



Oduor & 3 others v Magistrates and Judges Vetting Board & another (Civil Appeal 457, 458, 466, & 475 (Consolidated) of 2018) [2021] KECA 92 (KLR) (22 October 2021) (Judgment) (with dissent - HM Okwengu, JA)

Neutral citation: [2021] KECA 92 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 457, 458, 466, & 475 (CONSOLIDATED) OF 2018
PO KIAGE, S OLE KANTAI & HM OKWENGU, JJA
OCTOBER 22, 2021**

BETWEEN

**MICHAEL KIZITO ODUOR 1ST APPELLANT
WILSON KABERIA NKUNJA 2ND APPELLANT
OKELLO TIMOTHY ODIWOUR 3RD APPELLANT
BENARD JAMES NDEDA 4TH APPELLANT**

AND

**MAGISTRATES AND JUDGES VETTING BOARD 1ST RESPONDENT
JUDICIAL SERVICE COMMISSION 2ND RESPONDENT**

((An appeal from the judgment of the High Court of Kenya at Nairobi (Lessit, Wakiaga, Ngenye, Mativo & Onyiego, JJ.) dated 22nd June, 2018 in Petition No. 251, 154, & 230 of 2016 (Consolidated))

The ouster clause in section 23(2) of the Sixth Schedule to the Constitution is not applicable to Magistrates.

Reported by Beryl Ikamari

***Jurisdiction** - jurisdiction of the High Court - jurisdiction in relation to decisions of the Judges and Magistrates Vetting Board (Board) - where certain magistrates sought to challenge the decisions of the Board with respect to their suitability to continue serving in the Judiciary - whether the High Court had jurisdiction to review decisions of the Board with respect to magistrates - Constitution of Kenya, 2010, section 23(2) of the Sixth Schedule.*

***Constitutional Law** - interpretation of provisions of the Constitution - scope of applicability of the ouster clause in section 23(2) of the Sixth Schedule to the Constitution - whether the omission of the word 'magistrate' in the ouster clause was the result of inadvertence on the part of the framers of the Constitution - whether the purposive*



interpretation of the ouster clause, in light of its historical context, would mean that the word 'magistrate' would be read into the provision - Constitution of Kenya, 2010, article 259 and section 23(2) of the Sixth Schedule.

Precedent - binding precedent - decisions of the Supreme Court - whether the question as to whether the ouster clause in section 23(2) of the Sixth Schedule to the Constitution as being applicable to magistrates was raised before the Supreme Court - whether the Supreme Court rendered its determination on that question - Constitution of Kenya, 2010, article 163(7).

Brief facts

Section 23(2) of the Sixth Schedule to the Constitution expressly ousted the jurisdiction of the court to question or review the determinations of the Judges and Magistrates Vetting Board (Board) in relation to the removal of a judge from office but it did not expressly mention magistrates. The appellant invited the court to construe the ouster clause in section 23 of the Sixth Schedule to the Constitution as one that related to judges only and not magistrates as magistrates were not mentioned in it. Section 22(4) of the Vetting of Judges and Magistrates Act was a similar ouster clause that mentioned magistrates and the appellants argued that its inclusion of what was not included in the Constitution made it unconstitutional.

The Board had found the appellants unsuitable to continue serving in the Judiciary. The Board was a mechanism designed to vet judicial officers to determine their suitability to continue serving as part of the new constitutional dispensation. The appellants filed petitions at the High Court in which they alleged that the Board had violated their rights to a fair trial including the principles of natural justice.

The High Court found that the appellants were essentially asking the court to examine the process and outcome of the vetting process and the court could not do that. The High Court also held that section 23(2) of the Sixth Schedule to the Constitution had an ouster clause that was applicable to the decisions of the Board in relation to magistrates and that the Supreme Court had made determinations on the extent of applicability of section 23(2).

On appeal, the appellant's main contention was based on the interpretation that the High Court had given to section 23(2) of the Sixth Schedule to the Constitution. They wanted the court to recognize that there was some inconsistency between that constitutional provision and section 22(4) of the Vetting of Judges and Magistrates Act with respect to the scope of applicability of the ouster clause and to find that the High Court had the mandate to review decisions of the Board with respect to magistrates.

Issues

- i. Whether the ouster clause in section 23(2) of the Sixth Schedule to the Constitution was applicable to magistrates.
- ii. Whether the High Court had jurisdiction to review a decision of the Judges and Magistrates Vetting Board with respect to the suitability of a magistrate to continue serving in the Judiciary.
- iii. Whether the Supreme Court rendered a determination on the question as to whether the ouster clause in section 23(2) of the Sixth Schedule to the Constitution was applicable to magistrates.

Held

Per Kiage, JA

1. As the first appellate court, the court proceeded by way of re-hearing based on what was on the record. It considered the matter in a fresh and exhaustive manner in order to reach at its own independent conclusions.
2. Where a dispute was within the discretion of the trial court, the appellate court would not be quick to interfere with the trial court's decision and would only do so where the trial court misdirected itself in law, misapprehended the facts, took into account matters they should not have taken into account or failed to take into account matters that they should have taken into account or reached at a decision that was plainly wrong.
3. The Supreme Court had pronounced itself on the validity of the ouster clause in section 23(2) of the Sixth Schedule to the Constitution and it had found that the decisions of the Board were immunized



- from further inquiry or review at the superior courts. The decisions of the Supreme Court by dint of article 163(7) of the Constitution were binding on all courts in Kenya.
4. The question as to whether the issue with respect to the applicability of the ouster clause to magistrates was raised at the Supreme Court was noteworthy. That question was not specifically raised. The appellant asked a different question at the High Court as compared to the question determined at the Supreme Court. The Supreme Court had not provided an answer about the applicability of the ouster clause to magistrates and the High Court had failed to consider that question. The High Court decision was therefore discretionary but erroneous and reversible.
 5. It was the intention of the drafters of the Constitution and the Vetting of Judges and Magistrates Act that all serving judges and magistrates as at the effective date would be vetted and their suitability to continue serving be determined in accordance with the Act. It was difficult to believe that the drafters of the Constitution intended to include magistrates in the ouster clause but failed to do so by sheer inadvertence or inattention.
 6. The old rule or canon of interpretation *expressio unius est exclusio alterius* (the expression of one thing implied the exclusion of others) was applicable to the appellant's case. The fact that section 23(1) of the Sixth Schedule to the Constitution talked of a legislation that was to establish mechanisms, procedures and a time frame for the vetting of all judges and magistrates who were in office at the effective date, but section 23(2) in creating the ouster or finality clause spoke only of a removal or a process leading to the removal of "a judge" not being subject to question or review, meant that all judges and magistrates were to be vetted, but only judges were excluded from questioning a consequential removal or a process leading to such removal.
 7. The High Court was at fault in declaring that they lacked jurisdiction and failing to consider the petitions on merit.

Per S Ole Kantai, JA (Concurring)

8. The omission of the word 'magistrate' in section 23(2) of the Sixth Schedule to the Constitution was not an accident. The drafters of the Constitution did not include magistrates in the ouster clause.
9. Rights donated in law should not be taken away and should be protected by courts. Ouster clauses should not be imported into legal provisions as they had a tendency to visit injustice against the people. The rights reserved for magistrates under section 23(2) of the Sixth Schedule to the Constitution should be protected.

