in a manner not contemplated by the Constitution. A court of law exists for the purposes of adjudication of disputes and not for their distribution to other entities.

73. Article 159(1) of the Constitution provides that:

74. From that Article, it is clear that the people have donated their judicial authority to the courts and tribunals and that authority is to be exercised by or under the Constitution. In the exercise of that power, Article 160(1) expressly provides that the Judiciary:

75. When it comes to the interpretation of the Constitution, Article 165(3)(d)(i) and (ii) of the Constitution categorically clothes the High Court with the:

> ***"jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution."

76. What comes out from the said Article is that judicial authority as donated to the Judiciary is not a shared power. It is a power to be exercised by the Judiciary without recourse to any other authority or entity apart from the Constitution and the law. In the exercise of that power, the Judiciary does not consult other organs of the State or cede their mandate to those other organs in the manner in which it exercises its authority. While we appreciate that under Article 159(2)(c) of the Constitution, the Judiciary is under obligation to promote alternative dispute resolution mechanisms, that obligation only extends to appropriate cases. The judiciary cannot subject cases which are inherently inappropriate for ADR mechanisms to that mode of dispute resolution. The power to interpret the Constitution is one such power that is not amenable to alternative dispute resolution mechanism.

77. In its application before the High Court, the SRC specifically sought for referral to mediation. In matters of constitutional interpretation

mediation is not a suitable mode of dispute resolution. This is clearly so because mediation is basically a consensual process at every stage. Referral to mediation is generally consensual and participation in the process is also voluntary. Its expected end product is also by agreement. A party can opt out of it at any stage of the process. That is not what is contemplated where a party comes to court seeking a binding decision regarding interpretation of constitutional provisions. Further, mediated settlement agreements, being agreements between the parties to the dispute generally only bind those parties. Mediation settlements do not set out to guide the courts in the manner in which the law is to be applied. The application of the law and the interpretation of the Constitution, on the other hand, is not a matter for consensual arrangement by the parties.

78. It is also trite that when matters are referred to mediation, unless the parties agree, the courts retain the residual power to finally determine the dispute. Had the High Court allowed the application and referred the petition to mediation based on the grounds advanced before it, in the event of a stalemate, the parties would have been left with no recourse. In our view, the Judiciary being the final arbiter of disputes

should not send the parties to the wilderness with no recourse to the justice system when the vagaries of the wild make it impossible for the parties to reach their destination. Mr Wanyama submitted that in making the referral order, the court would have in effect issued a structural interdict. With due respect, structural interdict cannot be issued in circumstances where the matter is sought to be removed from the jurisdiction of the court on the ground that the Judges should not handle the matter. Structural interdicts presuppose that the court is properly seized of the dispute, hence its supervisory power over its decision. By acceding to the application, the High Court would have abdicated its role as a constitutional court and, by eventually adopting a decision made by the parties whose effect would be to bind the court, the court would have been guilty of dereliction of its constitutional mandate. With respect to matters falling under Article 163(3)(d)(i) and

(ii) of the Constitution, the words of **Oder, JSC** of the Supreme Court of Uganda in the case of ***Gokaldas Tanna v Sister Rosemary***

Muyinza & DAPCB ***SCCA No. 12 Of 1992 (SCU)*** readily comes to

mind. In that case, the learned Judge opined that:

"An agreement on the terms that upon finding the

issue in the positive judgement should be entered in

> ***favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgement in favour of one or other of the parties whether or not such a judgement was contrary to any legal provisions".***

79. In our view, what the appellant was seeking to achieve by its application was what was frowned upon by the court in the above decision. While such a course is acceptable and laudable in cases where the dispute is purely between the parties and amenable to ADR mechanisms, it is clearly inappropriate where the law and the constitutional provisions need to be settled as was in this case.

80. The appellant must have realised the absurdity of seeking that the High Court makes a referral order while at the same time challenging its impartiality in entertaining the dispute. It therefore suggested that the mediation be undertaken by a panel of 3 retired Judges from the Commonwealth, to be appointed by the President, or 3 arbitrators to

be appointed by the Chartered Institute of Arbitrators. The involvement of the President, the head of the Executive arm of government, in a judicial determination clearly would have contravened the principle of separation of powers between the three arms of Government. One only needs to mention it to be struck by its absurdity.

