Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae) (Civil Appeal 1 of 2016) [2016] KECA 534 (KLR) (27 May 2016) (Judgment)

Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR

Neutral citation: [2016] KECA 534 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 1 OF 2016

GBM KARIUKI, MSA MAKHANDIA, W OUKO, PO KIAGE, K M'INOTI, J MOHAMMED & JO ODEK, JJA

MAY 27, 2016

BETWEEN

JUSTICE KALPANA H. RAWAL ..... APPELLANT

AND

THE JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

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

AND

OKIYA OMTATA OKOITI ..... INTERESTED PARTY

AND

INTERNATIONAL COMMISSION OF JURISTS ..... AMICUS CURIAE

KITUO CHA SHERIA ..... AMICUS CURIAE

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mwongo, Korir, Ong'undi, Meoli, &Kariuki, dated 11th December 2015 inPetition. No. 386 of 2015)

Court of Appeal affirms the High Court's decision on the age of retirement for all judges as 70 years

The appellant was the Deputy Chief Justice and Vice President of the Supreme Court and was aggrieved by the judgment of the High Court dismissing her petition in which she contended that her retirement age was 74 years as provided in the repealed Constitution under which she was first appointed as judge, rather than 70 years as provided in the Constitution of Kenya, 2010, under which she was appointed as a Supreme Court judge. The court held that the Constitution did not preserve and save the retirement age of judges prescribed by section 62(1) of

the repealed Constitution as read with section 9 of the Judicature Act and section 31 of the Sixth Schedule to the Constitution, and that with effect from the effective date, the retirement age of all judges was 70 years.

Reported by Long'et Terer

***Constitutional Law** - office of judges - security of tenure of office of judges - original tenure of judges under the repealed Constitution vis a vis the Constitution of Kenya, 2010 - whether the Constitution of Kenya, 2010 applied to the retirement age of 70 years to all judges or whether it exempted serving judges and preserved their retirement age at 74 years as provided for under the repealed Constitution - whether retiring a judge at the age of 70 years, when they had a legitimate expectation to serve up to 74 years of age, constituted a violation of their right to property - whether a judge's retirement at the age of seventy years, where s/he previously was expected to serve for a longer time under the repealed Constitution would forfeit his/her pension bearing accrued entitlements - Constitution of Kenya, 2010, articles 40, 167 and Sixth Schedule, section 32; Constitution of Kenya, 1963(repealed), section 62(1); Pensions Act, Cap 189 sections 5 and 6.*

***Constitutional Law** – constitutional commissions - Judicial Service Commission (JSC) - role of the JSC in determining the retirement age of judges - whether the JSC could determine the retirement age of judges - Constitution of Kenya, 2010, articles 167; Sixth Schedule to the Constitution of Kenya, 2010, sections 23, 24 and 31.*

***Constitutional Law** - fundamental rights and freedoms – enforcement of fundamental rights and freedoms - rights to equality and freedom from discrimination, human dignity and right to property - protection of rights – whether retiring judge at the age of 70 years, when they had a legitimate expectation to serve up to 74 years of age constituted a violation of their right to property - whether the constitutional provision that a judge should retire upon attaining 70 years of age could not constituted discrimination on grounds of age - Constitution of Kenya, 2010, articles 27(4), 40 and 41.*

Brief facts

The appellant was the Deputy Chief Justice of the Republic of Kenya and Vice President of the Supreme Court of Kenya. She was aggrieved by the judgment of the High Court dismissing her petition in which she contended that her retirement age was 74 years as provided in the Constitution of Kenya, 1969 (the repealed Constitution) under which she was first appointed as judge, rather than 70 years as provided in the Constitution of Kenya, 2010 (the Constitution) under which she was appointed as a Supreme Court judge.

The appellant joined the Judiciary on June 2, 2000 when she was appointed a judge of the High Court under section 61(2) of the repealed Constitution. On December 9 2011, she was appointed a judge of the Court of Appeal before ultimately being appointed to the office of the Deputy Chief Justice and Vice President of the Supreme Court on May 29, 2013.

The High Court had found that the people of Kenya, in the exercise of their sovereign power, could reduce the retirement age of judges and that such reduction was not violative of security of tenure of judges and that the Constitution did not preserve the retirement of 74 years set for judges by the repealed Constitution as read with the Judicature Act. Accordingly, it concluded that the appellant's retirement age was 70 years as provided in section 167(1) of the Constitution.

Issues

i. Whether the Constitution of Kenya, 2010 applied the retirement age of 70 years to all judges or whether it exempted serving judges and preserved their retirement age at 74 years as provided for under the repealed Constitution.

ii. Whether retiring judges at the age of 70 years, when they had a legitimate expectation to serve up to 74 years of age, constituted a violation of their right to property.

iii. Whether the section 31(1) and (2) of the Sixth Schedule of the Constitution of Kenya, 2010 was applicable for purposes of transition of judges from the repealed Constitution to the Constitution of Kenya, 2010.

iv. Whether in the context of judicial offices, movement from one court to another amounted to a promotion

v. Whether a judge's retirement at the age of seventy years, where s/he previously was expected to serve for a longer time under the repealed Constitution would cause the forfeiture of his/her pension bearing accrued entitlements.

vi. Whether the repealed and current Constitutions had provision for career path or advancement or progression for individual judges of superior courts or such guarantee of advancement through the tiers of superior courts.

vii. Whether the Judicial Service Commission could determine the retirement age of judges.

viii. Whether the constitutional provision that a judge should retire upon attaining 70 years of age could not constituted discrimination on grounds of age.

Relevant provisions of the Law

Constitution of Kenya, 2010

Art 167 - Tenure of office of the Chief Justice and other judges

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

(2) The Chief Justice shall hold office for a maximum of ten years or until retiring under clause (1), whichever is the earlier.

(3) If the Chief Justice's term of office expires before the Chief Justice retires under clause (1), the Chief Justice may continue in office as a judge of the Supreme Court.

(4) If, on the expiry of the term of office of a Chief Justice, the Chief Justice opts to remain on the Supreme Court under clause (3), the next person appointed as Chief Justice may be selected in accordance with Article 166(1), even though that appointment may result in there being more than the maximum permitted number of Supreme Court judges holding office.

(5) The Chief Justice and any other judge may resign from office by giving notice, in writing, to the President.

Sixth Schedule

Section 23-Judges

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 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 Articles10 and 159.

Section 31-Existing offices

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

Held

1. The principle that people have the power to change and in particular to reduce the retirement age of judges was so evident to be denied or even disputed. The principle of sovereignty belied such precept. In addition, decisions abound which established the principle that prescribed retirement age at the time of appointment did not constitute a vested right and did not vest in the employee or official a right to remain in office until that retirement age.
2. The tenured office of a judge was not to be regarded as an item of property in which a judge had proprietary interest until retirement. There was no property right to hold the office of a judge under the Constitution; and a judge had no right to a salary for a period not served and for services not rendered.
3. Section 32 of the Sixth Schedule to the Constitution neither created nor conferred pension rights. It only safeguarded and protected the pension formula by prohibiting its alteration to the disadvantage of judges. The phrase the law applicable to pensions in the provision as read with article 160(4) of the Constitution provided constitutional protection to the pension formula that was in force and

applicable in determining the pension due to holders of constitutional offices under the repealed Constitution. The provision therefore ensured that the formula should not be less favourable to the retiring person. Section 32 should also be read with section 31(2), which provided for continuity of service and section 7, which allowed continuation of the Pensions Act as an existing law. Section 32 transited and re-enacted section 112(1) of the repealed Constitution into the Schedule.

4. The pension formula as well as the appellant's and other judges' pension for the period served was guaranteed and protected by the Constitution. Whilst the length or period of service was affected by the retirement age, the only right that the appellant could claim under section 32 of the Sixth Schedule was the right not to have the pension formula varied to her disadvantage or detriment. Ultimately therefore, the lowering or increasing of the age of retirement did not alter the pension formula while the appellant's pension was protected by article 160(4) of the Constitution which transited and substantially re-enacted section 104(3), (4), (5) and (6) of the repealed Constitution.

5. The right to pension for the period in which service had been rendered was a property right and accrued pension was vested property right. There was no evidence on record that such right of the appellant had been violated or was even threatened. However, the court was not persuaded that there was a right to pension in respect of an anticipated period in which no service had been actually rendered. In such period there were no contingent or accrued rights. The appellant's contention that her right to property was violated by retrospective application of the Constitution of Kenya 2010 to her was settled by article 167(1) of the Constitution.

6. That the Constitution provided that a judge should retire upon attaining 70 years of age could not constitute discrimination on grounds of age. The Constitution, which prohibited unequal treatment and discrimination, could not itself be said to discriminate. No provision of the Constitution could be said to be unconstitutional; that would be a major contradiction in terms.

7. The Constitution and statutes were dotted with many provisions, which set age as a qualification criterion, without the slightest suggestion of discrimination, irrationality or unreasonableness. Indeed article 24(1) as read with article 25 of the Constitution allowed limitation of the right guaranteed by article 27 of the Constitution, so long as the conditions set in article 24 were satisfied.

8. There was no evidence of deliberate policy of differential treatment adopted by the respondents. Since taking the view, correct or otherwise, that all judges should retire at 70 years of age, the respondents had not allowed any other judge to serve beyond 70 years of age, save in compliance with orders issued by the courts.

9. Article 10(1)(a) the Constitution anticipated that State organs and public officers like the respondents, in the discharge of their functions could be called upon to interpret and apply the Constitution. It was not practical to expect a State organ, created by the Constitution and empowered to execute a mandate flowing from the Constitution not to be involved in some form of appreciation and interpretation of the Constitution at threshold level. When there was a dispute however, regarding the interpretation of the Constitution, the final and authoritative interpretation did not lie with the State organ, State officer, or public officer or any other person. That mandate was given to the Judiciary in Chapter 10 of the Constitution.

10. Legitimate expectation was a doctrine that was well-recognized and established in administrative law. For an expectation to be legitimate, therefore, it should be founded upon a promise or practice by a public authority that was expected to fulfill the expectation.

11. Under article 167(1) of the Constitution, the 1st respondent was not competent to make final, authoritative and binding decisions determining the retirement age of judges. It could not make a binding promise on what the retirement age for any judge was. The retirement age for judges was set and fixed by the Constitution and could not be a subject of promise or legitimate expectation derived from the unbinding opinions of the 1st respondent. Such opinions could not form the basis for legitimate expectation. A claim based on mere legitimate expectation, without anything more in the

form of suffered detriment, could not *ipso facto* sustain an action founded on the doctrine of legitimate expectation.