Dissenting opinion

HM Okwengu, JA (Dissenting)

1. The Supreme Court in *Judges & Magistrates Vetting Board & 2 others vs Centre for Human Rights & Democracy & 11 others* [2014] eKLR (*JMVB (1)*), considered the scope and effect of section 23(2) of the Sixth Schedule to the Constitution. The question at the Supreme Court as framed was whether section 23(2) of the Sixth Schedule to the Constitution ousted the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board declaring a judge (or magistrate) as being unsuitable to continue serving as such. It was clear that the Supreme Court concluded that the ouster clause gave exclusive jurisdiction to the Board for purposes of the vetting of judges and magistrates and that consequently, the superior courts had no jurisdiction to review the process or outcome of the operations of the Board with regard to vetting.
2. The mandate of the Board included the vetting of judges and magistrates and although the Supreme Court was addressing the mandate of the Board in relation to the judges who were before the court, the interpretation by the Supreme Court related to the mandate of the Board as a whole in determining the suitability of a judge or magistrate hence the insertion "or magistrate" in the question under consideration.
3. The High Court arrived at the correct conclusion in determining that they had no jurisdiction to review the determination of the Board in relation to the suitability of judges and magistrates. The decision of the Supreme Court in *JMVB (1)* settled that issue, and the High Court correctly complied



- with article 163(7) of the Constitution that obligated all courts to follow binding precedent set by the Supreme Court.
4. While the text in section 23(2) of the Sixth Schedule to the Constitution, seemed to have left out magistrates, section 23(1) of the Sixth Schedule to the Constitution, spoke of both judges and magistrates, and section 23(2) could not be applied mechanically by relying on the text. Article 259 of the Constitution was instructive that the ouster clause had to be interpreted in a purposive way, by going beyond the text and invoking the spirit of the Constitution in considering whether it was consistent with the intention of the framers of the Constitution.
 5. The argument that judges and magistrates were identified separately in the Constitution and that the omission of magistrates from section 23(2) of the Sixth Schedule to the Constitution meant that the ouster clause was only limited to judges, and therefore, magistrates could challenge the outcome of their vetting process in court, overlooking the historical context of the ouster clause and the vetting process. Article 159 of the Constitution declared that judicial authority was derived from the people and vested in courts and tribunals established under the Constitution. The vetting process was included in the Constitution as part of a reform process, whereby judicial officers could be assessed on the basis of the values and principles set out in the Constitution.
 6. In light of the historical context of section 23 of the Sixth Schedule to the Constitution and the principle that the Constitution had to be construed broadly in a way that was in consonance with the spirit, values and principles espoused in the Constitution, it was apparent that the framers of the Constitution provided for the vetting of judges and magistrates as a transitional provision to ensure that judges and magistrates were able to fit into the new order that was ushered in by the Constitution.
 7. A literal reading of section 23(2) of the Sixth Schedule to the Constitution revealed that magistrates were not included in that section, but given the historical context of that provision, such a reading was absurd as the ouster clause would apply to the judges and not the magistrates. That could not have been the intention of the framers of the Constitution whose intention was to ensure that judges and magistrates who transited into the new order of the Constitution of Kenya, 2010, were those who complied with the national values and principles espoused in the Constitution.
 8. As the ouster clause related to the decisions of the Board with regard to suitability, it would be applying double standards to open up the decision relating to the vetting of magistrates for review by allowing review by the High Court, while not according the judges the same right. That would result in the decision of the Board in regard to the vetting of judges being final, and not that for magistrates. Such an interpretation of the ouster clause would not only be discriminatory but also inconsistent with the Supreme Court's decision and the intention of the framers of the Constitution.

Appeal allowed.

Orders

- i. *The judgment and decree of the High Court that dismissed the various petitions as consolidated set aside.*
- ii. *The Constitutional Petitions be listed for hearing and determination by a judge or a bench comprising an odd number of judges of the High Court, other than Lesiit, Wakiaga, Ngenye, Mativo and Onyiego, JJ.*
- iii. *No orders as to costs*

Citations

Cases

1. Dennis Mogambi Mong'are v Attorney General & 3 others — Explained
2. In the Matter of Kenya National Commission on Human Rights — Explained
3. Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association & another — Explained
4. Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others — Explained
5. Mbogo vs. Shah — Explained



6. Njoya & others vs AG & 3 others (No.2) — Explained
7. Speaker of the Senate & Another v. Attorney-General & 4 Others — Explained
8. Ndyambo vs AG — Explained
9. Reserve Bank of India Vs Peerless General Finance And Investment Co. Ltd & Others — Explained
10. Conn. Nat'l Bank vs. Germain — Explained
11. Hamdan vs. Runsfeld — Explained

Statutes

1. Constitution of Kenya, 2010 — section 23(1), 23(2) sixth schedule; article 10, 159, 163(7), 156(6), 167(7) — Interpreted
2. Vetting of Judges and Magistrates Act — section 22(4) — Interpreted

Texts

1. Statutory Interpretation: Themes, Tools, Trends

Advocates

Mr. Ongoya for the 1st, 2nd & 3rd Appellants

Mr. Ndeda for acting in Person

Mr. Marwa & *Ms. Omuom* for the 1st Respondent

Mr. Kanjama & *Mr. Wakwaya* for the 2nd Respondent

JUDGMENT

JUDGMENT OF KIAGE, J.A

- 1 Michael Kizito Oduor, Wilson Kiberia Nkunja, Okello Tim Oduor and Richard James Ndeda who are the appellants in the four consolidated appeals before us invite us to divine the true meaning of section 23(2) of the Sixth Schedule to the *Constitution* and pronounce on the effect of its omission of one word. They ask us to arrive at a construction that faults and reverses that of a 5-Judge bench of the High Court to the effect that the omission therefrom of the word “magistrate” was of no moment. That court had found and held that the provision in question barred it by express jurisdictional ouster, from entertaining the appellants’ consolidated petitions that challenged their removal as magistrates by the Magistrates and Judges Vetting Board (‘the Board’). It was there, as here, the 1st respondent and had made determinations that the appellants were not suitable to serve as magistrates. The learned Judges rejected the appellants’ contention, which they maintain, that the ouster clause related to Judges only, and that the Board’s constitutive and eponymous statute, in so far as it included magistrates in its own ouster clause is inconsistent with the constitutional text, and therefore unconstitutional.
- 2 It is not in dispute that in an attempt to break from a past in which the Judiciary was perceived as corrupt and unresponsive to the needs of Kenyans, the 2010 Constitution devised a mechanism by which judges and magistrates then in office were to be vetted to determine their suitability to serve in accordance with the principles and values set out in articles 10 and 159 of the Constitution, or to exemplify its tenets and ethos. That mechanism was compromise position arrived at as an alternative to a more radical proposal under which all judicial officers serving as the effective date were to be shown the door.
- 3 All the appellants duly presented themselves before the Board. They were all dissatisfied with the Boards’ determination that they were not suitable and accordingly filed separate suits at the High Court challenging the determinations. I do not consider it necessary to set out the grounds upon which each of the appellants was declared not suitable. It is of interest, however, that in their several petitions, the appellants complained that the Board violated their right to fair trial in several stated respects. It



appellants save Ndeda who was in person; Mr Marwa and Ms Omuom for the Board; Mr Kanjama and Mr Wakwaya for JSC.

11 Going first, Mr Ongoya distilled the matter as turning on the High Court’s understanding and interpretation of its jurisdiction under section 23(2) of the Act as read with section 23(1) of the 6th Schedule, which he asked this Court to reverse.

12 Referring to the text of section 23(1), he submitted that the

“Jurisdiction in *personae*” therein are judges and magistrates who were in office on the effective date, and pointed out that the drafters of the text were specific in identifying the two officers separately. He posited that ouster clauses, such as in the said section, must be read very restrictively because they have the capacity to take away vested rights of access to justice.

13 Pointing out that the provision in section 23(2) of the 6th Schedule was that “[a] removal, or process leading to the removal, of a judge from office by virtue of the operation of [the Act] shall not be subject to question in, or review by, any court,” he contended that the drafters limited the ouster clause to the office of judge. To him, the rationale for it was to avoid a scenario where Judges went before fellow judges to challenge their removal, or the process leading thereto.

14 The ouster clause was intended to remove potential conflict of interest obvious in judges being judges in their own causes.

15 The Act is the legislation that was contemplated by section 23 of the 6th Schedule and it was expected to accord with the latter. If in passing the Act, Parliament included matters not contemplated by the 6th Schedule, such provision would be null and void for inconsistency.