81. To the AG's position that the withdrawal of the allowance affected Judges appointed after the impugned decision and since the petition sought to confer a benefit to Judges appointed after 2021, two of whom were sitting on the bench, the application was well grounded, we wish

to refer to the decision of this Court in ***Rawal v Judicial Service***

Commission & another; Okoiti (Interested Party); International

Commission of Jurists & another (Amicus Curiae)

[2016] KECA 534 (KLR) where the Court asserted that:

> ***"Judging is a difficult and consuming task and making decisions about other people's lives is a serious responsibility that engages both intellect and emotion. It is even more serious when it involves judging fellow judges. But the judicial task of making difficult decisions is advanced when Judges care about and apply the law. Judges are not autocrats but are obligated to be faithful to the law and to apply it impartially and with open mind. To the***

community at large and to the laypersons in particular, it must seem incongruous that Judges

can be called upon to decide on matters of their welfare. One might legitimately ask whether in a matter such as this whose effect go beyond the parties and has immediate and future ramifications on the well-being of Judges generally can be decided by Judges without their inclination towards self- preservation, rationally and impartially. With such perception it can be disconcerting when a matter such as this appeal has to be decided by the very people its outcome will affect.

In determining this appeal however we are guided by the Constitution, the laws as well as our oath of office, all of which enjoin us to serve the people of Kenya diligently and to impartially do justice without fear, favour, bias, affection, ill-will, prejudice or other influence in order to promote fairness, independence competence and integrity in the Judiciary."

82. That was a case in which the main issue for determination was whether Judges who were appointed pre 2010 Constitution were subject to the retirement age set under the new Constitution which is 70 years as opposed to the retirement age under the retired Constitution which was

74 years. The bench comprised Judges appointed under both constitutional regimes. Going by the submissions of the Attorney General one would have expected those Judges who were appointed under the retired Constitution to rule in favour of the appellant since they stood to benefit from the retirement age of 74 years. However, the Court unanimously held that with effect from the effective date, the

retirement age of all Judges is 70 years. This judgment is a clear testament to the fact that Judges do not, as some are wont to believe, make determination based on which side of the bread is buttered.

83. In our view the application was clearly unmerited on both limbs of recusal and referral to mediation. It was properly dismissed and we uphold the decision arrived at by the learned Judges of the High Court on 23rd February 2024.

84. That now brings us to the main appeal (Civil Appeal No. E533 of 2024) against the judgment dated 24th May 2024. In our view, four issues arise for determination in respect of that appeal, and these are:

> ***(1) Whether the duty-free vehicle allowance was a benefit that accrued to the Judges before the promulgation of the current Constitution.***
> ***(2) Whether, if a benefit, it transited to the current Constitution.***
> ***(3) Whether the revisions after the establishment of the SRC were lawful.***
> ***(4) Whether, the learned Judges, in quashing the SRC's letter dated 12th July 2021 and compelling the Principal Secretary, National Treasury and Economic Planning to forthwith process and pay, and continue to pay, the taxable car allowance to Judges as and when it falls due, usurped the exclusive constitutional and statutory mandate of the SRC.***

85. Regarding the issue whether the taxable car allowance was a benefit that accrued to the Judges before the promulgation of the current Constitution, all the respondents agree it was a benefit that accrued under the retired Constitution. The point of divergence in so far as the 2nd respondent is concerned is the point at which it stopped to accrue.

86. It is agreed by all the parties that before the promulgation of the 2010 Constitution, the constitutional office holders (precursors to a section of State Officers) were remunerated and provided with benefits based on the provisions of section 104 of the retired Constitution. That section provided that:

> ***(1) There shall be paid to the holders of the offices to which this section applies such salary and such allowances as may be prescribed by or under an Act of Parliament.***
> ***(2) The salaries and any allowances payable to the holders of the offices to which this section applies shall be charged upon the Consolidated Fund.***
> ***(3) The salary payable to the holder of an office to which this section applies and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment.***
> ***(4) When a person's salary or other terms of service depend upon his option, the salary or terms for which he opts shall, for the purposes of***

subsection (3), be deemed to be more advantageous to him than any others for which he might have opted.