12. A judge held a specific constitutional office which office was an office in the Judiciary. A judge was not appointed to the Judiciary or generally to the superior courts. He or she was appointed to a constitutional office of judge of a specific superior court.
13. Not all persons serving in the Judiciary were judges or constitutional office holders whose tenure had a constitutional underpinning. The appellant's submission that she was appointed in the Judiciary, which was a successor institution to the former Judiciary, was not tenable in law. Under the repealed Constitution, the appellant was appointed to the specific constitutional office of judge of the High Court and judge of the Court of Appeal. It was the office of a judge of the High Court or of the Court of Appeal that was a constitutional office under the repealed Constitution and the holder thereof a constitutional office holder.
14. The concept of promotion entailed advancement from one position to another, involving increase in duties and responsibilities and increase in compensation and benefits. The appellant's contention that after the effective date, she was promoted to a judge of appeal and then to Deputy Chief Justice and Vice President of the Supreme Court and judge of the Supreme Court, the court doubted whether in the context of judicial offices, movement from one court to another was a promotion, unless the term was loosely used.
15. Both the repealed and current Constitutions had no provision for career path advancement or progression for individual judges of superior courts; there was no career path or scheme of service for progression from one superior court to another; and indeed there was no guarantee of advancement through the tiers of superior courts. Individual judges were appointed to specific and designated superior courts. The concept of a judicial career spanning roles in different tiers of courts was applicable in the magistracy and to some extent to other subordinate courts.
16. A judge was appointed to a specific court and he or she was not promoted from one court to another. A person who was appointed a judge of the High Court or of the Court of Appeal or of Supreme Court was appointed pursuant to separate and distinct articles of the Constitution and held separate and distinct constitutional offices with separate and distinct jurisdictions. Even though for example a judge of the High Court could apply and be appointed as Judge of Appeal, the appointment was separate and distinct, not a promotion as loosely understood. Having been a judge in one court before appointment to another was only relevant for continuity of service for pension purposes, and that was what was preserved by section 32 of the Sixth Schedule to the Constitution as read with section 5 of the Pensions Act and article 160(4) of the Constitution of Kenya 2010.
17. Neither the Supreme Court nor office of Deputy Chief Justice nor the office of judge of the Supreme Court were successors to any office established under the repealed Constitution. Indeed under section 29 of the Sixth Schedule to the Constitution, they were all among the institutions where new appointments were contemplated by the Constitution. Where the Constitution intended to continue in operation a provision or provisions of the repealed Constitution, it provided so expressly in section 3 of the Sixth Schedule.
18. Section 62(1) of the repealed Constitution and section 9 of the Judicature Act were not transited and saved into the Constitution by section 7 of the Sixth Schedule. To the extent that those provisions were not transited into the Constitution, the matters that they provided for were, with effect from the effective date provided for by the Constitution of Kenya 2010.
19. The transitional and consequential provision of the Sixth Schedule to the Constitution that was applicable to judges was section 23. That provision was specific to judges as the side note showed; was tailor made for that purpose; and was clear enough without being clogged or clouded by provisions of miscellaneous provisions of the Schedule.

20. Upon successful vetting, a judge who was in office on the effective date was transited to the Constitution by section 23 of the Sixth Schedule to the Constitution and thereafter the Constitution, rather than the other parts of the Schedule, applied to him or her. The oath of office taken by judges transited to the Constitution by section 23 was not, as the respondents contended, evidence of a new appointment, but was a condition precedent prescribed by article 74 of the Constitution to be satisfied even by judges who were successfully vetted.

21. The Constitution did not preserve and save the retirement age of judges prescribed by section 62(1) of the repealed Constitution as read with section 9 of the Judicature Act and section 31 of the Sixth Schedule to the Constitution, and that with effect from the effective date, the retirement age of all judges was 70 years.

Appeal dismissed.

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

1. 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.

2. 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.

3. The appellant, Hon. Justice Kalpana H. Rawal is the Deputy Chief Justice of the Republic of Kenya and Vice President of the Supreme Court of Kenya. She is aggrieved by a judgment of the High Court of Kenya dated 11th December 2015 dismissing her petition in which she contended that her retirement age is 74 years as provided in the Constitution of Kenya, 1969 (the former Constitution) under which she was first appointed a judge, rather than 70 years as provided in the Constitution of Kenya, 2010 (the Constitution) under which she was appointed to her present office. The main issue in this appeal therefore is one of interpretation of the Constitution to determine whether the appellant's age of retirement is 74 years or 70 years.

4. The appellant joined the Judiciary on 2nd June 2000 when she was appointed a judge of the High Court under section 61(2) of the former Constitution. On 9th December 2011, she was appointed a judge of the Court of Appeal before ultimately being appointed to her present office on 29th May 2013.

That office is created by the Constitution, which came into effect on 27th August 2010 (the effective date). Under section 61(2) of the former Constitution as read with section 9 ofthe Judicature Act, the retirement age of a judge was 74 years, unless the judge was sooner removed for cause. However, under Article 167(1) of the Constitution the retirement age of judges is 70 years.

5. The litigation leading to this appeal was triggered by two conflicting decisions taken by the Judicial Service Commission (the 1strespondent), on 18th April 2011 and 24th March 2014 regarding the retirement of serving judges appointed under the former Constitution. Those decisions were communicated to the appellant and other judges vide a circular date 24th May 2011 and a memorandum dated 27th March 2014. The 1st respondent is established by Article 171 of the Constitution and is responsible for among others, recommending to the President persons to be appointed as judges, reviewing and making recommendations on conditions of service of judges, (except remuneration), of judicial officers and staff of the Judiciary, and appointment of registrars, magistrates and other judicial officers, their discipline and removal from office.

6. By the first decision of 18th May 2011, the 1st respondent advised all judges that judges appointed under the former Constitution would continue to serve until they attained the age of 74 years. That decision was based on the 1st respondent's reading and understanding, at that time, of ***section 31(1)*** of the ***Sixth Schedule*** of the Constitution. However, by the second decision of 24th March 2014, the 1st respondent beat a quick retreat from its earlier position and advised that after all, the retirement age for all judges, irrespective of their date of appointment, was 70 years.

7. On 1st September 2015, the 2nd respondent, ***Mrs. Anne Atieno Amadi,*** the 1st respondent's secretary, who is also the Chief Registrar of the Judiciary, served upon the appellant a notice informing her that she was due to retire on 16th January 2016, by which date she would have attained 70 years of age. The 1st respondent thereafter declared the office of Deputy Chief Justice and Vice President of the Supreme Court vacant with effect from 16th January 2016 and invited applications from qualified candidates.

8. The appellant was not amused by the turn of events and on 14th September 2015, she lodged a petition in the High Court seeking among others, a declaration that under section 62(1) of the former Constitution and section 9 of the Judicature Act as read with section 31(1) of the Sixth Schedule to the Constitution, she was entitled, together with all other judges appointed under the former constitution, to continue serving and to retire upon attaining the age of 74 years; a declaration that the 1st respondent had no role to play regarding the discharge of her judicial duties; and an order of *certiorari* to quash the notice of her retirement dated 1st September 2015 and that advertising a vacancy in her office.

9. Those reliefs were sought on the basis of averments that the appellant was entitled by the Constitution to serve until the age of 74 years and that the respondents had infringed her fundamental rights and freedoms, in particular the right to equality and freedom from discrimination; the right to property; the right to fair labour relations; the right to fair administrative action; and had further disregarded her legitimate expectation.

10. The respondents opposed the petition maintaining that the appellant's retirement age was 70 and not 74 as she claimed. Before hearing the petition, the High Court admitted an interested party and two amici curiae into the proceedings. Mr. Okiya Omtata Okoiti, a private citizen was admitted as an interested party, while the International Commission of Jurists - Kenya Chapter and Kituo cha Sheria were admitted respectively as the 1st and 2ndamici curie. In the High Court and this Court, the interested party and the 1st *amicus curie made submissions that supported the view of the respondents, while the views of the 2nd*amicus curiae were supportive of the position espoused by the appellant.

11. After hearing the parties, the High Court held that the respondents had not violated any of the appellant's rights and freedoms. The court further found that the 1st respondent lacked authority to determine the retirement age of judges and to declare a vacancy in the appellant's office. On the main issue in dispute, the court found that the people of Kenya, in the exercise of their sovereign power, could reduce the retirement age of judges and that such reduction was not violative of security of tenure of judges and that the Constitution did not preserve the retirement of 74 years set for judges by the former Constitution as read with the Judicature Act. Accordingly, it concluded that the appellant's retirement age was 70 years as provided in section 167(1) of the Constitution.

12. The appellant was aggrieved by the judgment and decree of the High Court and lodged a notice of appeal three days later, followed ultimately by this appeal.

13. Although the appellant's memorandum of appeal contains a whooping 35 grounds of appeal, as presented by her learned counsel, the appeal in reality raises 9 grounds in which the appellant contends that the High Court erred: in its construction, interpretation and application of the Constitution in general and section 31(1) and (2) of the Sixth Schedule in particular; by holding that the retirement of judges appointed under the former Constitution was 70 years; by purporting to determine issues that were not pleaded; by ascribing to Article 167 of the Constitution retrospective application; by ignoring comparative jurisprudence; by sanctioning violation of the appellant's vested and accrued rights; by misapprehending the effect of the oath of office subscribed by the appellant under the Constitution and her appointment as the Deputy Chief Justice and Judge of the Supreme Court; by holding that the respondent's did not violate the appellant's specified constitutional rights and lastly by finding that the appellant had no legitimate expectation that she would serve as a judge until she attained 74 years of age.

14. By consent of all the parties, the Court directed the appeal to be heard through written submissions, which the respective counsel elected and were allowed to highlight orally before us. Mr. George Oraro, learned SC, teaming up with Mr. Waweru Gatonye and Mr. Kioko Kilukumi, learned counsel, appeared for the appellant. Mr. Ahmednassir Abdullahi, learned SC and Mr. Charles Kanjama, learned counsel, appeared for both respondents, while Dr. Ken Nyaundi, learned counsel, and Dr. John Khaminwa, learned SC, respectively appeared for the 1st and 2nd amici curiae. The interested party appeared in person.

15. For the appellant, it was submitted that the fundamental issue in this appeal was whether it was constitutionally permissible to alter the terms of serving judges to their detriment and the consequence of such alteration to the independence of the Judiciary. Other than the fact that such alteration was expressly prohibited by the former and current Constitutions, it was submitted, the principle is of almost universal application and has been respected in Kenya until this case.

16. Moving to the grounds of appeal, it was contended that the interpretation of the Constitution by the High Court, which led to the conclusion that the retirement age for judges appointed under the former Constitution is 70 years, was erroneous and contrary to the express terms of section 31(1) of the Sixth Schedule, which, save where it provided otherwise, allows a person holding an office established by the former Constitution to continue in office for the unexpired period, if any, of the term of that person. On the effective date, it was urged, the appellant held an office established by the former Constitution, had an unexpired term and there was no provision in the Schedule that was contrary to section 31(1) as regards the appellant.

17. It was further urged that there was no basis for excluding judges from the application of section 31(1) and that the interpretation adopted by the High Court, which did precisely that, was narrow, restrictive, and pedantic and ultimately ended up elevating Article 167(1) of the Constitution above section 31(1) of the Sixth Schedule. Moreover, it was contended, on the authority of among, others,

Nderitu Gachagua v. Thuo Mathenge & 2 Others,CA No. 14of 2013 (Nyeri),In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Application No. 2 of 2012,The Speaker of the Senate & Another v. Attorney General & 4 Others, SC Advisory Opinion Reference No. 2 of 2013; and Judges & Magistrates Vetting Board & 2 Others v. Centre for Human Rights & Democracy & 11 Others, SC Petitions Nos. 13A, 14 & 15 of 2013 (consolidated) that the interpretation adopted by the High Court was contrary to the cannons of interpretation that the Constitution is one indivisible document to be interpreted purposively, broadly, holistically and as one whole so as to achieve harmony of all its provisions.

18. As regards section 31(2) of the Sixth Schedule, the appellant argued that it was a deeming provision for the purpose of transiting public officers holding offices established by law, from the former Constitution to the current one and that it had no bearing to the unexpired term or tenure of the concerned public officers. To that extent, it was urged that it had no application to judges, who were covered by section 31(1) of the Sixth Schedule.

19. On the appellant's retirement age, it was argued that the same was 74 years as stipulated by section 62(1) of the former Constitution and Section 9 of the Judicature Act, and preserved by section 31(1) of the Sixth Schedule. The retirement age of 70 year set by Article 167(1) of the Constitution, we were told, applies only to judges appointed after the effective date. Upon Parliament setting the appellant's retirement age at 74 in section 9, it was further contended, it had no power to alter that age to her detriment because section 104(3) of the former Constitution prohibited alteration of a judge's salary and other terms of office to his or her disadvantage after appointment. In the appellant's view therefore, for all intents and purposes, the appellant's retirement age was set by the former constitution, rather than by a statute and the High Court erred in holding that section 9 of the Judicature Act was void for nonconformity with the Constitution.