16 Regarding the pronouncements of the Supreme Court in the *Judges & Magistrates Vetting Board & 2 Others vs Centre For Human Rights & Democracy* (Petitions 13A,14 &15 of 2013) [2014] eKLR (“JMVB I”) and *Judges and Magistrates Vetting Board vs Kenya Judges & Magistrates Association & Anor* (Petition 29 of 2014) [2014] eKLR (JMVB II), Mr Ongoya urged that should it be found that there is a conflict between them, we should give effect to JMVB II “which made a finding in favour of jurisdiction as opposed to ouster of jurisdiction.”

17 Counsel urged that a provision in the Act purporting to extend the ouster of jurisdiction to cover magistrates must be found to be inconsistent, not only with section 23(2) of the 6th Schedule, but also with article 24 of the Constitution and Parliament’s purporting to limit magistrate’s access be disallowed for failing to comply with the scheme for limitations of rights and freedoms set out in Article 24 of the Constitution. He implored us to find that the learned Judges were in plain error in giving effect to limitations to rights not contemplated in section 23 of the 6th Schedule.

18 He was emphatic that whereas in JMVB1 the Supreme Court made some broad declarations, it said nothing on whether courts had jurisdiction over the removal of a magistrate, which was not an issue before that court and it could only have made obiter remarks thereon. By contrast, in JMVBII, Magistrates were parties and active players. The Supreme Court agreed with them that courts had some latitude to exercise jurisdiction.

19 Representing himself, Mr Ndeda first associated himself with those submissions. He faulted the learned Judges for failing to refer to the canons of constitutional interpretation. Had they done so, they would have found the impugned section 22(4) of the Act to be unconstitutional because the term ‘magistrate’ is defined and cannot be added or equated to ‘Judge’ for to do so would be to interpret the Constitution. If the Supreme Court should be understood to have misinterpreted ‘judge’



- to include magistrate, it can only have done so *per incuriam* and considering that under article 259 of the Constitutions all its provisions are the same and no article can fly higher than the rest.
- 20 Stating that it is subsequent amendments to the Act that were problematic for purporting to grant the Board more powers than the Constitution gave it and attempting to invest it with impunity instead of immunity, he posited that his petition raised serious justiciable issues which should have been heard on merit.
- 21 For the Board, Mr Marwa stated that even though section 23(a) of the 6th Schedule does not include magistrates, Parliament was right to pass the Act and to include Magistrates because “the issue was vetting of judicial officers and there could not be a separation of judges from magistrates.” He blamed the appellants for never seeking to declare the Act unconstitutional until after the term of the Board had expired. Moreover, they voluntarily submitted themselves to its jurisdiction. Stating that the Supreme Court’s decisions are binding on all courts, he urged us to dismiss the appeals.
- 22 Still for the Board, Ms Omuom submitted that the issue in this appeal is the appellants’ suitability to continue serving as magistrates. To her, the Supreme Court had answered the issue in view of a holistic context of the vetting process guided by the need to bring the entire Judiciary in psychic alignment with the new constitutional dispensation. She concluded that there would be a challenge of availability of remedies as the Constitution and the Act did not envisage any remedy outside of the Board, which is since defunct,
- 23 Mr Kanjama took the position that the two Supreme Court decisions settled the question whether the removal of magistrates was insulated from judicial inquiry. In JMVB 1, that court answered the question with regard to both. It adopted a holistic approach and added “and magistrate” in holding that jurisdiction had been ousted, thereby “expressly extending the ouster to magistrates” after finding that the ouster with regard to magistrate in the Act could be inferred in the Constitution. He continued that the position was reiterated in JMVB II which dealt with the question whether allegations after the effective date were within the mandate of the Board.
- 24 The Supreme Court arrived at that conclusion on the basis of historical analysis and justification for the existence of the mechanism in the Constitution and the fact that section 23 was transitional to last for a maximum of 5 years. When asked why that section did not expressly refer to magistrates, he offered that it is because a special mechanism for removal of a judge, which was not to apply in the context of vetting, and added that it would be strange that judges would be excluded from seeking review but magistrates be allowed to. This would go against the mischief behind section 23 of the 6th Schedule and lead to an absurdity in which a process that was time limited were to be resurrected.
- 25 On his part, Mr Wakwaya contended that the determination of constitutionally has a bearing on the validity of the ouster clause. He added that in *Dennis Mogambi Mongare vs Attorney General & 3 Others* [2014] eKLR, this Court upheld the constitutionality of the Act. He urged that even though section 23(2) of the 6th Schedule omits the word ‘magistrate,’ it would be to interpret the Constitution to narrowly as it should not be interpreted in isolation from sub-section (1). He hazarded the guess, in his own words, that ‘magistrate’ was left out of the provision because the Constitution addresses appointment and removal of judges but not magistrates. However, the vetting was to apply to both. Thus, section 22(4) of the Act is not inconsistent with section 25(2) of the 6th Schedule as “nothing limits Parliament’s power to extend ouster to magistrates.” He concluded by stating that in JMVB I the question was whether section 23(2) of the 6th Schedule and section 27(4) of the Act ousted jurisdiction which the Supreme Court answered in the affirmative. JMVB II on the other hand held that courts could have jurisdiction but under conditions or requirements to be fulfilled, and the appellants did not contend that they had complied. He urged us to dismiss the appeals.



- 26 Mr Ongoya in his brief reply submitted that the appeals should not be defeated by effluxion of time and that a finding that the High Court has jurisdiction will not immunize the appellants. He emphasized that there is no other way of treating ouster clauses than narrowly because they cause great harm in denying access to justice. He pointed out that the Board did not vet Kadhis or members or various Tribunals for the reason that they were not mentioned in article 23 of the 6th Schedule. He concluded by stating that allowing the appeals will pave way to the High Court's consideration of the appellants' individual petition on merit.
- 27 As a first appellate court we proceed by way of re-hearing based on what is on the record. We place ourselves in the shoes of the first instance court and consider the matter in a fresh and exhaustive manner to the end that we should reach independent conclusions. This may result in our affirming varying or reversing the decision of the court below. We pay due respect to the findings and conclusions of the court below and are slow to depart therefrom, especially where the matter before it involved a trial in which it had the advantage of hearing and observing witnesses in live testimony. Where, as here, the matter did not involve live testimony but was decided on the basis of pleadings, affidavits, submissions and case law, we are at no disadvantage.
- 28 And where, as here, the matter in dispute falls within the** discretion of the first instance Court, we are further guided by the principles, set out by the old Court in *Mbogo vs Shab* [1968] EA 93 and followed in many other by this Court. We are not to be quick to interfere, and should do so only where the judge (or judges) below;
1. Misdirected themselves in law.
 2. Misapprehended the facts.
 3. Took into account matters or issues they should not have taken into account.
 4. Failed to take into account matters and issues they should have taken into account or
 5. Reached a decision which is plainly wrong.
- 29 I have given careful and anxious consideration to the submissions made and the authorities cited and have painstakingly considered the record and the judgment that is under challenge in this appeal.
- 30 In answering the central question of whether the learned Judges erred in adjudging themselves as bereft of jurisdiction to consider the appellant's petition on merit and dismissing them on that score, I deem it convenient to address it in two aspects, namely;
- (a) Whether the Supreme Court has conclusively determined the question on report of magistrates.
 - (b) Whether the ouster clause in section 23(2) of the 6th Schedule to the Constitution applies to the Board's decisions in respect of Magistrates.
- 31 Regarding the 1st issue, there is no dispute that the applicability and efficacy of article 23(2) of the 6th Schedule has been conclusively determined by the Supreme Court. That court, the decisions of which are by dint of article 163(7) binding on all courts in the country except itself, firmly declared in *JMVBI* that the ouster clause was effective. In so doing, the apex court overruled the decision of a majority of this Court (including myself) in Civil Appeal No 308 of 2012, which had affirmed the decision of a 5-Judge bench of the High Court and held, in the main, that the ouster clause was ineffective to deprive the High Court of its constitutional mandate to enquire into the acts and decisions of the Board. I



need not go into the reasons that informed our decision. It is enough that the Supreme Court declared the ouster clause valid.