(5) This section applies to the offices of judge of the High Court, judge of the Court of Appeal, member of the Public Service Commission, member of the Electoral Commission, Attorney-General and Controller and Auditor-General.

87. In order to operationalise the said provisions of the Constitution, Parliament enacted the ***Constitutional Offices (Remuneration) Act***. The objective of the Act was to fix salaries and allowances of constitutional office holders. Section 2 of the said Act mandated the President to set remuneration and allowances of the officeholders specified in the First Schedule to the Act which included the Chief Justice, Judge of Appeal and Puisne Judge. Section 2 provided for annual salary scales with reference to the second column of the Schedule to the Act. Where scales were provided, the President was given the power to determine the actual salary payable, within the scale, having regard to seniority and difference in skills, workloads and accountabilities attached to the office. The President was also empowered to determine the allowances payable from time to time. The Act in section 4 made it clear that its provisions did not preclude the payment of any allowances which, though not determined in

accordance with the Act, were nevertheless payable other than by virtue of the Act. It is not contested that during the constitutional regime of the retired Constitution, the government introduced an allowance called duty free car grant to certain cadre of constitutional office holders including Judges, by which they were allowed to buy or import vehicles duty-free for private use. This benefit was enjoyed by the Judges up to the effective date, 27th August 2010. Section 5 of the Act provides that:

88. Section 210(3) of the 2010 Constitution which came into force on the effective date, however, provides that:

> ***(a) the office held by that State officer; or***
> ***(b) the nature of the work of the State officer.***

89. The Constitution, in Article 230 contemplated the establishment of the Salaries and Remuneration Commission whose functions included to set and regularly review the remuneration and benefits of all State

officers. It is not in doubt that the SRC Act came into force on 29th July 2011 and its first commissioners were appointed on 10th January 2012. Between the effective date, 27th August 2010 and 10th January 2012, the SRC could not function in the manner contemplated. On 7th July 2011, prior to the coming into force of the SRC Act, the Permanent Secretary, Secretary to the Cabinet and Head of Public Service issued a circular Ref OP.CAB.56/2A, addressed to the Attorney General, Permanent Secretaries/Accounting Officers, Registrar of the High Court and the Secretary of Public Service Commission under reference "Taxable allowances for Purchase of motor vehicles", stating:

> ***"In compliance with the Constitutional requirement under Article 210(3) which prohibits exclusion of state officers from payment of taxes on benefits accruing to state officers by the nature of their work, the earlier provision whereby the government has been paying duty free on vehicles bought for private use by some of the public servants has been removed.***
>
> ***It has been decided, that in place of the provision for duty free facility a taxable allowance of a maximum of 2 million will be granted to eligible office holders starting 1st July 2011. The following conditions will apply.***
>
> ***The allowance will be granted every four years on production of documents supporting the purchase of the vehicle. The motor vehicle be purchased must be for personal use, not for commercial purposes.***

Serving officers will qualify for the allowance 4 years after the last vehicle was purchased under the old arrangement….”

90. What comes out clearly from the above circular is that its author was aware of the provisions of Article 210(3) which prohibits exclusion of state officers from payment of taxes on benefits accruing to them by the nature of their work. He must have also been aware of section 104(3) of the retired Constitution which prohibited the alteration of the salary payable to the listed constitutional office holders and their terms of service to their disadvantage. He must also have been aware of Article 160(4) of the current Constitution which provides that:

91. It is important to note that whereas under the retired Constitution, the remuneration and benefits of the enlisted constitutional office holders and their terms of service could not be altered to their disadvantage, the 2010 Constitution only ring fenced the remuneration and benefits payable to a Judge. We also take it that the Permanent Secretary, Secretary to the Cabinet and Head of Public Service was aware of

sections 6 and 7 of the Sixth Schedule to the current Constitution, and in order to obviate a constitutional vacuum that was created by Article 210(3), issued the above referenced circular.