20. Pursuing the theme of non-alteration of retirement age for judges to their detriment, the appellant submitted that in the history of Kenya prior to the effective date, alteration of the retirement age had always been towards increment rather than reduction, starting from 68 years, to 70 years and ultimately to 74 years. In the appellant's view, notwithstanding the Constitution setting the retirement age at 70, there was no evidence that a judge of over 70 years of age was incapable of executing his or her duties.

21. The appellant further urged that her retirement age of 74 years under the former Constitution was saved by Articles 262 and 264 as read with section 7 of the Sixth Schedule of the Constitution, whose effect was "to keep alive" provisions of the former Constitution that were expressly mentioned or necessarily implied by the Schedule. On the authority of the decision of the Supreme Court in Judges & Magistrates Vetting Board & 2 Others v Centre for Human Rights & Democracy & 11 Others (Supra) and the dicta of Otieno-Odek, JA in Dennis Mogambi Mong'are v Attorney General & 3 Others CA No. 123 of 2013, it was argued that transitional and consequential provisions such as the Sixth Schedule are the bridge between two constitutional epochs and as such are part and parcel of the same indivisible Constitution, enjoying equal standing and status as the substantive provisions.

22. Next, the appellant invoked section 7 of the Sixth Schedule, which saves all laws in force immediately before the effective date subject to alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution and submitted that section 9 of the Judicature Act, as existing law, ought be interpreted as required by section 7. If so interpreted, it was contended, section 9 would require the appellant to retire at 74 years.

23. Regarding the complaint that the High Court had purported to determine unpleaded issues, the appellant argued that the question whether a person above the age of 70 years was eligible to be appointed Chief Justice under the Constitution was not an issue before the trial court. Accordingly

the court was faulted for holding that such a person was not eligible and for further holding that the appellant cannot act in the office of the Chief Justice because, as of 16th January 2016, she would have attained the age of 70 years and therefore would be unqualified for appointment as Chief Justice.

24. Invoking the judgment of this Court in D.E.N. v. P.N.N. CA (Application) No 226 of 2012, the appellant submitted that the enduring principle is that all cases must be determined on the basis of issues on record which flow directly from pleadings or issues framed by the parties for the court's determination and that the court should not make findings on unpleaded matters or grant a relief that is not sought by the parties in their pleadings. The finding of the High Court on unpleaded issues was erroneous, it was urged, and that notwithstanding, judges appointed under the former Constitution were qualified and eligible to be appointed to the offices of Chief Justice and Deputy Chief Justice and to serve until they attained the age of 74 years.

25. The next issue canvassed by the appellant was what she perceived to be erroneous and retrospective application of Article 167(1) of the Constitution by the High Court. Having found that the Article had a forward rather than a retrospective orientation, it was argued, the High Court erred by applying it to the appellant and by concluding that her retirement age was 70 instead of 74 years. Citing the ruling of the Supreme Court in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others__ SC Application No. 2 of 2011//**, the appellant submitted that where the words used in a provision are forward-looking without a hint of retrospective effect, the court ought not to import retrospective effect, particularly where it would have the effect of divesting individuals of legitimately accrued rights.

26. On comparative jurisprudence, the appellant's submission is that the High Court erred by failing to follow "jurisprudence of universal application", which establishes that it is impermissible to alter retrospectively the retirement age of serving judges to their detriment. That submission was anchored on four documents, namely the United Kingdom Judicial and Pensions Act, 1959; the Australia Constitutional Alteration (Retirement of Judges) Act, 1977; the Commonwealth Secretariat's Report of Research Undertaken by Bingham Centre for the Rule of Law; and lastly on an article by Steven G. Calabresi and James Lindgren titled "Term Limits for the Supreme Court: Life Tenure Reconsidered", Harvard Journal of Law and Public Policy [Vol. 229], 770. It was submitted that those materials establish that any changes reducing the retirement age of judges should be prospective rather than retrospective.

27. The next issue taken up by the appellant was violation of her vested and accrued rights. Once again, on the authority of the ruling of the Supreme Court in ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others (supra),*** the appellant submitted that where rights have vested and accrued the court should not readily sanction retrospective application of the Constitution or legislation. In disregard of that binding authority, it was submitted, the High Court applied Article 167 retrospectively whilst the appellant had vested and accrued rights by virtue of her retirement age of 74 years which was guaranteed upon her appointment under the former Constitution.

28. Section 6 of the Sixth Schedule was invoked to argue that the Constitution recognized and protected the appellant's vested and accrued rights by providing in that section that all rights and obligations of the Government or the Republic subsisting immediately before the effective date shall continue as rights and obligations of the National Government or the Republic under the Constitution. So too was section 32 of the same Schedule, which provides for the law applicable to pensions of holders of constitutional offices under the former Constitution to be the law that is not less favourable. The appellant urged that this latter provision clearly sought to preserve all her benefits.

29. Turning to the question whether the High Court misapprehended the effect of the oath of office subscribed by the appellant under the Constitution and her appointment as the Deputy Chief Justice and judge of the Supreme Court, the appellant submitted that the retirement age set by the Constitution applied to all judges of the superior courts, irrespective of the court a judge is appointed to or even the administrative duties discharged by a judge such as the Chief Justice, the Deputy Chief Justice, the President of the Court of Appeal or the Principal Judge of the High Court. Irrespective of the court or administrative office held by a judge, the appellant urged, all judges have one retirement age. Similarly, it was contended, the former constitution set one retirement age for all judges irrespective of the court they were serving in or any administrative duties discharged by them. Accordingly, it was submitted, the appellant's appointment as Deputy Chief Justice and Judge of the Supreme Court, offices created by the current rather than the former Constitution, did not affect her retirement age. The High Court was therefore faulted for holding that tenure attaches to the office rather than to the person of a judge and that the appellant's appointment to the Supreme Court affected her tenure.

30. As regards the effect of subscribing to the oath of office under the Constitution, it was submitted that the High Court erred by holding that subscribing to the oath of office marked a fresh start. In the appellant's view, subscribing to the oath of office was a symbolic act demanded by Article 74 of the Constitution and did not signify a new appointment or, as it were, wipe out the service rendered by the appellant under the former Constitution. It was argued that in terms of section 23 of the Sixth Schedule, after being found suitable, consequent upon vetting, the appellant "***continued"*** to serve as a judge, dispelling any notion that she was starting afresh and confirming that her tenure and accrued rights were continued and preserved.

31. The next issue that the appellant addressed was violation of her constitutional rights. The first of her rights to be violated, it was submitted, was the right to fair administrative action, entailing the right to be heard and to be given written reasons for a decision that adversely affects a person's rights.

32. The appellant urged that Article 47(2) of the Constitution entitled her to written reasons once the 1st respondent decided to change its position on retirement age from 74 to 70 years, because the decision adversely affected her rights. Despite demand, the 1st respondent had declined to give her the reasons for its change of position and in that respect the High Court erred by finding that Article 47(2) was not violated. On the same note, the finding by the High Court that the appellant was afforded an opportunity to be heard before the 1st respondent took the impugned decision was faulted as factually incorrect because the memorandum by four judges of the Supreme Court which the High Court held constituted sufficient hearing was received by the 1st respondent after it had already made the impugned decision. It was the appellant's view therefore that her right to be heard before an adverse decision was taken against her was violated.

33. The next in the cluster of rights that the appellant contended was violated in relation to her is the right tf equality and freedom from discrimination under Article 27 of the Constitution. It was submitted that the appellant was discriminated against on the basis of age and that the respondents had allowed two judges of the Court of Appeal, Aganyanya and Onyango Otieno, JJA. who were appointed under the former Constitution to serve until the age of 74 years.

34. That the appellant was treated differently, it was argued, constituted unconstitutional differential treatment and a violation of the right to equal protection and application of the law, which could not be cured by the claim that the 1st respondent had made an error. The decision of the Constitutional Court of South Africa in Justice Alliance of South Africa v President of the Republic of South Africa & Others, [2011] ZACC 23 was cited in support of the submission on unconstitutional discrimination.

35. As regards violation of her right to property, the appellant argued that by requiring her to retire at 70 years instead of 74 years, the respondents had violated her right to property under Article 40 of the Constitution. That argument was founded on the assertion that the appellant expected to serve until the age of 74 years and in the process earn her monthly remuneration and benefits, such as expected monthly emoluments and pension, which created a contingent and vested right to property duly recognized and protected by Article 40(2) as read with Article 260 of the Constitution.

36. The last of the violated rights, according to the appellant, was the right to fair labour practice under Article 41 of the Constitution. It was submitted that the decision by the 1st respondent to retire the appellant at 70 years constituted unfair labour practice because the 1st respondent, as the appellant's employer, was resiling from an earlier written commitment that she would retire at 74 years.

37. The last ground of appeal, founded on the same argument as that of violation of the right to fair labour practice, was the violation or disregard of the appellant's legitimate expectations. The appellant submitted that the 1st respondent, having informed her in writing in May 2011 that she would retire at 74 years, she had legitimate expectation that she would so retire. The decision of 24th March 2014 was therefore in violation of that legitimate expectation. The appellant faulted the High Court for framing legitimate expectation as one of the issues for determination, but ultimately failing to determine the issue. The appellant accordingly invited us to re-evaluate the evidence, find that her retirement age is 74 years as prescribed by section 61(2) of the former Constitution as read with the Section 9 of the Judicature Act and as preserved by section 31(1) of the Sixth Schedule to the Constitution and ultimately allow the appeal.

38. The respondents vigorously opposed the appeal. A substantial part of their written submissions was a mischievous and an unnecessary rant, apparently provoked by the ruling of this Court dated 29th January 2016, which dismissed a preliminary objection by the respondents and held that the appellant had a right of appeal to this Court. We do not intend to spend more time on that aspect of the respondent's submissions, which does not in any way contribute to the just and expeditious determination of this appeal.

39. In the respondents' view, the appeal raises only two broad issues, namely first, the interpretation, of Article 167 (1) of the Constitution and sections 31 and 32 of its Sixth Schedule, and second the alleged violation of the appellant's rights and freedoms.

40. As regards the interpretation of the specified Article and sections of the Schedule, the respondents submitted that the Sixth Schedule is deliberately arranged in a systematic and thematic format, with Part 5 being devoted to "administration of justice" while Part 7 (erroneously written Part 6) addresses "miscellaneous matters". It was submitted that the appellant's case is untenable because the provisions of the Sixth Schedule upon which it is founded, are in a miscellaneous provisions rather than under administration of justice. In the respondent's view part 5 of the Schedule, which is devoted to administration of justice addresses all the transitional issues pertaining to the Judiciary. The existence of a specific part of the schedule devoted to transition of the Judiciary, it was argued, excludes the possibility that the same issue would be addressed in a part of the schedule devoted to miscellaneous matters. Where a matter touching on the Judiciary is not addressed in Part 5 of the Schedule, it was urged, the substantive provisions of the Constitution would regulate it.

41. The respondent's next submitted that save for Articles 160, 167 and 168 of the Constitution which were suspended solely for the purposes of vetting of judges and magistrates, by dint of Article 263, all other provisions of the Constitution touching on the Judiciary took effect on the effective date.

42. It was the respondents' further contention that to the extent that the appellant transited to the Judiciary established by the Constitution as a judge of the High Court, her claim was an illegitimate attempt to enforce her terms under the former Constitution, but as a the Deputy Chief Justice and a judge of the Supreme Court appointed under the Constitution. It was also the respondent's view that under the former Constitution, the retirement age of judges was set by section 9 of the Judicature Act rather than section 62(1) of the Constitution.

43. As regards Article 167 (1) of the Constitution, the respondents submitted that the question of its retrospective application did not arise and that the Article was in force with effect from the effective date because its operation was not suspended by the Constitution.