32 Now, what was in issue in that case was the legality and propriety of the finality of the decision of the Board, fully immunized from judicial enquiry. Indeed, at paragraph 202, which the learned Judges quoted, the court’s finding was emphatic thus;

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

33 My reading of the case as it was before this court and the decision of the Supreme Court leads me to accept as correct the appellant’s contention that it was all about whether the Courts had jurisdiction to entertain, question or review the removal or process leading to the removal of Judges. To them, the question of whether the reference to ‘a Judge’ in section 23(2) of the 6th Schedule to the Constitution should be extended to include ‘a magistrate’ was never raised, was never urged, and was never decided by the Supreme Court. I think, with respect, that a careful, indeed even a cursory, reading of the judgment of the apex court should lead to that conclusion inevitably. It is noteworthy that not a single magistrate or association of magistrates was a party to the matter that was before the Supreme Court. The parties were the Board, the LSK, the Attorney General, some public spirited persons, the Judicial Service Commission, 3 judges of the High Court and a judge of the Court of Appeal. It is thus not surprising that the specific question posed in this case was never directly or at all canvassed before the Supreme Court.

34 The Supreme Court itself captured and expressed what was before it thus;

“(175) The main issue for determination is whether section 23(2) of the Sixth Schedule to the Constitution” ousts the review jurisdiction of the High Court of Kenya, otherwise provided for in article 156(6) of the Constitution, with respect to the removal or a process leading to the removal from office of a Judge. Learned counsel, on this question, devoted themselves to finding an answer within the general concept of the supervisory jurisdiction of the High Court.”
(Emphasis in original)

35 It is this specific question that the Supreme Court answered in the affirmative and went on to declare that the ouster clause was “not devoid of valid and effective grounding in law,” and that there was nothing out of harmony in the common purpose of the Constitution, section 23 of its Sixth Schedule and the relevant statute – the Judges and Magistrates’ Vetting Act.” And it declared that;

“(193) It follows that a contest to the decision of the Judges and Magistrate’s Vetting Board, in so far as such a decision affects particular Judges involved in the vetting process, is an effect, a collateral challenge to the Board’s authority; and this would be inconsistent with the terms of the Constitution.”

36 I note that even though the question of the Supreme Court’s determination of the issue with finality was an important one, the learned judges treated of it very briefly and even then largely by quoting



two paragraphs from the above judgment of the Supreme Court. This is the full extent of the learned judges' dealing with the issue at paragraph 49 to 53 of their judgment;

“Whether the question of this Courts' jurisdiction to review decisions rendered by the first respondent has conclusively been determined by the Supreme Court of Kenya.

49. The High Court's jurisdiction in determinations made by the Board has been the subject of determination by the Apex Court in Kenya. In particular, in the earlier referred to case of *Judges & Magistrates Vetting Board & 2 Others v Centre for Human Rights & Democracy & 11 Others* the Supreme Court held that the High Court lacks jurisdiction to adjudicate upon the suitability of a judge or a magistrate to continue in service; and the responsibility for such a determination during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board.

50. In the said case, the Supreme Court of Kenya went into great length to interpret section 23(2) of the Sixth Schedule to the Constitution in which the Supreme Court stated in no uncertain terms that:-

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

228. In conclusion, the people of Kenya ordained legislation on mechanisms and procedures for vetting, to be conducted within a specified time-frame, to determine the suitability of judges and magistrates. The majority Judgment (at paragraph 159) cites paragraphs from the decision of the Court of Appeal which are relevant to the issue of the constitutionality of section 19(3) of the VJM Act. In concurrence, I would reiterate the content of paragraph 189 in the majority judgment, to the effect that the High Court lacks jurisdiction to adjudicate upon the suitability of a Judge or Magistrate to continue in service; and the responsibility for such a determination



during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board. Emphasis added)

51. Article 163(7) of the Constitution explicitly provides that all courts, other than the Supreme court are bound by the decisions of the Supreme Court. Clearly, the interpretation of section 23(1) (2) of the Sixth Schedule in the above case by the Supreme Court is binding on this Court by dint of article 163(7) of the Constitution. The binding nature of the Supreme Court decisions under article 167(7) of the Constitution is absolute. Article 163(7) is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.
52. Clearly, by dint of the above clear provision of the Constitution, the Supreme Court decision cited above and by virtue of article 163(7), the conclusion becomes irresistible that this Court lacks jurisdiction to entertain this petition. On this ground alone, we find and hold that this petition must fail.
53. Clearly, by dint of the above clear provisions of the Constitution, the Supreme Court decision cited above and by virtue of article 163(7) we are persuaded that the conclusion becomes irresistible that this Court lacks jurisdiction to entertain this petition.”

37 With great respect to the learned judges, I am of the opinion that the manner in which they dealt with the issue that was before them was patently erroneous. The first thing that is quite clear from the heading they ascribed to the part of the judgment I have referred to is that they asked the wrong question namely whether the Supreme Court had conclusively determined the High Court’s jurisdiction to review the Board’s decisions. That was not a question to be asked for the simple reason that not only was it never in doubt that the Supreme Court had determined that issue, but the more, because the proper issue was whether the Supreme Court had rendered such a conclusive determination in respect of magistrates. The learned judges themselves captured, at paragraph 36, that it was Mr Ongoya’s argument that the High Court’s jurisdiction was not ousted in respect of the Board’s decisions touching on magistrates. I would offer that the learned judges should have framed their question in those precise terms focusing on decisions concerning magistrates. It seems to me inevitable that by asking the wrong question, the learned judges returned the wrong answer.

38 Next, the learned judges in their seeming attempt to answer the question appear to have simply repeated excerpts from the judgment of the Supreme Court, specifically paragraphs [202] and [228] thereof, as the answer to the question, instead of interrogating the arguments that had been made before them to see how they accorded with the said judgment. That failure to interrogate and analyze those arguments led to a wholesale adoption of the Supreme Court’s general finding on the ouster clause and applying it to the determination involving magistrates without breaking it down to the specific question to ascertain applicability.



- 39 It is particularly concerning to me that the emphasis the learned judges laid on the words “judges” and “magistrates” in paragraph [202] of the Supreme Court’s judgment had the effect of totally distorting the meaning of the said words. With the emphasis so laid, the words of the Supreme Court seem to carry the meaning that all superior courts are bereft of jurisdiction to review the process or outcome of the vetting of judges and magistrates. A careful look at the Supreme Court’s judgment, however, should leave no doubt that the court was not referring to the act or process of vetting as applied to of judges and of Magistrates. Rather, the two proper nouns are referred to merely in a descriptive sense as part of the name of “the judges and Magistrates Vetting Board,” which might as well have been called ‘the Vetting Board’ or simply “the Board” and convey the full meaning and description of the statutory body. The words as used by the Supreme Court were not intended, nor could they reasonably be expected, without more, to provide any definitive answer to the serious and vexed issue of ouster clause with regard to decisions on magistrates. In so far as the learned judges seem to have read more meaning than the bare name of the Board contained and conveyed, I apprehend that they fell into error.
- 40 I am also of the respectful view that the portion of paragraph [228] of the Supreme Court’s judgment that the learned judges underlined for emphasis provides no answer to the question they should have been engaging with. The said portion, which, incidentally, was not part of the majority judgment of the Supreme Court but was rather in the concurring judgment of Mutunga, CJ, a fact the learned Judges did not point out, was a statement that the High Court lacks jurisdiction to adjudicate upon the suitability of a judge or magistrate to continue serving. I do not see how the said excerpt and observation advanced in any way the process of answering the question that the learned judges ought to have been answering. The statement was, with respect, no more than a fortuitous restatement of an uncontested truism.
- 41 For those reasons I would answer in the negative the question whether the Supreme Court determined with finality the question that was before the court. The Supreme Court never answered the question and it was incumbent upon the High Court to answer it but it clearly did not do so on that occasion. It failed to give consideration to proper matters it should have considered and its decision, though within its discretion, was erroneous and reversible.
- 42 I turn now to the crux of the matter, which I hazard the learned judges might have treated differently had they not erred that the Supreme Court had given a definitive and binding answer, thereto. Does section 23(1) of the Sixth Schedule oust the jurisdiction of the High Court to review decision of the Board regarding magistrates? It is a matter of some puzzled interest to me that the learned judges arrived at of this conclusion on the question;