92. Section 6 of the Sixth Schedule to the current Constitution provides-

93. Section 7(1) thereof provides that:

94. The circular, in our view, was meant to ensure adherence to Article 210(3) while at the same time ensuring that Article 160(4) of the Constitution was not contravened. The effect of the circular was to legally transition the duty-free facility to a taxable allowance, thereby legally transitioning the benefit from a duty-free car grant under the repealed Constitution to a taxable car allowance, to Judges to conform with the 2010 Constitution.

95. The appellant takes the view that:

> ***"only the appellant had the mandate to confer the car grant and subsequently review the same. The decision by the Head of Public Service to confer the grant and subsequently review it is unconstitutional…as of 7th July 2011, the Head of Public Service lacked the constitutional mandate to introduce, confer, or vary any remuneration or benefits for State Officers. As the Constitution of Kenya, 2010, had already been promulgated on 27th August which established Independent Commissions with specialised mandates."***

96. The appellant seems to have, either deliberately or inadvertently, misconstrued the circular. In our understanding the Head of the Public Service did not purport to confer the car grant as a new benefit. He only repackaged an existing benefit in order to comply with the provisions of the Constitution. During the plenary hearing, Mr Wanyama, indeed, made some concessions. In his own submissions, he stated:

> ***"So, then my lady and my lords we will submit that you exercise your judicial wisdom on two things; to notice our argument that indeed, there was a benefit which transited, and that benefit is Kshs.2 million; secondly, that only Salaries and Remuneration Commission can enhance it. Thirdly, that that benefit only applies to Judges who are appointed in the pre-2010 constitutional dispensation."***

97. So, there it is in black and white. All the parties agree that there was a benefit that was enjoyed by the Judges prior to the effective date known as duty free car grant in the amount of Kshs 2 million. That benefit transited to the 2010 Constitution. What Mr Wanyama and the SRC did not address was what became of that benefit, if their argument is that only SRC could set the remuneration and benefits of judges. Did SRC address itself to this benefit? We shall come back to this matter later.

98. In the period between the promulgation of the current Constitution and the coming into force of the SRC and the appointment of its commissioners, the appellant has not addressed the entity that was supposed to implement the existing salary structures and the allowances. If we understand the appellant correctly, at the effective date, the old constitutional regime came to an end and was replaced by the new constitutional regime and hence all actions that ought to have been taken by the entities contemplated under the new constitution could not be undertaken notwithstanding the non- existence of those entities. That thinking was disabused by the Supreme Court in ***Communication Commission of Kenya & 5***

<u>Others v Royal Media Services & 5 Others</u> [2014] eKLR (CCK case)

in which it was held that:

> ***"The transition Chapter and clauses in the Constitution are meant not only to ensure harmonious flow from the old to the new order, but also to preserve the Constitution itself, by ensuring that the rule of law does not collapse owing to disruptions arising from a vacuum in the juridical order. Unless it is demonstrated that the legislation establishing CCK was* incapable of being construed with the necessary alterations and exceptions*, so as to bring it into conformity with the Constitution, pending the three-year legislative intervention, it would be* improper in law and in principle, *to declare CCK unconstitutional."***

99. In our view, the existing duty free car grant facility could be construed with *the necessary alterations and exceptions*, so as to bring it into conformity with the Constitution, and that is exactly what the Head of Public Service did by his circular of 7th July 2011, Ref OP.CAB.56/2A. We therefore agree with the learned Judges' holding that:

> ***"When the SRC was constituted in 2012, the benefit was already set and in existence following the transition pursuant to the circular dated 7th July 2011 in conformity with Article 210(3) as read with Article 160(4) and section 6 and 7 of the Sixth Schedule to the Constitution. At that point the SRC's duty was limited to reviewing that which was already in place"***