44. Regarding violation of the appellant's constitutional rights and freedoms, the respondent submitted that the appellant's right to fair administrative action was not violated as she was given an opportunity to be heard through the memorandum by judges of the Supreme Court and that in any event application of Article 167(1) of the Constitution, which sets the retirement age of judges is not dependent on observance of the right to fair administrative action. In the same vein, it was submitted that to the extent that the respondents had no power to extend or shorten the retirement age of judges set by Article 167(1) of the Constitution, they did not violate the appellant's right to be heard. The judgment of this Court in ***The Judicial Service Commission v Justice Mbalu Mutava & Another CA No. 52 of 2014*** was cited to reinforce the submission that although the right to be heard is a principle of universal application, it is nevertheless flexible and whether it applies and the extent of application depends on the circumstances of each case.

45. The respondents denied that the appellant's right to equality and freedom from discrimination was violated, contending that the appellant's claim was tantamount to asserting that because two judges had retired at 74 years in breach of the Constitution, she should also be allowed to so retire. They accordingly supported the conclusion of the High Court that the appellant did not prove discrimination against the respondents. We were similarly urged to find no merit in the alleged violation of the appellant's rights to property and to fair labour practice, and uphold the findings of the High Court. Lastly on legitimate expectation, the respondents submitted that contrary to the assertion by the appellant, the High Court considered the issue at length, made a determination thereon, and found the same to have no basis.

46. The respondents concluded by urging us, in interpreting the provisions of the Constitution, to be guided by the historical context in which the provisions were made as extrapolated by Mutunga CJ in Judges & Magistrates Vetting Board & 2 Others v Centre for Human Rights & Democracy & 11 Others (supra) and to eschew overreliance on foreign decisions.

47. Next to make his submissions was the interested party, who asserted that the reduction of the retirement age of judges from 74 to 70 years upon the adoption of the Constitution was an act in the exercise of sovereign power by the people of Kenya which could not be contested by the appellant. In his view, in the exercise of their sovereign power, the people of Kenya may elect not only to reduce the retirement age of judges, but also to reconstitute or abolish the Judiciary. To that extent, he argued, the provisions of the former constitution on the remuneration and benefits of judges cannot limit the sovereign power of the people of Kenya.

48. The interested party further asserted that reduction of the retirement age did not undermine the independence of the Judiciary because the Constitution has express and adequate provisions that shield judges, in the discharge of their duties, from improper pressure by the Executive, the Legislature or litigants. It was the interested party's further submission that reduction of the retirement ages for all judges did not target the appellant and cannot be construed as discriminatory against her. He

also submitted that as regards the remuneration and benefits of judges, what is prohibited by the Constitution is varying the same to the disadvantage of a particular judge, so that for example, a general wage reduction for all judges consequent upon reduction of remuneration in the public service is permissible.

49. In the interested party's view, the initial determination by the 1st respondent that the appellant's retirement age was 74 years was an error which was validly corrected; that it is only the courts that are mandated to authoritatively interpret the Constitution; that in interpreting sections 31(1) and 31(2) of the Sixth Schedule distinction must be made between contractual employment and public employment under a statute; that offices established by law in s 31(2) of the Schedule includes offices established by the former Constitution; that section 31(1) of the Sixth Schedule applies to constitutional offices held under fixed term contracts and excludes employment under statute; that section 31(1) did not apply to judges as they do not serve contract terms but serve until the prescribed retirement age; that the section applies to unexpired period of person on contract like the President, the Prime Minister or Commissioners; that on the effective date offices of judges were abolished and new ones established by the Constitution; and that as found by the High Court, it is section 31(2) which applies to transiting judges.

50. Regarding the obligations of the State to the appellant, the interested party submitted that those were limited only to her pension dues under the Pensions Act which are protected by section 32 of the Sixth Schedule and did not extend to a right to work until the prescribed retirement age. He relied in support of that submission on three American decisions, namely, Gorman v. City of New York, 280 App. Div. 39 (N.Y. App. Div. 1952); Miller v. State of California, 18 Cal. 3d. 808 and Townsend v. County of Los Angeles, Civ. No. 444591, June 20, 1975.

51. The interested party concluded his submissions arguing that comparative jurisprudence cannot override exercise by the people of Kenya of their sovereign power and that the persons whose offices are abolished have a remedy under the Pensions Act For the 1st *amicus curie,* it was contended that to the extent that the appellant was the holder of a public office established by the former Constitution, she was a public officer within the meaning of section 31(2) of the Sixth Schedule. By dint of that section, it was contended, she continued in office as if appointed under the Constitution. Consequently, we were told,Article 167(1), which sets the retirement age for judges under the Constitution at 70 years, applies to the appellant. In the view of this amicus curiae, section 31(1) is subject to section 31(2) due to the words "unless this schedule otherwise provides", which are in section 31(1).

52. It was argued that the interpretation of the above provisions must not lose sight of the circumstances under which the Constitution was promulgated, key among them the quest for reform of the Judiciary which saw the departure of a chief justice, the vetting of judges and magistrates and adoption of a new retirement age for judges. The decision of the Court of Appeal of Tanzania in Ndyanabo v. Attorney General [2001] 1 EA 485 was cited to make the point that interpretation of the Constitution should not lose sight of the lofty ideals and purposes of its makers.

53. In the 1st *amicus curiae's* view, no meaningful value is added by the distinction between "unexpired period" and "unexpired term" because section 31(2) of the Sixth Schedule is clear enough that continued service in the Judiciary must be in accordance with the Constitution. The argument was also made that the constitution allows retrospective application of the provision on retirement age, which is understandable and permitted while making a new Constitution. Finally it was posited that while reduction of tenure of a judge may amount to a violation of vested rights, it is subject to the right of a people to reorganize or revise their institutions affecting all judges as happened in Kenya in 2010.

54. The last to make submissions was the 2nd *amicus curie* who submitted that by virtue of Art 262 of the Constitution as read with section 31 of the Sixth Schedule, the retirement age of a judge appointed under the former constitution is 74 years. It was submitted that since by dint of Article 2(5) of the Constitution general rules of international law form part of the law of Kenya, basic international principles on administration of justice are applicable. Quoting from the ***United Nations Manual on Human Rights for Judges, Prosecutors and Lawyers (UN, 2003)***, it was submitted that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and retirement age should be adequately secured by law.

55. Several international and Commonwealth instruments were cited to underline the critical importance of the independence of the Judiciary and the role of security of tenure in guaranteeing an independent and impartial Judiciary.

56. Reference was also made to the Judicial and Pensions Act, 1959 and the Judicial Pensions and Retirement Act, 1993, both of the United Kingdom and it was submitted, as regards the former that the retirement age of judges was reduced from life tenure to 75 years of age, but serving judges were not affected by the reduction. As regards the latter, it was argued, the same principle applied when the retirement age was further reduced to 70 years.

57. The 2nd *amicus curiae* concluded that even if section 31 of the Sixth Schedule did not preserve the appellant's retirement age of 74 years, her retirement age would still be 74 years by application of principles of international law.

58. We have duly considered the record, the grounds of appeal, submissions by the parties, both written and oral, the authorities relied upon by each of them and the law. This being a first appeal, we are obliged to re-evaluate and reappraise the evidence and come to our own conclusion. We however bear in mind that save in a few instances, there is not much disagreement on matters of fact; the real dispute is in the interpretation and application of the Constitution. Subject to slight re-arrangement for convenience, we propose to deal first with the grounds of appeal in the order in which the appellant raised them, save for the first and second grounds of appeal on whether the High Court erred in holding that section 31(1) does not apply to judges and that under the Constitution, the retirement age of all judges is 70 years of age, which we shall address last.

59. Turning first to the contention that the High Court erred by determining unpleaded issues, the appellant's complaint is directed at the finding of the High Court that under the Constitution, no judge who is more than 70 years of age can serve as Chef Justice and that the appellant was not qualified for appointment as Chief Justice as she would have attained 70 years by 16th January 2016.

60. The principles of law on unpleaded issues, as stated by the appellant, are correct and not in dispute. A court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court can validly determine the unpleaded issue. Accordingly we need not belabour or restate the principles here in detail, save to mention but some decisions, which have crystallized those principles. These include Captain Harry Gandy v. Caspar Air Charters Ltd [1956] 23 EACA 139; Odd Jobs v Mubea [1970] 476, D.E.N. v. P.N.N. (supra), Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, CA No 296 of 2001; and Mapis Investment (K) Ltd v Kenya Railways Corporation (2005) 2 KLR 410.

61. The dispute before the High Court and in this appeal revolves around interpretation and application of the Constitution, which is a question of law, to the extent that the resolution of the dispute rests solely on what the Constitution provides on given set of circumstances. (See Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, SC Petition No. 2B of 2014and Republic v. Malabanan,GR.

No 169067, SCRA 338-Supreme Court of the Philippines). The determination that has aggrieved the appellant arises from the High Court's interpretation of Article 167(1) of the Constitution, which was at the heart of this dispute. Article 167 has seven sub-Articles, with Article 167(2) providing for the term of the office of the Chief Justice. With great respect, granted the emphasis that the appellant has rightly laid on the principles of interpretation that require holistic, contextual and harmonious interpretation of the Constitution, it could not reasonably have been expected that the High Court would interpret Article 167(1) in total isolation and without regard to the other provisions of the same Article, or even other related Articles.

62. In her pleadings, the appellant prayed for, among others, a declaration that she is at liberty to serve in the Judiciary until the age of 74 years and that she is entitled to hear and determine disputes and preside over all other judicial proceedings and functions until the age of 74 years. In her submissions, she also contended that the offices of Chief Justice and Deputy Chief Justice are administrative offices and that the holders thereof share the same retirement age with all other judges. In our understanding the appellant's argument was that any judge, including one appointed under the former Constitution, is entitled to serve up to the age of 74 years and is qualified to hold the offices of Chief Justice and Deputy Chief Justice. It was a central part of her case that judges appointed under the former Constitution can be appointed to any higher superior court. Indeed, paragraph 52 of her written submissions captures this argument as follows:

> " It is our humble submission that judges transiting from the repealed Constitution qualify to be appointed to the office of Chief Justice and the Deputy Chief Justice after attaining the age of seventy (70) years and are at liberty to serve in those offices until they attain the age of seventy four (74) Years."

63. We must accordingly conclude that the High Court did not err or go on a frolic of its own as the appellant alleges, and that granted the reliefs sought in her petition, the issue considered and determined by the High Court touching on who qualifies to hold the office of Chief Justice, was directly relevant to the interpretation and application of Article 167(1) of the Constitution.

64. The next issue raised by the appellant is that the High Court erred by applying Article 167(1) retrospectively. As a general principle, statutes, which create criminal liability, must operate prospectively rather than retrospectively unless they expressly provide so, or they relate to matters of evidence and procedure only. In Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others(supra), the Supreme Court did advert to the fact that the Constitution may not necessarily be interpreted like a statute on the question whether it operates prospectively or retrospectively. The Court stated thus:

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

65. In Du Plessis & Others v. De Klerk & Another [1996] ZACC 10, the Constitutional Court of South Africa, while accepting as a general principle that the Constitution may not be retroactive, nevertheless

did not shut out the possibility that in some instances, it may as well be retrospective, depending on the circumstances. The Court expressed itself thus:

> " The Constitution is neither retroactive nor retrospective; it does not enact that as at a date prior to its coming into force "the law shall be taken to have been that which it was not". But we leave open the possibility that there may be cases where the enforcement of previously acquired rights would in light of our present constitutional values be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis."

66. The conclusion of the Supreme Court in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others (supra) regarding the approach to be taken on the question of retroactivity of the Constitution is, in our view, very clear for present purposes. The Court stated:

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

67. We shall say more on this issue later in this judgment when we consider whether the retirement age of judges can be legitimately reduced and whether such reduction constitutes a violation of the appellant's expectation to serve until 74 years of age and her vested property rights including to pension.