“48. Accordingly, we conclude and find that it was the intention of the drafters of the Constitution and the Act that all serving judges and magistrates as at the effective date were to be vetted and their suitability to continue serving be determined in accordance with the Act. In view of our aforesaid conclusion, we find and hold that Section 23(2) of the Sixth Schedule expressly applies to a removal of a magistrates or, a process leading to the removal of a Judge.”(My emphasis)

- 43 I think that there can be no serious argument against the learned judges’ conclusion in the first part of the aforesaid excerpt that indeed it was the intention of the drafters that the judges and magistrates in office as at the effective date be individually vetted for suitability to serve under a new constitutional dispensation before they could be transitioned thereto in their previous capacities. Indeed, it was never a complaint by any of the appellants herein that they were aggrieved by the fact of vetting or that they were vetted *per se*. The bone of contention, and which was the heart of the arguments made before us, was whether the process and outcome of their vetting was immunized and removed from the reach



of judicial inquiry. I have already stated that on the basis of Supreme Court pronouncements, the question is settled as far as judges are concerned. Whether the same applies to magistrates can only be concluded upon by a perusal and appreciation of the words of section 23 of the Sixth Schedule which are that:

- “(1) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite article 160, 167 and 168, establishing mechanism and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in articles 10 and 159.
- (2) A removal, or a process leading to the removal of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.”

44 Giving those words their ordinary, normal meaning as tools of communication, it would seem plain that whereas the vetting process was a requirement for all judges and magistrates, both classes for judicial officers being explicitly mentioned in section 23(1), when it comes to section 23(2), which contained the immunity or finality clause as far as removal or the process of removal is concerned, it relates to judges only, because magistrates are not mentioned as subjects of that review or inquiry bar. It is thus no small curiosity that the learned judges in referring to section 23(2), which explicitly and exclusively mentions judges and does not contain the word magistrate by direct mention, went on to conclude that the said provision “expressly’ applied to a removal of a magistrate” With respect, I am unable to fathom the basis for the conclusion that the provision applied to magistrates in any wise when they were deliberately and consciously excluded. It seems to me that the conclusion of express inclusion, in the face of express-non-inclusion, is a misdirection. The best they could have done, had there been reason to, would have been to say magistrate was included implicitly but I am of the view that the option was unnecessary and unavailable.

45 The learned judges quoted themselves in Petition No 230 of 2016 on the principles governing statutory interpretation which I consider to be facially correct even though, to my mind, they reveal a purposivist inclination over the rival textualist approach. These approaches have sued for supremacy for as long as judges have engaged in the task of discovering or discerning the meaning of the law maker as expressed in statutory language. My surmise that they preferred purposivism over textualism is based on the rather unusual sequence of their analysis in the 4-page excerpt in which they started with context and ended with text when, to my mind the approach would have been the other way, as we ought to start with text before getting to context so that where the former is express and unambiguous, admitting to no deficiencies, there ought not be any recourse to context in order to divine meaning. The judges themselves faithfully captured this approach in the latter, (which in my view ought to have been the first) part of their quoted analysis thus;

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

It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court



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

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

It is trite law that in interpreting the provisions of a statute the Court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.”

- 46 It is telling that immediately after that, the learned Judges quoted the Supreme Court of India’s observation in *Reserve Bank of India vs Peerless General Finance and Investment Co Ltd & Others* [1987] 1 SCC 424 that both text and context are important and that the best interpretation is the one that makes the textual interpretation match the contextual.” It is plain from the judgment that it is on the basis of that thinking that the learned judges went on to dwell at length on the historical context, bearing in mind the purpose of the provision in question, and arrived at the conclusion that the section referred to Magistrates expressly. I respectfully say it did not.
- 47 I am of the firm conviction that the manner in which section 23 is framed reflects a deliberate and conscious decision on the part of the drafter to limit the exclusion of judicial question, enquiry or review to the removal or process leading to the removal of judges only. The exclusion of magistrate from the provision cannot by any stretch of the imagination be seen to have been accidental or unintended. I am prepared to presume, as I must, that the drafter was conscious of what was meant to be conveyed and understood by the provision. Simply put, had it been the intention of the drafter to include ‘magistrates’ in the provision, nothing would have been easier than to simply insert and include it. And so that fact of non-conclusion to me appears to lead to the intent to exclude as the only logical, natural and reasonable conclusion to be drawn from the fact.
- 48 It seems to me quite indisputable that where the text is clear, as seems to doubtless be, there is absolutely no justification for a court to resort to the policy context, no matter how salutary or tempting, in order to qualify the meaning of a provision. It can be stated, and with patent justification, that the written word is key. Even averred purposivists concede that the statutory text is the starting point and the ultimate constraint to interpretation. See Valerie C Barannon; “[Statutory Interpretation: Themes, Tools, Trends](#)” (Congressional Research Service; April 2018).



49 I am of the firm persuasion that words really must be given their ordinary meaning and that a provision such as section 23(2) of the Sixth Schedule means what it says. It is not the province of judges to attempt to go behind the word when that word is crystal clear, to attempt to read into it what was clearly excluded. The old rule or canon of interpretation *expressio unius est exclusio alterius* (“the expression of one thing implies the exclusion of others”) is particularly apt in the present case. The fact that section 23(1) talks of a legislation that was to establish mechanisms, procedures and a time frame for the vetting “of all judges and magistrates who were in office at the effective date,” but section 23(2) in creating the ouster or finality speaks only of a removal or a process leading to the removal of “a judge” not being subject to question or review, conveys to me the plain meaning that all judges and magistrates were to be vetted, but only judges were excluded from questioning a consequential removal or a process leading to such removal. I do not see that any other interpretation would be reasonable or tenable. There is no reason at all for supposing that the exclusion of magistrate in sub-section (2) was an accident or an error. Rather, that exclusion should be appreciated and given effect as conscious, deliberate and significant. I adopt the apt words of the US Supreme Court in *Hamdan vs Runsfeld* 548 US 557, 578;

“Courts will generally read as meaningful the exclusion of language from one statutory provision [section 23(2)] that is included in other provisions of the same statute [section 23(1)].”

50 To my mind, this approach also accords and is consistent with the canon or rule that there is a presumption of consistent usage to the effect that, generally, the use of identical words in different parts of a statute are taken to have the same or consistent meaning. Thus, if there is a variation in a material respect, such as the use of ‘judge’ only omitting ‘magistrate’ where previously the expression was “judges and magistrates,” the implication must be that there is a variation in meaning. In the present case, that means that magistrates, so omitted, are not subject to the exclusionary limitation in sub-section (2).

51 I would echo the practical wisdom of Justice Clarence Thomas in the US Supreme Court case of *Conn Nat’l Bank vs Germain* 503 US 249, 253-54 (1992).

“--- In interpreting statute, a Court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”

52 I am myself unable to see what difficulty or impracticality, less still absurdity, arises from ascribing to section 23(2) the meaning of its express terms. I do not for a moment think that there is any heresy in stating that the ouster clause, which on sound authority must be given the most strict application and limited in its scope, does not apply to Magistrates who may wish to challenge, by question or review, their removal or a process leading to their removal. I think that it is good law and sound jurisprudence to always restrict ouster or finality clauses, rather than to lionize and normalize them, because their potential to claw back fundamental rights is plain to see. And I have no hesitation finding that on the basis of the clear words of the provision, the ouster clause in section 23(2) of the Sixth Schedule does not apply to the Board’s decisions in respect of magistrates.