100. While seemingly comfortable with the continued implementation of the existing salary structures, notwithstanding the SRC's non-existence, the SRC's concern seems to be only the allowances and benefits that were transitioned into the new Constitution. What the appellant seems to be urging is that Article 210(3) of the Constitution ought to have been upheld while Article 160(4) of the Constitution should have been ignored. That course would not accord with Article 259 of the Constitution which demands that the Constitution be interpreted in a manner that, *inter alia*, promotes its purposes, values and principles. As restated the Supreme Court in ***the Speaker of the Senate & Another v Honourable Attorney General & Others [2013] eKLR***:

101. From the material placed before us and the submissions of counsel, we hold that the duty-free car grant was a benefit that accrued to the Judges before the promulgation of the current Constitution and it transited to the current Constitution in the form of taxable car

allowance. The attempted distinction between benefit and allowance by the SRC is one without a difference in the circumstances.

102. The SRC, through its learned counsel, Mr. Wanyama, takes the view that the benefit was only available to the Judges who were appointed in the pre-2010 constitutional dispensation. The SRC's position seems to be that a benefit attaches to a particular Judge as opposed to the office of Judge. That thinking is clearly not in consonance with Article 160(2) which creates the office of a Judge of a superior court. We agree with the learned Judges that Article 160 of the Constitution is designed to protect both institutional and individual Judges' independence. Both are interlinked. You cannot talk about one without the other since the institution of the Judiciary comprises, *inter alia,* the Judges. Therefore, when the Constitution sets out the independence of the Judiciary, it protects both the institutional and individual Judges' independence. There can, therefore, be no basis for the same cadre of Judges, save in cases of assignment of special responsibilities, to be subjected to differentiation in benefits. The Constitution of Kenya only recognises Judges of superior courts sitting in the High Court (and courts of equal status), the Court of Appeal and the Supreme

Court.

There is not distinction based on the promulgation of the Constitution so as to treat some Judges as pre-2010 Constitution and post 2010 Constitution. Such distinction would clearly contravene Article 27 of the Constitution.

103. The Attorney General, the Government's legal adviser, must have been

very much alive to this when Ms Kiramana submitted that:

104. On whether the revisions after the establishment of the appellant were lawful, from the submissions by Ms Kiramana, there is an explicit concession that although the increments post 2010 Constitution were not undertaken by the SRC, nevertheless, they had accrued to Judges and the act of taking them away would have contravened the provisions of the Constitution. In learned counsel's own words:

> ***"Now, on the question if it was taken away by Salaries and Remuneration Commission, it would negatively affect the benefits of the Judges contrary***

to the constitutional provisions, your lordship, we submit that the complaint was the group of judicial officers that were not able to get this benefit after June 2021, which means that anybody who was hired after 2021, they ought to have known that the benefits they are getting is in exclusion of an illegally bestowed upon taxable car grant reviewed upwards to Kshs.10 million from the initial Kshs.2 million that transited from the previous constitution, so our submission is that it wouldn't affect their benefits."

105. Since by June 2021, all the three circulars had been implemented, if we understood Ms Kiramana's submission correctly, those circulars ought to be implemented in so far as the Judges who had benefited from them are concerned but not those who had not benefited. This argument, in our respectful view, is flawed based on our finding above that the law does not distinguish between Judges appointed at different periods when it comes to benefits save for cases of enhanced responsibility.

106. The learned Judges in their findings took a dim view of the loud silence by the SRC regarding the two reviews that were undertaken after the Commission was functional. The learned Judges detailed what took place after the SRC was constituted and concluded that:

"being a recipient of the two circulars, the SRC did not protest or assert its mandate in relation to

those reviews. It maintained a studious silence and allowed the benefit to accrue and crystallized under article 160 (4) of the constitution, thus has been accessed by judges as reviewed."