68. Next we consider whether the High Court erred by ignoring comparative international jurisprudence on reduction of retirement ages for serving judges. In our view, the proper approach in this regard, is not wholesale, uncritical application of the approaches of other nations on matters touching on the exercise of a people's sovereignty in designing, structuring and recreating their institutions.

69. As the Preamble to the Constitution asserts without equivocation, the people of Kenya ordained and gave themselves the Constitution in the exercise of their sovereign and inalienable right to determine the form of governance for their country, having participated fully in the making of the Constitution. Constitution-making is informed keenly by a people's peculiar experience, lessons drawn from their society, their failures and successes, their fears, hopes, aspirations, and vision for the future. True, in today's world no nation is an island. As provided in Article 2 (5) of the Constitution, there are general rules of international law and practice that Kenya, as part of the community of nations, subscribes to, upholds and respects. While at a theoretical level the submission by the interested party that in exercise of their sovereign power the people of Kenya can do virtually anything they wish, including abolishing the Judiciary as an institution and vesting its role in any other institution, may hold sway, in practice the people exercise their sovereign power for their own good, informed by practical realities rather than abstract theories. Accordingly, while invocation of sovereign power remains powerful and unquestionable, in practice sovereign power is exercised against a backdrop of great circumspection informed or constricted by among others, experiences of other people and accepted practices in other nations.

70. It is on that basis that the Supreme Court has sounded the caution that the Constitution must first and foremost be interpreted, taking into account the unique experiences and aspirations of the people of

Kenya. Thus in Jasbir Singh Rai & 3 Others v. Estate of Tarlochan Singh Rai & 4 Others,SC Petition No. 4 of 2012, the Supreme Court Stated:

> " In the development and growth of our jurisprudence, commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the US yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country."

71. And in Judges & Magistrates Vetting Board & 2 Others v. Centre for Human Rights & Democracy & 11 Others (supra), Mutunga, CJ, in his concurring opinion added that:

> " Although the High Court and the majority in the Court of Appeal convincingly argued, relying on jurisprudence from various jurisdictions, that the High Court has supervisory jurisdiction over the decisions of the Vetting Board, they had not appreciated the unique historical context in which Kenya's Constitution should be interpreted and relied on foreign jurisprudence. The history of the country must be considered and 'a stereotyped recourse to interpretive rules of common law, statutes or foreign cases can subvert relevant contextual approaches. "

72. In the United Kingdom, the Judicial Pensions Act, 1959 first introduced mandatory retirement age for judges when it set the retirement age at 75 years.

73. Before 1959, judges served for life. By an express provision, the retirement age of 75 did not apply to judges already in office. In 1993 the Pensions andRetirement Actof that year further reduced the retirement age for judges to 70 years. Once again, by an express provision the new retirement age did not apply to the judges who were already in office.

74. In Australia, the Australia Constitution Alteration (Retirement of Judges) Act No. 83 of 1977 empowered Parliament to enact a law setting the retirement age of judges at less than 70 years and at any time to repeal or amend such law. However it was expressly provided that any repeal or amendment would not affect judges appointed before the amendment or repeal.

75. The Courts and Court Officers Act, 1995 of Ireland took a similar approach. It reduced the retirement age of ordinary judges of the Supreme Court from 72 to 70 years, but provided that judges appointed before 1995 would serve until 72 years.

76. In our view, the principle that a people have the power to change, and in particular to reduce the retirement age of judges is so evident to be denied or even disputed. The principle of sovereignty belies such precept. In addition, as we shall demonstrate later in this judgment, decisions abound which establish the principle that prescribed retirement age at the time of appointment does not constitute a vested right and does not vest in the employee or official a right to remain in office until that retirement age. (See for example Judge Rochelles S.Friedman & Others v Governor Thomas W. Corbett Jr. & Others, No 39 MAP, 2013; Townsend v. County of Los Angeles (supra) and Miller v. State of California, 18 Cal. 3d. 808). The foregoing three cases of UK, Australia, and Ireland indeed confirm that the retirement age of judges is not cast in stone. Even in Kenya, the appellant has relied on instances when the retirement age of judges has been altered, only that she claims the power to alter the retirement age should be towards increment only.

77. The real issue is not whether the retirement age of judges can be reduced; it is whether in the event of reduction, judges who are already in office would be affected. In a bid to establish something

akin to a principle of universal application that reduction of retirement age cannot affect serving judges, the appellant relied on varied material, in addition to the above instances in the United Kingdom, Australia and Ireland. First, Steven G. Calabresi and James Lindgren in an article titled "Term Limits for the Supreme Court: Life Tenure Reconsidered" Harvard Journal of Law and Public Policy [Vol. 229], 770, express the opinion as regards the USA, that any retirement age for the Supreme Court should be prospective only and that retrospective application of term limits would be "unfair and unnecessary." Also relied upon was "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice" (Report of Research Undertaken by Bingham Centre for the Rule of Law),Commonwealth Secretariat, 2015, where it is stated that lowering retirement age of judges with retrospective effect constitutes a violation of judicial independence because it poses a danger that such changes might amount to a backdoor method of removing judges.

78. The examples of the United Kingdom, Australia and Ireland show nothing more than the conscious choices made by the three countries, which in their context and circumstances opted for the choice that serving judges should not be affected by reduction in the retirement age. They enacted express statutory provisions to exempt serving judges from the new provision, strongly suggesting that if it was an obvious and immutable principle that reduction of retirement age cannot affect judges in office, such express provisions would have been superfluous or unnecessary. With respect, those cases cannot constitute precedent, which must be followed and bind all other countries.

79. In our minds, the dispute in this appeal cannot be settled by applying lock, stock and barrel the approach taken by other countries. It will be resolved by discerning whether the Constitution of Kenya elected to apply the retirement age of 70 to all judges or whether it exempted serving judges and preserved their retirement age under the former Constitution. By declining to adopt and apply in Kenya practices and provisions of other nations while interpreting the Constitution of Kenya on the background of its peculiar history and context, the High Court cannot be said to have erred. The Court, in our view was living up to the true meaning the Supreme Court caution that in interpreting the Constitution of Kenya, primacy must be given to its historical context.

80. We shall address the appellant's contention that her accrued and vested rights were violated by the respondents in the context of her other complaints alleging violation of a number of her other constitutional rights and freedoms.

81. First is the appellant's claim that retiring her at 70 years of age constitutes a violation of her right to property under Article 40(1) of the Constitution. The basis of this claim is the view that the additional 4 years that the appellant would have served before attaining the retirement age prescribed by the former Constitution as read with the Judicature Act constitutes contingent and expected property rights. In other words the appellant claims to have been denied the opportunity to work, receive personal emoluments until the age of 74 years and thereby increase her pension. That claim raises the further question whether the appellant has proprietary rights to the office of judge or the personal emoluments accruing therefrom up to retirement age, whatever it is.

82. There is a consistent line of judicial opinion, including from Kenya, that the tenured office of a judge is not to be regarded as an item of property in which a judge has proprietary interest until retirement. That was the holding of the High Court in Amraphael Mbogholi Msagha v. The Chief Justice & Others_, HC Misc. App. No 1062 of 2004//, which the trial court followed in this case. In the USA, in Mial v. Ellington, 134, N.C. 131 [1903], the Supreme Court of North Carolina held that a public office is not property and that an officeholder has no vested property interest therein.

83. The three decisions from the USA relied upon by the interested party are also pertinent to this issue. In Gorman v. City of New York(supra) the Supreme Court of New York Appellate Division held that merely because a member's benefits in a pension scheme may not be constitutionally impaired does not create a constitutional right to stay in public employment. Subsequently in Townsend v. County of Los Angeles(supra) the court of Appeals of California held that retirement age, if any, in effect when a public employee is hired, does not constitute vested right. And in Miller v. State of California(supra), in an action by a plaintiff challenging reduction of the mandatory age from 70 to 67 years, the Supreme Court of California held that the plaintiff had no vested contractual right to remain in State employment until the age of 70 years.

84. In the Philippines, the Supreme Court held in The Provincial Government of Camarines Norte v Beatriz O. Gonzales, G.R. No. 185740 that:

> " Security of tenure in public office simply means that a public officer shall not be suspended or removed or dismissed except for cause as provided by law and after due process. It cannot be expanded to grant a right to public office. Security of tenure is only violated if an individual is removed from position without sufficient cause and due process as provided by law."
>
> (See also another decision of the Supreme Court of the Philippines in Commission on Elections v Conrado Cruz & Others, C.R. No. 186616).

85. In Butler v. Pennsylvania,10 How. 402: 13L. ed. 472 the US Supreme Court rejected the argument that an official is entitled to pay for a period he expects to work, but has not in fact worked. The court expressed itself thus:

...promised compensation for services actually performed and accepted during the continuance of the particular agency may undoubtedly be claimed, both upon principles of compact and of equity, but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures."

86. Accordingly we are satisfied that the High Court did not err; that there is no property right to hold the office of judge under the Constitution; and that a judge has no right to a salary for a period not served and for services not rendered.

87. Closely related to the issue we have disposed of above is the question of the appellant's pension, which she claims will be diminished by 4 years if she were to retire at 70 years, thus violating her right to pension. The appellant's claim here raises two issues, namely her entitlement to pension for the period served and her right to earn future pension.

88. As regards the first limb, we entertain no doubt that pension constitutes property which is protected by the Constitution. Pension is either contributed, during the employment, by the employer alone, the employee alone, or by the employee and supplemented by the employer. Pension benefits are deferred to retirement or disability of the employee and are generally payable thereafter to dependants on the employee's death. Section 5(1) of the Pensions Act provides that every officer shall have an absolute right to pension and gratuity while section 6 (1) is express that no pension, gratuity or other allowance shall be granted under the Act to any officer except on retirement from public service. Accordingly, a

person entitled to pension, far from being a volunteer, has given valuable consideration and therefore when the employer is paying pension, he is not conferring bounty.

89. In Director of Pensions v. Cockar [2000] 1 EA 38, Shah, JA held that property includes choses in action, money and pension and that therefore arbitrary denial of accrued pension amounts to unconstitutional violation of the right to property. In India, the same view holds sway. Thus, for example, in State of Jharkhand & Others v. Jitendra Kumar Srivasteva & Another, CA. No. 6770 of 2013, the Supreme Court of India stated thus on pensions:

> " The antiquated notion of pension being a bounty a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar & Others. [1971] Su. S.C.R. 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension."

(See also, Bhagwant Singh v. Union of India, AIR 1962 PH. 503 and Imperial Group Pensions Trust Ltd v. Imperial Tobacco[1991] 1 WLR 589). Section 32 of the Sixth Schedule to the Constitution makes transitional and consequential provisions regarding pensions, gratuities and other benefits of holders of constitutional offices under the former Constitution, in the following terms:

> 32. The law applicable to pensions in respect of holders of constitutional offices under the former Constitution shall be either the law that was in force at the date on which those benefits were granted or any law in force at a latter date that is not less favourable to the person." (Emphasis added).

90. The above provision uses the term "granted" because under section 112 of the former Constitution as read with section 3(1) of the Pensions Act, it was provided that "pension, gratuities, and other allowances may be "granted" by the Minister in accordance with the Pensions Regulations, to officers who have been in service of Government". The provision uses the term "granted" deliberately because in Government service pension is not contributory.

91. Accordingly the pension paid to judges is non-contributory and is instead a grant made pursuant to a defined formula. This notwithstanding, section 5(1) of the Pensions Act makes that pension and gratuity an absolute right.