53 Considering that what is in the transitional Sixth Schedule was, much like the rest of the Constitution, the result of negotiations, horse-trading and a balance of interests with all manner of concessions along the way in the delicate task of Constitution making, I see nothing strange about non-application of the ouster clause to magistrates. The learned judges themselves pointed out that the Final Report dated 11th October 2010 by the Committee of Experts on Constitutional Review who drafted the Constitution clearly showed that the submissions received saw judges and magistrates differently in



terms of their fate. Indeed, at paragraph 42, the learned judges stated that the Committee of Experts had recommended that the vetting be restricted to judges only and not include magistrates, but that the draft Constitution that was submitted to and approved at the referendum included them. My view, as I have shown above, is that whereas indeed section 23(1) did subject magistrates to the vetting process, the recorded differentiation between them and judges was nonetheless captured and given effect by their non-inclusion in the ouster clause.

54 One last matter I need to comment on is paragraph 37 of the judgment in which the learned judges, after a 3-page interpretive analysis of the word ‘or’ as used in section 23(2) of the Sixth Schedule arrived at this conclusion;

“The above dictionary definitions and judicial construction leave us persuaded beyond doubt that the use of the word ‘or’ in section 23(2), used after the word ‘removal,’ introduces another possibility. The first possibility is a removal. The second possibility is a process leading to the removal of a judge. In our view, the declaration by the Board that a magistrate is unsuitable to continue serving is a removal which falls under the first possibility in the challenged provision.”

55 With great respect to the learned judges, I was totally unable to fathom their reasoning by which they ended up straining and impossibly stretching the meaning of the rather straight-forward provision in order to accommodate the peculiar meaning they ascribed to it. Had the intention been to cause the first possibility to refer to magistrate, the simple, reasonable way to achieve the meaning would simply have been to render it as “a process leading to the removal of a magistrate”. I find it difficult to believe and accept that the drafters, while intending to include magistrates in the ouster clause, should somehow have failed, by sheer inadvertence or inattention, to state the word ‘magistrate’ not once, but twice, in the space of a single sentence.

56 That possibility is to me so remote and implausible, and with consequences so significant, to have been what was intended. The words of the section as they stand are logical and reasonable, making perfect sense, and it would be to do violence to my understanding of the English language and a total rewriting of the provision, for me to accept the meaning that was ascribed by the court below, which appears to have totally obliterated and distorted the text in an attempt to give effect to context and unstated intentions of the drafters.

57 I believe that my findings on the two critical issues suffice to dispose of this appeal. I would hold that the learned judges were at fault in declaring themselves devoid of jurisdiction and thereby failing to go into a consideration of the petitions before them on merit. I have taken cognizance of the arguments made that the Supreme Court has in JMVB II appreciated that there are circumstances under which the courts can intervene in decision of the Board. I only need add that it would be for any magistrate to show, upfront, that he falls within such parameters for intervention. In the end, such matters, if they be live still, must be decided on a case by case basis.

58 In the result, I would allow these appeals and set aside the judgment and decree of the High Court that dismissed the various petitions as consolidated. I would substitute therefor an order that the Constitutional Petitions be listed for hearing and determination by a judge or a bench comprising an odd number of judges of the High Court, other than Lesiit, Wakiaga, Ngenye, Mativo and Onyiego, JJ.

59 I would make no orders as to costs.

60 As Kantai, JA agrees those shall be the orders of the Court.



JUDGMENT OF KANTAI, JA

- 1 I have had the benefit of reading in draft the Judgment of my brother Kiage, JA and I fully agree with him.
- 2 The Supreme Court of Kenya in *Judges & Magistrates Vetting Board and 2 Others v Centre for Human Rights & Democracy* [2014] eKLR determined with finality the effect of section 23(1) of the Sixth Schedule of the Constitution of Kenya, 2010. The omission of “magistrate” in section 23(2) is not by accident. The drafters of the Constitution did not include magistrates in the said provision.
- 3 Rights donated in law should not be taken away and should be protected by courts. I think that ouster clauses should not be imported into legal provisions as they have a tendency to visit injustice against the people.
- 4 I agree with my brother that rights reserved for magistrates by the said section 23(2) of the Sixth Schedule should be protected. The final orders will be as proposed by Kiage, JA.

DISSENTING JUDGMENT OF OKWENGU, JA

- 1 The appellants in the four consolidated appeals were among magistrates who were subjected to vetting process by the Judges & Magistrates Vetting Board (Vetting Board) in accordance with section 23(1) of the Sixth Schedule of the *Constitution* as read with the *Vetting of Judges and Magistrates Act*, No. 2 of 2011 (the Act), and found unsuitable to serve. Their applications to the Vetting Board for review of the Vetting Board’s determination, were rejected. Thereafter, the appellants and other magistrates individually petitioned the High Court, each seeking to quash the determination of the Vetting Board regarding their suitability to continue to serve as magistrates, alleging violation of fundamental rights and freedoms and breach of process.
- 2 Seven (7) of the petitions including that of Okello Timothy Odiwuor (appellant in CA No 466/2018), and Bernard James Ndeda (appellant in CA No 475/2018), were consolidated and heard together, and a judgment delivered on 22nd June, 2018 by a five-Judge Bench of the High Court. The same bench also heard the petition lodged by Michael Kizito Oduor (appellant in CA No 457/2018), and the petition lodged by Wilson Kaberia Nkunja (appellant in CA No 458/2018) back to back, and delivered two separate judgments on the same day, 22nd June, 2018.
- 3 In each of the three judgments, the learned judges of the High Court dismissed the appellants’ petitions, making identical findings which I reproduce herein verbatim as follows:
 - a) In ordinary use the word ‘or’ is a disjunctive that makes an alternative which generally corresponds to the word ‘either.’ The word “or” is used to introduce another possibility or alternative, that is either, or. It can also be used interchangeably with the word “and.” The dictionary definitions and judicial construction leave us persuaded beyond doubt that the use of the word “or” in section 23 (2) immediately after the word “removal,” introduces another possibility, the first possibility being a removal. The second possibility is “a process leading to the removal, of a judge. In our view, the declaration by the Board that a magistrate is unsuitable to continue serving amounts to a removal within the said provision.
 - b) A literal and proper construction of the use of the word “or” in section 23 (2) of the Sixth Schedule which reads “A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated



under subsection (1) shall not be subject to question in, or by, any court is that the said provision does not exclude the removal of a magistrate.

- c) The word magistrate appears at the preamble clearly indicating the clear intention of the legislature which is to give effect to section 23 of the Sixth Schedule. We find no inconsistency between the provisions of the Act and the Constitution. We conclude and find that it was the intention of the drafters of the Constitution and the Act that all the serving judges and magistrates as at the effective date were to be vetted and their suitability to continue serving be determined in accordance with the Act. We find and hold that section 23 (2) of the Sixth Schedule expressly applies to a removal of a 45 magistrate, or, a process leading to the removal of a judge.
- d) The High court's jurisdiction in determinations made by the Board has been the subject of determination by the Apex Court in Kenya. In particular, in *Judges & Magistrates Vetting Board & 2 others vs Centre for Human Rights & Democracy & 11 others* the Supreme Court held that the High Court lacks jurisdiction to adjudicate upon the suitability of a judge or a magistrate to continue in service; and the responsibility for such a determination, during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board.
- e) Article 163 (7) of the Constitution explicitly provides that all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. Clearly, the interpretation of section 23 (1) & (2) of the Sixth Schedule in the above case by the Supreme Court is binding on this court by dint of article 163 (7) of the Constitution. The binding nature of the Supreme Court decisions under article 163 (7) of the Constitution is absolute. Article 163 (7) is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.
- f) Constitutional provisions touching on the same subject are to be construed together without one provision destroying the other but each provision sustaining the other. Section 23(1) of the Sixth Schedule expressly provides that "Within one year after the effective date, Parliament shall enact legislation, which shall operate despite article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all Judges and Magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in articles 10 and 159." It is our view that Sub-section (2) of section 23 cannot be read in isolation without considering sub-section (1) if the intention of the drafter(S) is to be effected.
- g) From the preamble to the Act, it's clear that the intention of the statute was to provide for vetting of judges and magistrates pursuant to section 23 of the Sixth Schedule, hence, the inclusion of the word magistrate in section 22 (4) of the Act cannot have been a mistake. Further, it is also clear from the provisions that it was the intention of the drafters of the Constitution that both the serving judges and magistrates were to be vetted. The word magistrate



in section 22(4) of the Act is in conformity with the provisions section 23 (1)&(2) of the Sixth Schedule.