107. According to SRC, being a constitutional body, it cannot be presumed to have known of the decision of the Head of the Public Service for the benefit to have crystallised. In our view, this was not a matter of presumption. The circulars by the Head of Public Service Reference Nos. OP/CAB.56/2A dated 2nd June 2015 and OP/CAB.56/2A dated 4th June 2018 were addressed to, among others, all accounting officers. The learned Judges categorically concluded that "the SRC was aware of the two circulars upon their issuance." This finding of fact was well founded. On the face of the circulars, they were addressed to all accounting officers. In paragraph 22 of the replying affidavit, Anne R. Gitau, the SRC's CEO deposed that:

THAT as learned by SRC in 2021 – on 2nd June 2015, the Head of Public Services (without consulting the SRC and of his own volition) revised the rate of taxable car allowance for Permanent Secretaries/Accounting Officers; Judges of the High Court, Clerk to the National Assembly and Provincial Commissioners from 2 million to a maximum of 5 million.

THAT further, on 4th June 2018, the Head of Public Service unilaterally increased the taxable car

allowance from 5 million to Kshs 10 million for Permanent Secretaries/Accounting Officers; Judges of the High Court, Clerk to the National Assembly and Provincial Commissioners.

108. While the deponent averred that SRC became aware of the initial letter in 2021, she did not comment about the fact that the three circulars were addressed to accounting officers. She did not deny that the same were addressed to the accounting officers of SRC and the contents of the said letter were not challenged by the SRC. All these were facts material to her averment that SRC was not aware of the enhancement. The only point she asserted was that JSC and KJWA did not inform it of the enhanced benefits. It was upon the SRC to place before the court, evidence that would have assisted the court in finding that it was unaware of the benefits. This was evidence that was peculiarly within its knowledge and as section 109 of the ***Evidence Act*** provides:

that the proof of that fact shall lie on any

109. In light of the clear evidence that the circulars were addressed to, among others, the accounting officers, without evidence either from SRC or the AG who represented the Government to the contrary, we

see no reason for faulting the finding by the learned Judges that SRC was aware of the circulars that enhanced the transited benefit.

110. If the SRC is to be believed that it was not aware of the enhancement of the benefit, then it would at least have addressed the issue of the transited benefit when it was reviewing Judges' benefits. The fact that it did not address its mind to it can only show that it had no problem with the action of the Head of the Public Service transiting the benefit to the 2010 Constitution and that being the position, it cannot be heard to complain about its enhancement which we find it was aware of. We agree with the finding by the learned Judges that "SRC is not being candid as to when it became aware that Judges were accessing the taxable car allowance". The letter dated 12th July 2021 seems to have been a face-saving manoeuvre for its failure to undertake its duty when it ought to have done so.

111. The learned Judges correctly relied on the decision in ***Attorney General of the Republic of Uganda v Masalu Musene Wilson & Ors*** [supra) where the Court held that:

> ***"However, as we have already noted, the appellants and other judicial officers of the rank of Registrar***

or magistrate have been enjoying the privilege of tax exemption for over three years. The appellant did not apply for stay of execution of the judgment of the Constitutional Court and the Government has in its wisdom not been taxing the emoluments of the said judicial officers. It would be unconscionable and contrary to the spirit of provisions of Article 128(7) of the Constitution to remove the tax exemption."

112. Before we depart from this issue, it is important to understand the constitutional mandate of the SRC *vis-à-vis* that of the JSC. Article 172 of the Constitution sets out the powers of the Judicial Service Commission which include, at clause (1) paragraph (b)(i), to:

113. Article 230(4)(a) of the Constitution, on the other hand, sets out the powers of the SRC as, *inter alia*, the power and function to:

(a) set and regularly review the remuneration and benefits of all State officers.
(b) advice the national and county governments on the renumeration and benefits of all other public officers.

114. Juxtaposed with Article 127 of the Constitution which establishes the Parliamentary Service Commission, one can see that unlike Article 172, Article 127 does not give power to the Parliamentary Service

Commission to review conditions of service of its staff. So that whereas the Judicial Service Commission has no power to review and make recommendations on the remuneration of Judges and judicial officers, the Constitution donates the power to review and make recommendations on other conditions of service of Judges and judicial officers to the JSC. It is noteworthy that Article 230(4) distinguishes between remuneration and benefits. In our view, the drafters of the Constitution intended to carve out the powers to review other benefits other than remuneration from the powers of the SRC and instead give them to the JSC as regards Judges and judicial officers. It cannot be that both Commissions exercise the same power simultaneously or concurrently. We believe it is important to make that distinction.