92. Other than the pension that the appellant claims she could have earned if she were to serve for 4 years, how is the appellant's accrued pension, which we have held constitutes property, threatened? To preserve independence of the Judiciary, most countries have constitutional provisions, which protect the pension benefits and the pension formula. That protection ensures that judges' pension benefits are not diminished or impaired. It therefore bolsters independence of the Judiciary by taking away the power to alter judges' pension, which is a potential source of illegitimate pressure and control of the Judiciary.

93. Several decisions from comparative jurisdictions on the issue affirm what we have stated above. Thus for example, the Supreme Court of Illinois, in In re Pension Reform Litigation, 2015, IL, 118585 reiterated that the pension protection clause eliminates any uncertainty as to whether the State or Government is obliged to pay pension benefits to its employees, makes participation in a public pension plan an enforceable contractual relationship and demands the benefits of the relationship shall not be diminished or impaired. (See also McDermott v Reagan 82 NY2d 534 604; and Allen v. City of Long Beach, Cal. 1995).

94. The appellant asserts that the judgment of the High Court violated her pension rights under section 32 of the Sixth Schedule. In our view, that provision neither creates nor confers pension rights. It only safeguards and protects the pension formula by prohibiting its alteration to the disadvantage of judges. The phrase "the law applicable to pensions"/ in the provision as read with Article 160(4) of the Constitution provides constitutional protection to the pension formula that was in force and applicable in determining the pension due to holders of constitutional offices under the former Constitution. The provision therefore ensures that the formula shall not be less favourable to the retiring person. Section 32 of the Sixth Schedule must also be read with section 31(2), which provides for continuity of service and section 7, which allows continuation of the Pensions Act as an existing law. Section 32 of the Schedule transits and re-enacts section 112(1) of the former Constitution into the Schedule.

95. The pension formula that is protected under section 32 of the Sixth Schedule is inter alia, the pension formula in rules 4 and 5 of the First Schedule to the Pensions Act and the qualifying service as defined in rule 2 of the Pensions Regulations. The formula provides that every officer shall be granted retirement pension at the annual rate of one four hundred-eighth of his or her pensionable emoluments for each completed month of his or her pensionable service. Section 32 also protects increment in pensions as provided for in the Pensions (Increase) Act.

96. We therefore harbour no doubt that pursuant to the above provisions the pension formula as well as the appellant's and other judges' pension for the period served is guaranteed and protected by the Constitution. Whilst the length or period of service is affected by the retirement age, the only right that the appellant can claim under section 32 of the Sixth Schedule is the right not to have the pension formula varied to her disadvantage or detriment. Ultimately therefore, the lowering or increasing of the age of retirement does not alter the pension formula while the appellant's pension is protected by Article 160(4) of the Constitution which transited and substantially re-enacted section 104(3) (4) (5) and (6) of the former Constitution.

97. Accordingly we are satisfied that the right to pension for the period in which service has been rendered is a property right and accrued pension is vested property right. There is no evidence on record that such right of the appellant has been violated or is even threatened. We are however not persuaded that there is a right to pension in respect of an anticipated period in which no service has been actually rendered. In such period there are no contingent or accrued rights. Our conclusion in this respect therefore also settles the appellant's contention that her right to property was violated by retrospective application to her of Article 167(1) of the Constitution.

98. We now turn to consider the appellant's argument that the respondents violated her right to equality and freedom from discrimination under Article 27. In Andrews v Law Society of British Columbia [1989] 1 SCR 143, the Supreme Court of Canada explained the essence of discrimination as follows:

> " Discrimination is a distinction which, whether intentional or not (is) based on grounds relating to personal characteristics of the individual or group, (and) has effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society."

99. It cannot be gainsaid that differential treatment *per se* does not in and of itself constitute a violation of the right to equality or the kind of discrimination prohibited by the Constitution. The differential treatment must be based on the grounds prohibited by the Constitution and be devoid of any reasonable or rational basis. Judge Tanaka, of the International Court of Justice powerfully articulated

the essence of equality in his dissenting opinion in the South West Africa Cases (www.icj-cij.org/docket/files/46/4945.pdf) as follows:

> " The most fundamental point in the equality principle is that al1 human beings as persons have an equal value in themselves, that they are the aim itself and not means for others, and that, therefore, slavery is denied. The idea of equality of men as persons and equal treatment as such is of a metaphysical nature. It underlies al1 modern, democratic and humanitarian law systems as a principle of natural law. This idea, however, does not exclude the different treatment of persons from the consideration of the differences of factual circumstances such as sex, age, language, religion, economic condition, education, etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently. We know that law serves the concrete requirements of individual human beings and societies. If individuals differ one from another and societies also, their needs will be different, and accordingly, the content of law may not be identical. Hence is derived the relativity of law to individual circumstances.
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> ...
>
> We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal."

100. That the Constitution provides that a judge must retire upon attaining 70 years of age cannot constitute discrimination on grounds of age. The Constitution, which prohibits unequal treatment and discrimination, cannot itself be said to discriminate. As Mutunga, CJ observed in Judges & Magistrates Vetting Board & 2 Others v Centre for Human Rights &Democracy & 11 Others (supra), no provision of the Constitution can be said to be unconstitutional; that would be a major contradiction in terms. The Constitution and statutes are dotted with many provisions, which set age as a qualification criterion, without the slightest suggestion of discrimination, irrationality or unreasonableness. For example, under Article 57(d), persons who have attained 60 years of age (older members of society) are entitled to receive reasonable care and assistance from the State, which other persons are not entitled to. Under Article 53, persons who have not attained 18 years of age (children), have special rights and privileges that are not available to those who have attained that age. Under the Elections Act the right to vote is reserved for persons who have attained 18 years of age, just as under the Traffic Act, the right to lawfully drive a motor vehicle is reserved for people who have attained 18 years of age. In all those cases the rational basis of the differential treatment on grounds of age is so obvious that it does not require any elaboration from us.

101. On the same basis, it is in our view stretching imagination to lofty heights, to claim that when the Constitution or a law sets a retirement age, that constitutes unequal treatment or discrimination on grounds of age. Indeed Article 24(1) as read with Art 25 of the Constitution allows limitation of the right guaranteed by Art 27, so long as the conditions set in Article 24 are satisfied.

102. The more substantial issue raised by the appellant is her differential treatment by the respondents vis-à-vis her two colleagues who, though appointed under the former Constitution, were allowed to serve until they reached 74 years of age. The respondents' explanation for the differential treatment, is that the two judges served until 74 because the respondents were then labouring under a misapprehension that section 31 of the Sixth Schedule allowed judges appointed under the former Constitution to serve until 74 years.

103. Subsequently, they came to the conclusion that the correct view of section 31 was that it did not extend the retirement age for judges appointed under the former Constitution and that the retirement age for all judges was 70 years as provided in Article 167(1).

104. That explanation was accepted by the High Court. We do not see any evidence of deliberate policy of differential treatment adopted by the respondents. Since taking the view, correct or otherwise, that all judges must retire at 70 years of age, the respondents have not allowed any other judge to serve beyond 70 years of age, save in compliance with orders issued by the courts. The appellant does not suggest that her two colleagues were allowed to serve until 74 years for an unconstitutional reason, such as the fact that they are men and she is treated different because she is not.

105. Having carefully considered this aspect of the appeal, we are satisfied that the High Court did not err in concluding that the respondents had not deliberately subjected the appellant to unequal and discriminatory treatment.

106. We, in particular deduce the respondents' *bona fides* in this regard that they went out of their way to seek legal opinions from the Attorney General and some of the leading advocates of the Kenya Bar, who had equally divided opinions on the retirement age of judges appointed under the former Constitution.

107. Under Article 10 (1) (a) the Constitution anticipates that state organs and public officers like the respondents, in the discharge of their functions may be called upon to interpret and apply the Constitution. In our view, it is not practical to expect a State organ, created by the Constitution and empowered to execute a mandate flowing from the Constitution not to be involved in some form of appreciation and interpretation of the Constitution at threshold level.

108. That is what Article 10(1) (a) of the Constitution anticipates, otherwise the provision would not have been necessary if State organs, state officers and public officers or indeed "all persons" had absolutely no role in the issue. When there is a dispute however, regarding the interpretation of the Constitution, the final and authoritative interpretation does not lie with the State organ, State officer, or public officer or any other person. That mandate is given to the Judiciary in Chapter 10 of the Constitution. Accepting the appellant's submission comes perilously close to saying that any interpretation of the Constitution, however erroneous, by a State organ or public officer would be absolutely binding. We cannot countenance that possibility. The quest by the appellant to be treated in like manner as her two colleagues, when it is contended that their treatment was based on a misapprehension of provisions of the Constitution by an organ that does not have the final authority in the interpretation of the Constitution, and when there is no *mala fides* alleged or apparent on the part of the respondents, must be rejected because the appellant does not have a right to retire at an age that is not set by the Constitution.

109. The next issue we shall dispose of is whether the High Court erred by finding that the respondents did not violate the appellant's right to fair administrative action under Article 47 of the Constitution. The appellant's complaint in this ground of appeal is that the 1st respondent did not afford her an opportunity to be heard before taking an adverse decision, and also did not give her written reasons for its decision.

110. The right to a hearing before an adverse decision is taken against a person and the right for that person to be given reasons for an adverse decision cannot be contested in view of the provisions of Article 47 of the Constitution and the provisions of the Fair Administrative Action Act, 2015.

111. Having carefully re-evaluated and re-appraised the evidence, we agree with the appellant that the High Court erred when it concluded, on the facts of this appeal, that the 1st respondent heard the appellant

through writing before it took the decision of 27th March 2014. The evidence on record does not support that conclusion but is instead clear that the letter addressed to the 1st respondent by the appellant and some judges of the Supreme Court, which the High Court found to have constituted a hearing, was written on 17th April 2014, yet the decision of the 1st respondent that aggrieved the appellant was made on 24th March 2014 and communicated on 27th March 2014. Therefore it could not have been received and considered by the 1st respondent before the date it was written. Clearly, the appellant's representation was made after the 1st respondent's decision and there is no evidence on record that the 1st respondent reconsidered the matter after receiving the appellant's representations.

112. On the second issue, there is no dispute that the 1st respondent did not give the appellant any written reasons for its decision that was communicated on 27th March 2014. Section 6(4) of the Fair Administration Act provides that where reasons for a decision are not given, a presumption arises that the decision was taken without good reason.

113. The crux of the matter is what is the consequence of the 1st respondent's failure to hear the appellant and to give her written reasons? Having found that the authoritative interpretation of the Constitution for purposes of determining the retirement age of judges (the very issue upon which the appellant wanted to be heard by the 1st respondent), lies with the Courts, the failure by the 1st respondent to give the appellant a hearing and written reasons, is of no moment because, and as this litigation has vividly demonstrated, the 1st respondent's take on the retirement age of judges was neither authoritative nor binding.

114. Again, we are satisfied that the High Court did not err in its conclusion that whether the 1st respondent gave the appellant a hearing or not or whether it gave her reasons or not, the authoritative, conclusive and binding determination of the retirement age of judges, is an issue for the courts, not for the 1st respondent.

115. The claim that the respondents violated the appellant's right to fair labour practices is so closely intertwined with the claim of violation or disregard of the appellant's legitimate expectation, that it is convenient to address the two together. In both grounds of appeal, the basis of the complaint is that the 1st respondent made a written commitment, from which it later arbitrarily resiled.

116. The appellant's additional complaint as regards her legitimate expectation is that the High Court framed the same as one of the issues for determination, but ultimately failed to determine the issue.

117. It is patently clear that at page 32 of its judgment, the High Court framed legitimate expectation as one of the issues for determination. From pages 88 to 99 of the judgment, the High Court extensively considered the doctrine of legitimate expectation. While it is true that the court did not expressly state whether the appellant had any legitimate expectation, a proper reading of the judgment makes it palpably clear that the High Court rejected the claim that the appellant's legitimate expectations were violated.