- h) That the vetting process is governed by the Act and in particular sections 14 and 18 of the Act.
- i) By dint of the Supreme Court decision in *Judges and Magistrates Vetting Board and 2 Others vs Centre for Human Rights and Democracy and 11 Others*, no Court has jurisdiction to review the process or the outcome of the vetting process. By dint of article 167 (3) of the Constitution, the Supreme Court decision is binding to this Court. Differently put, this court may not examine the merits of the decision.
- j) We find no reason (sic) to impeach the impugned decisions on grounds that the Board exceeded its constitutional and statutory mandate.
- k) *Orbiter*- The statute created a body with powers to conduct an investigation, and act as an adjudicator. The Act mandated the Board to hear applications for Review. Considering the implications of the ouster Clause, we are of the considered opinion that Parliament ought to have included in the Act provisions establishing an appellate mechanism to be undertaken by a totally different body as opposed to the same Board. This could have insulated the process from perceptions of bias.
- l) Courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights. Such an order, in our view must be viewed from the lens of our Constitution which guarantees access to justice. The court must exercise caution and ensure that costs do not become a barrier to access to courts. The rationale for refusing to award costs against litigants in constitutional litigation is that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights." This is not an inflexible rule and in accordance with its wide remedial powers, the court has repeatedly deviated from the conventional principle that costs follow the result. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."

4 The four appellants being aggrieved, have each filed an appeal to this Court which appeals were consolidated for hearing. The appellants have also filed written submissions that were duly highlighted by Mr Ongoya who appeared for three of the appellants, and the 4th appellant, Bernard James Ndeda who appeared in person.

5 According to the respective memorandum of appeals that were filed by the appellants, the grounds upon which the judgment of the High Court is assailed, are essentially the same. The learned judges are faulted for finding: that there was no inconsistency between the provisions of the Act and the Constitution; that section 23(2) of the Sixth Schedule applies to a removal of a magistrate or a process leading to the removal of a judge; that the High Court lacked jurisdiction to review decisions rendered by the Vetting Board as relates to magistrates; that the Supreme Court had conclusively determined the process leading to the removal of a magistrate; and failing to find that the High Court had the mandate



to review the decision of the Vetting Board, if the Vetting Board exceeded its statutory mandate. In addition, the appellant in Civil Appeal No 475 of 2018 also faulted the learned judges for misdirecting themselves while interpreting section 23(2) of the Sixth Schedule to the Constitution in relation to articles 165 and 260 of the Constitution, by using rules of statutory interpretation instead of canons of constitutional construction and interpretation.

6 I have carefully considered the consolidated appeals, the rival submissions and the authorities cited, bearing in mind this Court's role as a first appellate Court. In my view this appeal turns on one main issue, which is whether section 23(2) of the Sixth Schedule to the Constitution is applicable to magistrates. It is an issue of jurisdiction as its resolution determines whether the High Court had the power to hear the appellants' plea for review of the Vetting Board's determination on their suitability.

7 In order to put section 23 of the Sixth Schedule in proper perspective, I reproduce the section in full:

“23(1) Within one year after the effective date, parliament shall enact legislation, which shall operate despite article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a time frame to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in articles 10 and 159.

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

(8) The Supreme Court in *Judges & Magistrates Vetting Board & 2 others vs Centre for Human Rights & Democracy & 11 others* [2014] eKLR (JMVB (1), considered the scope and effect of section 23(2) of the Schedule, together with section 22(3) of the Act, and concluded as follows:

“[119]...we now proceed to resolve the main question brought before this Court. That question is ‘whether section 23(2) of the Sixth Schedule to the Constitution of 2010 ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board declaring a judge (or magistrate) as being unsuitable to continue serving as such’.

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

[201] The intent of the Constitution is to be safeguarded by the High Court, even when that Court acts within its supervisory remit in relation to quasi-judicial bodies, with the recognition that a holistic interpretation of the Constitution requires the fulfilment of



its transitional provisions, such as those relating to the vetting process for judges and magistrates.

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

(Underlining added)

- 9 It is clear from the above extract, that the Supreme Court in its judgment concluded that section 23(2) is an ouster clause that gives exclusive jurisdiction to the Vetting Board in the vetting of Judges and magistrates, and consequently the superior courts have no jurisdiction to review the process or outcome of the operation of the Vetting Board in regard to the vetting.
- 10 The mandate of the Vetting Board covered both the vetting of Judges and Magistrates, and although the Supreme Court was addressing the mandate of the Vetting Board in relation to the Judges who were before the Court, the interpretation by the Supreme Court related to the mandate of the Vetting Board as a whole in determining the “suitability of a judge or magistrate” hence the insertion “or magistrate” in the question under consideration. That is to say, that the Supreme Court considered the applicability of section 23(2) of the Schedule as relates to the mandate of the Vetting Board in its determination of the suitability of both judges and magistrates. Hence the decision of the Supreme Court that section 23(2) of the Schedule as an ouster clause ousts the jurisdiction of the High Court in matters concerning the removal of a judge from office through a process initiated under the legislation passed by Parliament, pursuant to section 23(1) of the same Schedule applies to both judges and magistrate.
- 11 The learned Judges of the High Court in determining the matter before them, may not have engaged in a long drawn out argument in arriving at their conclusion that the issue before them has been settled by the Supreme Court. Nevertheless, I am satisfied from the extract of the judgment of the Supreme Court in JMVB (1) reproduced above, that the learned Judges of the High Court arrived at the correct conclusion that they had no jurisdiction to review the determination of the Vetting Board in relation to the suitability of Judges and magistrates. The decision of the Supreme Court in JMVB (1) settled this issue, and the learned Judges correctly complied with article 163(7) of the Constitution that obligates all courts to follow binding precedent set by the Supreme Court.
- 12 The judgment in JMVB (1) and the binding precedent of the Supreme Court, would be sufficient to determine this appeal. That notwithstanding, I have further endeavoured to interpret section 23(2) of the Sixth Schedule. The Constitution provides for the manner of its interpretation under article 259 wherein it states that:

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

- a. promotes its purposes, values and principles;
- b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c. permits the development of the law; and
- d. contributes to good governance”

(2)...



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

13 Section 23(1) of the Schedule refers to vetting of judges and magistrates, but section 23(2) only mentions judges, which begs the question whether magistrates have been impliedly excluded from the application of section 23(2). This is the substratum of the consolidated appeals. While the text in section 23(2) of the Sixth Schedule, seems to have left out magistrates, section 23(1) speaks of both judges and magistrates, and section 23(2) cannot be applied mechanically by relying on the text. Article 259 of the Constitution is instructive that the section must be interpreted in a purposive way, by going beyond the text and invoking the spirit of the Constitution in considering whether the section is consistent with the intention of the framers of the Constitution.

14 I find support in this argument by the persuasive decision of the Tanzanian Court of Appeal *Ndyanambo vs AG* [2001]2 EA 485 in which Samatta CJ stated as follows:

“First the Constitution ... is a living instrument having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must therefore endeavor to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it...”

15 I find further persuasion in *Njoya & others vs AG & 3 others (No 2)* [2004] 1 KLR 261 at p 277, where Ringera, J (as he then was) followed *Ndyanambo's* case stating thus:

“I shall accordingly approach constitutional interpretation in this case on the premise that the Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution are called into question, the court must seek to find whether those provisions meet the values and principles embodied in the Constitution. To affirm that is not to deny that words even in a constitutional text have certain ordinary and natural meanings in the English or other language employed in the Constitution and that it is the duty of the court to give effect to such meaning. It is to hold that the court should not be obsessed with the ordinary and natural meaning of words, if to do so would either lead to an absurdity or plainly dilute, transgress or vitiate constitutional values and principles.”