115. The next issue is whether, the learned Judges, in quashing the SRC's letter dated 12th July 2021 and compelling the Principal Secretary, National Treasury and Economic Planning to forthwith process and pay, and continue to pay, the taxable car allowance to Judges as and when it falls due, usurped the exclusive constitutional and statutory mandate of the appellant.

116. The appellant argued that the court overstepped its judicial boundaries by intervening in matters of public financial management and salary determination, which fall within the exclusive mandate of the SRC. Further, the court's order compelling the Principal Secretary of the National Treasury to process and continue paying the taxable car allowance contradicts the principles of separation of powers. In the SRC's view, by that order, the Judiciary appears to have intervened in a policy and financial matter that is outside its scope, potentially infringing on the authority vested in the SRC and the executive branch by ordering the continuation of payment of a specific allowance. According to the SRC, the direction raises pertinent questions about the proper balance between judicial review and constitutional mandates. It suggests that a more cautious approach might involve the court reviewing the lawfulness of the SRC's action rather than issuing a direct mandate on how the Executive should allocate resources.

117. In our view the complaint by the SRC does not amount to much in substance. The court having found that the benefit had accrued to the Judges and that it could not be reviewed to their disadvantage as decreed by the Constitution, the direction that it be processed and paid

naturally followed from that finding. It is a constitutional obligation on the part of the Government to pay salaries and allowances to Judges when due and that is why they are a charge on the Consolidated Fund. The SRC has no discretion when it comes to payment of accrued salaries and benefits. While it has discretion to review upwards the said salaries and benefits, that discretion does not encompass deciding whether or not the same ought to be paid. The obligation to pay arises once the salaries are determined and the benefits accrue. The posture taken by the SRC that the decision poses substantial risks to Kenya's fiscal sustainability and governance integrity rings hollow. In ringfencing the remuneration and benefits of Judges, the drafters of the Constitution took into account the important role played by the Judiciary and Judges and the potential risk that may be posed to the rule of law if the remuneration and benefits were subjected to whim and the vagaries of alleged fiscal sustainability and governance integrity. The importation of such vague and ambiguous terms to defeat explicit constitutional imperatives cannot be countenanced. We associate ourselves, once again, with the opinion of the Supreme Court

of Uganda in ***Attorney General of the Republic of Uganda v Masalu***

Musene Wilson & Ors (Supra), in which the Judges stated that:

> ***"We agree that Article 128(7) is meant to be a pillar for the independence of the judiciary. The need for the judicial officers to be well compensated to be able to uphold their judicial independence cannot be overstated. We agree with Mpagi-Bahigene J. A. when she states in her judgment:***
>
> > ***'the underlying principle in the entire Article 128 is the issue of judicial independence and security of tenure, the latter being among the traditional safeguards of the former. This means among other things that the term of office, emoluments and other conditions of service of judicial officers generally shall not be varied or altered to their detriment or disadvantage. This is an elementary safeguard to be found in most developed legal systems where it took many historic struggles to establish on a firm footing as the most fundamental of all safeguards to judicial officers' security of tenure. When this safeguard is destroyed by whittling away the provisions of Article 128(7) and judicial officers are put at the sufferance of the executive or the whims of the legislature, the independence of the judiciary is the first victim. The rationale under Article 128(7) is that there should be adequate salaries and pensions for judicial officers commensurable with their status, dignity and responsibility of their office.'"***

118. While it was not really necessary to make that obvious directive, the court only made it consequent to its findings and we see no justification for faulting that order.

119. Having considered the issues raised before us in this appeal, the decision we come to is that the appeal is unmerited. It is dismissed in its entirety. Being a matter touching on the public interest, we make no order as to the costs.

It is so ordered.

Dated and delivered at Nairobi this 25th day of March, 2026.

W. KARANJA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.