118. In our view, the High Court's conclusion to that effect comes out clearly from its erroneous conclusion that the 1st respondent heard the appellant before it made its second decision of 27th March 2014. In other words, the High Court found that after the 1st respondent made and communicated to the appellant, among other judges, its first decision to the effect that the retirement age of judges appointed under the former Constitution was 74 years, it heard the appellant in writing before reversing its decision and settling for 70 years as the retirement age for all judges. Having been heard by the 1st respondent and having ultimately been informed that the retirement age was 70 years, the appellant had no legitimate basis for continuing to expect that the retirement age for judges was 74 years.

119. Be that as it may, we shall address the issue, not the least because the appellant invited us to re-evaluate the evidence and come to our own conclusion. As has been observed time and again, legitimate expectation is a doctrine that is well recognized and established in administrative law. In Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others, SC Petition Nos. 14, 14 A, 14B & 14C of 2014, the Supreme Court stated that legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill. For an expectation to be legitimate, therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfill the expectation.

120. The appellant's claim for legitimate expectation is founded on section 9 of the Judicature Act as read with section 31 (1) of the Sixth Schedule and the 1st respondent's decision of 24th May 2011 that the retirement age for judges appointed under the former Constitution was 74 years. Subsequently the 1st respondent violated the appellant's legitimate expectation by its second decision communicated on 27th March 2014 determining that the retirement age for all judges is 70 years. Accordingly the appellant claims that the 1st respondent changed goalposts and took a diametrically opposite position and violated her legitimate expectation to retire at the age of 74 years.

121. The decision of the Supreme Court that we have just cited adds that legitimate expectation involves a representation that must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. Other important aspects of the doctrine is that the law does not protect every expectation save only those which are legitimate (South African Veterinary Council v. Szymanski 2003 ZASCA 11); clear statutory words override any contrary expectation, however founded (R. v. DPP ex parte Kebilene and Republic v Nairobi City County & Another, ex parte Wainaina Kigathi Mungai, HC. JR. Misc. C. No 356 of 2013; the representation must be one which the decision-maker can competently and lawfully make without which the reliance cannot be legitimate Hauptfleisch v Caledon Divisional Council [1963] (4) SA 53); legitimate expectation does not arise when it is madeultra vires the decision-maker's powers (Rowland v Environment Agency [2003] EWCA Civ. 1885; and a public authority which has made a representation which it has no power to make is not precluded from asserting the correct position which is within its power to make (Republic v Kenya Revenue Authority, ex parte Aberdare Freight Services Ltd [2004] 2 KLR 530).

122. A pertinent question in this appeal is whether the 1st respondent's decision of 24th May 2011 created a legitimate expectation on the part of the appellant that she would retire at 74 years. Was this decision a promise to the appellant that she would serve and hold office as a judge until the age of 74 years? In our view, the 1st respondent's decisions on the retirement age of judges are a reflection of its diverse interpretation of section 31 (1) of the Sixth Schedule to the Constitution and Article 167 (1) of the Constitution which we have held under the Constitution could not be final and authoritative. That the appellant could not possibly have been misled into believing that she would retire at 74 years of age is also evident from the advertisements that the respondents caused to be published in two daily newspapers, The Star of Thursday, 8th November 2012 and The Standard of Tuesday, 4th December 2012 regarding the vacancy in the office of the Deputy Chief Justice and Vice President of the Supreme Court. Those advertisements were crystal clear that the office was a constitutional office and that the retirement age was 70 years with an option to retire on attaining the age of 65 years. These advertisements were more than one and half years after the decision of 24th May 2011 that the appellant claims to have constituted the basis of her legitimate expectation that she would retire at 74 years of age.

123. To quote the Supreme Court again in Communication Commission of Kenya & 5 others v. Royal Media Services & 5 others (supra):

(288) What is the legal effect of such general policy statements, in relation to the Commission, or to the public? Are they capable of being a basis for a legitimate expectation that the 1st appellant ought not to abrogate?

...

[290] It was not possible, in our view, for a general statement of policy by the Government, however clear or unambiguous, to be attributed to, or construed as a promise by CCK to the media-fraternity, that the grant of licences would take a particular course. Policy statements by the Government cannot confer or assure a promise of a specific benefit to third parties, so as to be enforceable against a particular public institution even where that institution is vested with the mandate to perform the task in respect of which the Government has given a clear promise. This is because under the Kenya Information and Communications Act, 1998, the Government is not a decision maker on issues of BSD licensing and, by extension, had no competence, or lawful basis to make a binding promise that such licensing would ensure a 'maximization of use of broadcast infrastructure." (Emphasis added).

124. In the context of this appeal, under Article 167 (1) of the Constitution, the 1st respondent is not competent to make final, authoritative and binding decisions determining the retirement age of judges. It could not make a binding promise on what is the retirement age for any judge. The retirement age for judges is set and fixed by the Constitution and cannot be a subject of promise or legitimate expectation derived from the unbinding opinions of the 1st respondent. Such opinions cannot form the basis for legitimate expectation.

125. A pre-requisite to successful invocation of the doctrine of legitimate expectation is that the person who bases his or her claim on the doctrine has to satisfy that he or she has relied on the decision-maker's representation to his or her detriment. In the instant case, the appellant has not demonstrated how she relied on the 1st respondent's decision to her detriment. A claim based on mere legitimate expectation, without anything more in the form of suffered detriment, cannot *ipso facto* sustain an action founded on the doctrine of legitimate expectation. (See Sethi Auto Service Station & Another v. Delhi Development Authority & Others, [2009] 1 SCC 180//**).

126. In the final analysis, we are satisfied that even if the High Court did not determine the issue of legitimate expectation (which we have found it did), in the circumstances of this appeal the appellant's claim founded on legitimate expectation was not sustainable. For the same reasons, the appellant's claim of violation of her right to fair labour practices, which is founded on decisions of the 1st respondent that it was not competent to make, is unmeritorious.

127. Turning to the central issue raised by the appellant in this appeal, namely whether the High Court's determination that the appellant's retirement age under the former Constitution was not preserved by section 31(1) of the Sixth Scheduled is sound, there are a couple of issues raised by the appellant touching on that issue that require to be disposed of.

128. One of them is the appellant's contention that she was appointed to the Judiciary and has been holding the office of judge in the superior courts of Kenya, which is an office of judge in the Judiciary. She argues that prior to the effective date, she was appointed judge of the High Court, which is a superior court and that under the Constitution, a judge of the Supreme Court is a judge of a superior court. Consequently, she submits that her status as judge of a superior court is continuous and uninterrupted under both Constitutions and that being a judge of a superior court, her tenure (which includes the retirement age of 74 years under the former Constitution), was preserved, safeguarded and continued by section

31(1) of the Sixth Schedule. She contends further that the Judiciary as re-established under the 2010 Constitution is the successor institution to the Judiciary that existed under the former Constitution.

129. This line of submissions was made to counter the contention by the respondent's that the appellant was appointed to the office of Deputy Chief Justice and judge of the Supreme Court under the Constitution because those offices did not exist under the former Constitution.

130. The appellant's argument begs the question whether a judge holds office in the Judiciary or is appointed to a particular superior court. The appellant's submission is that a judge holds office in the Judiciary as judge of the superior courts. This, in our view is not entirely correct; a judge holds a specific constitutional office which office is an office in the Judiciary. A judge is not appointed to the Judiciary or generally to the superior courts. He or she is appointed to a constitutional office of judge of a specific superior court.

131. Under the former Constitution, a judge was appointed to a specific judicial office either, as Judge of the High Court or Judge of Court of Appeal. There is and was no constitutional office to which a judge could be appointed known as "the Judiciary"; the Judiciary is an institution that has both constitutional office holders and non-constitutional office holders. As Waweru, J. stated in his dissent in Benson Ndwiga Njue & 108 Others v Central Glass Industries Ltd HCCC No 515 of 2003, a judge cannot be appointed at large without portfolio. The Judiciary does not have the equivalent of the concept of "minister without portfolio." A judge is appointed to a particular court.

132. To buttress this position, Article 161 (1) provides that "The Judiciary consists of the judges of the superior courts, magistrates, other judicial officers and staff." Not all persons serving in the Judiciary are judges or constitutional office holders whose tenure has constitutional underpinning. In this context, the appellant's submission that she was appointed in the Judiciary, which is a successor institution to the former Judiciary, is not tenable in law. Under the former Constitution, the appellant was appointed to the specific constitutional office of judge of the High Court and judge of the Court of Appeal. It is the office of a judge of the High Court or of the Court of Appeal that was a constitutional office under the former Constitution and the holder thereof a constitutional office holder.

133. In Karisa Chengo & 2 Others v. Republic, Cr. App. Nos. 44, 45 and 76 of 2014, this Court expressed the view that a judge is appointed to a specific court; that Section 2 of the Judicature Act defines a "judge" to mean the Chief Justice or Puisne Judge appointed under Section 61 of the former Constitution (equivalent of Article 166 (5) of the Constitution) or a Judge of Appeal appointed under Section 64 of the former Constitution (now Article 166 (4) of the Constitution). The professional experience required for each office of judge of superior court is different; when the vacancies for appointment of judges are advertised, an applicant elects to apply to a specific court that he or she aspires to join; courts established under the Constitution and judges appointed thereto are synonymous with the court they are appointed to. Each judge appointed to a particular court possesses the requisite constitutional qualifications for that court, which vary from court to court and so it cannot be said, without more that a judge is a judge: He or she is a judge of what court? It cannot be said that the judge was appointed to serve in the superior court or the Judiciary because his or her jurisdiction is tied to a court. The Judiciary as an institution has no jurisdiction to hear and determine cases; jurisdiction is vested in a specific court.

134. In addition, in Karisa Chengo & 2 Others v. Republic (supra) this Court expressed the view that once a judge is appointed, he takes the oath of office to the specific court he has been appointed to and the judge can only exercise the jurisdiction conferred to the court he is so appointed.

135. The second issue relates to whether the appellant was promoted from office of judge of the High Court to judge of appeal and ultimately to judge of the Supreme Court. The concept of "promotion"

entails advancement from one position to another, involving increase in duties and responsibilities and increase in compensation and benefits. We doubt whether in the context of judicial offices, movement from one court to another is promotion, unless the term is loosely used. The former and current Constitutions provide for specific constitutional offices and office holders.

136. The appellant contends that after the effective date, she was promoted to a judge of appeal and then to Deputy Chief Justice and Vice President of the Supreme Court and judge of the Supreme Court. Both the former and current Constitutions have no provision for career path advancement or progression for individual judges of superior courts; there is no career path or scheme of service for progression from one superior court to another; and indeed there is no guarantee of advancement through the tiers of superior courts. Individual judges are appointed to specific and designated superior courts. The concept of a judicial career spanning roles in different tiers of courts is applicable in the magistracy and to some extent to other subordinate courts. While promotion is pegged on an appraisal system and a scheme of service, there is no systematic use of appraisal for advancement or progression from one tier to another in Kenya's superior court system.

137. A reading of Article 166 (3) (a), (b); Article 166 (4) (a) and Article 166 (5) (a) shows that one of the criteria or qualification for appointment to the position of judge of a superior court in Kenya is experience as a superior court judge or professional magistrate. This criterion is listed among others in the respective sub-articles. All the listed criteria for qualification for appointment to be a superior court judge are disjunctive and each criterion carries equal weight to the other. The requirement for experience as a superior court judge is one of the disjunctive requirements for appointment and it is neither a criterion for promotion nor for continuity of service. Any other interpretation would lead to absurdity for how can it be said that the criteria for years of experience as a distinguished academic or legal practitioner is a criteria for promotion? It would be absurd to pick, isolate and choose one criterion for experience as judicial officer in Article 166 (3) (a) (b) and 166 (4) a) and 165 (5) (a) and hold the same to be criterion for promotion while the rest are criteria for appointment. The heading or title to Article 166 is explicit that the Article is about appointments to office of judges of the specified superior courts; it is not about promotion of judges.