16 Mutunga CJ & President in his concurring opinion in *Re: The Speaker of the Senate & Another v Attorney General & 4 others*, [2013] eKLR puts the obligation of the court in interpretation of the Constitution as follows:

“It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.”



17 *In the matter of the Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion, Reference No 1 of 2012 [2014] eKLR, provides further guidance as the Supreme Court deciphered what is meant by a holistic interpretation of the Constitution as follows:

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

18 With the above in mind, I have considered the argument that judges and magistrates are identified separately in the Constitution and that the omission of magistrates from section 23(2) of the Sixth Schedule means that the ouster clause is only limited to Judges, and therefore, magistrates can challenge the outcome of their vetting process in court. This argument in my view overlooks the historical context of section 23 of the Sixth Schedule and the vetting process.

19 In its judgment in JMVB (1), the Supreme Court Considered at length the historical context of section 23 of the Sixth Schedule as relates to the vetting of judges and magistrates. At paragraph 86 of the judgment the Court noted:

" [86] It is to be recognized that the Constitution of Kenya, 2010 was a radical departure from the earlier norms of governance. Article 1 provides that all sovereign power belongs to “the people”. And Chapter 10 contains elaborate provisions on judicial authority and the legal system, with article 159 declaring that judicial authority is derived from the people and vested in Courts and tribunals established under the Constitution. The vetting process was included in the Constitution as part of a reform process, whereby judicial officers could be assessed on the basis of the values and principles set out in the Constitution. This was because the Judiciary was considered one of the most important institutions to ensure the Constitution is upheld; it was perceived as the main arbiter, in instances where interpretation or application of the Constitution was essential.”

20 Mutunga CJ & President**, in his concurring judgment in the same decision outlines the history as follows:

" [212] During the process of formulating a new Constitution, it became clear that the public’s confidence in the Judiciary was severely eroded. The Kenyan people wanted all the sitting Judges and Magistrates who were in office on or before 27th August, 2010 retired. The public’s concerns had to be addressed, and a compromise was reached, which called for the vetting of sitting Judges and Magistrates. Compromises of this kind have the tendency to create legal penumbras; and it is such penumbras that the Supreme Court is called upon to illuminate. In the CCK case, the Court recalled its decision in *Speaker of the Senate & another v. Attorney General & 4 others* , Sup Ct Advisory Opinion No 2 of 2013; [2013] eKLR where it had stated at (paragraph 156):

" constitution-making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to



illuminate legal penumbras that Constitutions borne out of long-drawn compromises, such as ours, tend to create.”

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

21 Njoki Ndung’u SCJ, in her concurring judgment in the same decision also recalled the history and the necessity of vetting as a transition mechanism, adding as follows:

" [233] Our own transitional experience has been marked by various constitutional causes in our Courts seeking the interpretation of certain provisions of the Constitution. This duty ought to be clearly exercised even where the provisions to be interpreted go to the heart of judicial transition. The language of section 23 of the Sixth Schedule leaves no doubt as to the intention of the Constitution to hasten the process of vetting and to restrict it to a single body established in line with the Constitution. It was submitted that the ouster clauses could not have ousted the supervisory jurisdiction of the High Court in the framework of rights and freedoms. While the values and principles embodied in the Constitution must always be promoted while interpreting the Constitution, the clear language of the Constitution ought also to be heeded...

[234] I deeply recognize the constitutional struggle and sacrifice of all Kenyans. The constitutional review process, our near immersion into civil war in 2007/2008 and the realization that everything about public institutions and republican engagement had to be remodeled culminated into the subsequent restructuring of our nation....It was a duty, required of every judge and Magistrate on the effective date to participate in the patriotic duty of conforming to the dictates of the Constitution. Although this process has been long contested in the Courts, it is finally time for this Court to affirm with finality, that the vetting process was a constitutional-transitional imperative, akin to a national duty upon every judicial officer to pave way for judicial realignment and reformulation.”

22 In light of the above historical context of section 23 of the Sixth Schedule, and applying the principle that the Constitution must not be construed narrowly or technically, but broadly in a way that will be in consonance with the spirit, values and principles espoused in the Constitution, I find it apparent that the framers of the Constitution provided for the vetting of judges and magistrates as a transitional provision to ensure that judges and magistrates were able to fit into the new order that was ushered in by the Constitution of Kenya, 2010. The learned judges cannot therefore be faulted for giving due weight to this historical context. Besides, section 23 of the Sixth Schedule carries the same weight as



- a constitutional provision, and though the section was being read together with the Act, article 159 of the Constitution had to be applied in interpreting the provision, which means the literal rule of statutory interpretation and any other statutory interpretation rules had to be qualified accordingly.
- 23 The Vetting Board was entrusted with the process of vetting, and the Supreme Court has already rendered itself that the decision of the Vetting Board cannot be reviewed by any court. In my view, to argue that magistrates are excluded from the ouster clause in section 23(2), belies the fact that the vetting process was intended to be a transitional process which has now come to conclusion, the term of the Vetting Board having ended. What this means is that the vetting process cannot be reopened by the Vetting Board as it is no longer in existence, with the result that if the High Court were to review the decision of the Vetting Board, and set it aside, the purpose of the framers of the Constitution to have the suitability of the appellants as magistrates determined, would not be achieved as there would be no Vetting Board to subject the magistrates to a fresh vetting.
- 24 I appreciate that a literal reading of section 23(2) reveals that magistrates are not included in that section, but given the historical context of this provision, such a reading is absurd as the ouster clause would apply to the Judges and not the Magistrates. That could not have been the intention of the framers of the Constitution whose intention was to ensure that Judges and Magistrates who transit into the new order of the Constitution of Kenya, 2010 are those who comply with the national values and principles espoused in the Constitution.
- 25 In interpreting section 23(2) of the Sixth Schedule the learned judges of the High Court stated as follows:
- " The use of the word "or" in section 23 (2) immediately after the word "removal," introduces another possibility, the first possibility being a removal. The second possibility is "a process leading to the removal, of a judge. In our view, the declaration by the Board that a Magistrate is unsuitable to continue serving amounts to a removal within the said provision."
- 26 With due respect, that is a tenuous interpretation of the provision. A simple reading of the words: "A removal, or a process leading to the removal, of a judge, from office" connotes two different aspects in which the vetting contemplated under section 23(1) could be challenged. First is the substantive decision whether to remove or not remove a judge, that is the conclusion on suitability to transition to the new order. Secondly, is the procedural aspect or process undertaken in arriving at the conclusion on suitability. With the suspension of articles 160, 167 and 168 of the Constitution which relates to tenure of judges and removal of Judges from office, the process of removal of judges and magistrates through the vetting exercise was the same. It cannot therefore be as concluded by the learned judges that removal in section 23(2) of the Schedule relates to removal of a magistrate while the process leading to a removal, relates to a Judge. As I have endeavored to demonstrate above, both relate to judges and magistrate, so that the ouster relates to both the decision to remove a judge or a magistrate or the process leading to the removal of a Judge or a magistrate.
- 27 As the ouster clause relates to the decisions of the Vetting Board in regard to suitability, it would be applying double standards to open up the decision relating to the vetting of magistrates for review by allowing review by the High Court, while not according the judges the same right. This would result in the decision of the Vetting Board in regard to the vetting of judges being final, and not that for magistrates. Such an interpretation of section 23(2) of the Schedule would not only be discriminatory but also inconsistent with JMVB (1) and the intention of the framers of the Constitution.
- 28 For the above stated reasons I would have dismissed the consolidated appeals as section 23(2) of the Sixth Schedule is an ouster clause that insulates the determination of the Vetting Board in regard to



the suitability of judges and magistrates, from the review jurisdiction of the courts. Consequently, the High Court had no jurisdiction to entertain the appellants' petition that sought review of the Vetting Board's determination and the process leading thereto. Unfortunately, I am in the minority as my brother Judges Kiage, JA and Kantai, JA are of a contrary view. The final orders shall therefore be as proposed by Kiage, JA.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