138. Accordingly we are satisfied that in Kenya a judge is appointed to a specific court and that he or she is not promoted from one court to another. A person who is appointed a judge of the High Court or of the Court of Appeal or of Supreme Court is appointed pursuant to separate and distinct Articles of the Constitution and holds separate and distinct constitutional office with separate and distinct jurisdictions. Even though for example a judge of the High Court may apply and be appointed as Judge of Appeal, the appointment is separate and distinct, not a promotion as loosely understood. Having been a judge in one court before appointment to another is only relevant for continuity of service for pension purposes, and this is what is preserved by section 32 of the Sixth Schedule to the Constitution as read with Section 5 of the Pensions Act and Article 160 (4) of the 2010 Constitution.

139. The appellant's submission that having been appointed a judge of a superior court under the former Constitution, it does not matter in which superior court she serves, begs the further question whether the Supreme Court is a successor institution to any office established by the former Constitution. This is because the appellant further asserts that the Judiciary existing before the effective date was re-established under the Constitution and that the re-established Judiciary is the successor to the former Judiciary. In the premises she argues, she continues to hold office as judge of a superior court in

the re-established successor Judiciary. Section 33 of the Sixth Schedule provides as follows regarding succession of institutions, offices, assets and liabilities:

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

140. Under the former Constitution, the Judiciary encompassed *inter alia* the magistracy, the High Court and the Court of Appeal. The superior courts were the High Court and Court of Appeal, while the Supreme Court did not exist. The Constitution established the Supreme Court pursuant to Articles 162 (1) and 163 (1) as one of the superior courts in Kenya. The office of a judge of the Supreme Court is an office that neither existed nor was established under the former Constitution. No one held the office of judge of the Supreme Court under that Constitution and the Supreme Court was not an existing office within the meaning of Section 31 of the Sixth Schedule. The Supreme Court is neither a successor to any office nor a corresponding office or institution that existed under the former Constitution. The rights embodied in Section 31 (1) of the Sixth Schedule relate to existing offices or corresponding offices by whatever name called, and such rights cannot *ipso jure* inhere to any person holding the office of judge of Supreme Court, which was not an existing office and is not a successor or corresponding office to any office under the former Constitution.

141. A further pertinent and related question is whether the Office of Deputy Chief Justice is a successor institution or office to any office established under the former Constitution. Just like the Supreme Court, the office of the Deputy Chief Justice was not established by and did not exist under the former Constitution. Accordingly it does not have a corresponding office by whatever name called in the former Constitution.

142. It follows that neither the Supreme Court nor office of Deputy Chief Justice nor the office of Judge of the Supreme Court are successors to any office established under the former Constitution. Indeed under section 29 of the Sixth Schedule, they are all among the institutions where new appointments were contemplated by the Constitution.

143. The third issue is whether section 62 of the former Constitution and section 9 of the Judicature Act continue in force as part of the laws that existed prior to the effective date and were saved by the section 7(1) of the Sixth Schedule. The appellant urges that those sections continue in force as part of existing laws under the Constitution. For convenience we must reproduce those three provisions.

Section 62(1) of the former Constitution provided thus:

> " 62(1) Subject to this section, a judge of the High Court shall vacate his office when he attains such age as may be prescribed by Parliament."

Section 9 of the Judicature Act provides:

> "9. For the purposes of section 62(1) of the (former) Constitution, the age at which a person holding the office of judge shall vacate his office shall be seventy-four years."

Lastly section 7(1) of the Sixth Schedule of the Constitution provides as follows:

Existing Laws

7(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

144. The purpose of section 7 is to avoid a legal interregnum in the transition between the two constitutional orders, for it is not practical to immediately enact a whole gamut of laws under the new order. Section 7 therefore legitimizes the laws enacted under the old order and in existence on the effective date and sanctions their continuity, subject to their interpretation and application in a manner that is consistent with the new constitutional order. (See Kassamali Co. v. Kyrtatas Brothers [1968] EA 542 and Royal Media Services Ltd v Attorney General & 2 Others HC Petition No. 346 of 2012.

145. The natural question to ask is what laws were transited and continued by section 7? Do those laws include the former Constitution itself or sections of it?

146. The Constitution does not define the term "existing laws", but it is instructive to note that section 2 of the Constitution of Kenya (Amendment) Act, No. 28 of 1964 defined existing law to exclude the Independence Constitution and restricted the meaning to any Act, enactment, law, rule regulation, order or other instrument made or having effect as part of the laws of Kenya. It is also important to note that section 2 of the Interpretation and General Provisions Act, for purposes of interpretation, defines law to exclude the Constitution.

147. In our view, section 7 cannot transit the former Constitution or any of its provisions into the current Constitution as an existing law, firstly for the obvious reason that it would result in the absurdity of a new constitutional order perpetuating the old. Secondly, where the Constitution intended to continue in operation a provision or provisions of the former Constitution, it provided so expressly in section 3 of the Sixth Schedule. Thirdly, with the exception of the provisions of the former Constitution that were expressly saved by section 3 of the Sixth Schedule, the former Constitution stood repealed in its entirety on the effective date. With respect, we are convinced that section 62(1) of the former Constitution was not transited into the Constitution by section 7 of the Sixth Schedule as existing law.

148. The corollary question is whether section 9 of the Judicature Act was transited to continue in force under the current Constitution as part of existing law. Section 9 of the Judicature Act is anchored on section 62 of the former Constitution and is not a standalone provision, which could be transited on its own. Being a provision that is underpinned by the former Constitution, it does not have an independent existence; that is why it expressly refers to section 62(1) of the former Constitution. So how could it have been transited to the Constitution when the provision of the former Constitution that it was implementing, was repealed?

149. We are satisfied that both section 62(1) of the former Constitution and section 9 of the Judicature Act were not transited and saved into the Constitution by section 7 of the Sixth Schedule. To the extent that those provisions were not transited into the Constitution, the matters that they provided for are, with effect from the effective date provided for by the Constitution.

150. As we turn to consider the appellant's retirement age under the Constitution, it is pertinent to first point out in outline the nature and extent of the changes that the people of Kenya, in the exercise of their sovereign power, introduced to their governance system through the promulgation of the Constitution in 2010. Those changes, far from being confined to a single clause on the Judiciary, fundamentally altered and redefined all other state institutions.

151. Upon the promulgation of the Constitution, among others, a devolved system of government was introduced dismantling power that hitherto was concentrated in the national government and diffused a substantial part of it to 47 county governments; the powers of the Executive were considerably

reduced; a Westminster type cabinet government was replaced by an executive one; the legislature was transformed from a unicameral to a bicameral institution; the electoral system changed from a pure first-past-the-post to include a form of proportional representation, a revamped bill of rights, incorporating economic social and cultural rights was introduced; and a host of watchdog institutions were created and granted constitutional mandate. The Attorney General and the Auditor General in office immediately before the effective date were to vacate office within one year and their replacements were to be appointed under the Constitution. In the Judiciary, beyond reduction of the retirement age of judges from 74 to 70 years, a supreme court was introduced at the apex; the office of the deputy chief justice was created; a new transparent and competitive system of appointing judges was adopted; the Chief Justice in office immediately before the effective date was required to vacate office within six months to the intent that the successor would be appointed under the Constitution; and serving judges were subjected to vetting to determine their suitability to continue serving. We refer to these developments to emphasize the point that what happened in 2010 was not a mere constitutional amendment to change a provision of the Constitution on retirement of judges; it was a fundamental rethink and reorganization of the State and its institutions.

152. Much has been said and written on why, as regards the Judiciary, the people of Kenya considered fundamental changes imperative. We shall quote just three sources in that regard. The Final Report of the Committee of Experts on Constitutional Review (COE), 11th October 2010, the body that was charged with the responsibility spearheading the finalization of the constitutional review process gives the background and rationale of the reforms in the Judiciary as follows:

> " Submissions to the Committee of Experts on the Judiciary were virtually unanimous on one point: the Judiciary must be reformed. The Committee of Experts received a number of submissions on how this should be done. These submissions can be classified into two groups: those that proposed that the entire Judiciary should be reappointed (with all judicial officers or at least all judges being treated as having lost their jobs but permitted to reapply); and those that proposed a more gentle approach-that judicial officers remain in office but are required to take a new oath and undergo a 'vetting process.' " (Emphasis added).

153. Before that, the Constitution of Kenya Review Commission, the COE's predecessor, established the Advisory Panel of Eminent Commonwealth Judicial Experts to advise on constitutional reforms regarding the Judiciary.

154. In its report dated 17th May 2002, the Panel observed as follows:

> " The Advisory Panel has drawn two general conclusions as a result of its Programme of Consultation. Regrettably, the first is negative. We have concluded that as presently constituted, the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform. It is our considered view that strong measures are necessary for Kenya to achieve an independent and accountable Judiciary, capable of serving the needs of the people of Kenya by securing equal justice and the maintenance of the rule of law under a new constitutional order...We are disappointed to report that the Kenya Judiciary has failed to come to grips with the crisis confronting it." (Emphasis added).

155. Lastly, the Chief Justice, reflecting on the state of the Judiciary under the former Constitution, stated as follows after being in office for slightly more than 100 days:

> "We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a Judiciary that was designed to fail. The institutional structure was such that the Office of the Chief Justice operated as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralised. Accountability mechanisms were weak and reporting requirements absent."

(See the Judiciary Transformation Framework, 2012-2016, page 7.) That is a snapshot of what necessitated reforms in the Judiciary, part of which entailed reduction in the retirement age of judges, the subject of this litigation.

Section 31 of the Sixth Schedule to the Constitution provides as follows:

"Existing offices

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

156. Subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution.The provisions of this section shall not affect the powers conferred on any person or authority under this Constitution or legislation to abolish offices or remove persons from an office contemplated in subsection (2).Subparagraph 4)

If a person has vacated an office that the person held before the effective date, and that office is retained or established under this Constitution, the person may, if qualified, again be appointed, elected, or otherwise selected to hold that office in accordance with the provisions of this Constitution, except to the extent that this Constitution expressly provides otherwise.

The functions of the Director of Public Prosecutions shall be performed by the Attorney-General until a Director of Public Prosecutions is appointed under this Constitution.The functions of the Controller of Budget shall be performed by the Auditor-General until a Controller of Budget is appointed under this Constitution.SUBPARAGRAPH (7)

157. Despite subsection (1), the Attorney-General and the Auditor-General shall continue in office for a period of no more than twelve months after the effective date and the subsequent appointments to those offices shall be made under this Constitution.

158. After interpreting the above provision, the High Court delivered itself as follows at paragraph 388 of its judgment, regarding section 31(1):

> "Accordingly, if there are other provisions in the Schedule which have a contrary effect, section 31(1) would obviously not apply. Such application is expressly excluded by the wording of the section. Clearly, the provision is a catch-all provision applicable in a wholesale and unqualified manner to any and sundry constitutional offices not specifically

provided for and in addition are officers serving a periodic term, hence, the reference to "the unexpired period, if any, of the term of that person."

159. The court then concluded that there was a clear distinction between the words "term" and "tenure". The court further found that the word "term" in the section is used in reference to an office held for a specific period of time in years, whose termination is not dependent on a retirement age or an age set for the vacation of office, but rather ends by effluxion of the specified time period in years. "Tenure", on the other hand, the court continued, refers to an office held for unspecified duration from the date of appointment, ending upon attainment of a specified age. Accordingly the court held that section 31(1) does not apply to judges who were in office on the effective date because they were to serve until a retirement age and not for a fixed term of years. In support of that holding the court noted that section 23 of the Sixth Schedule provided that judges appointed under the former Constitution who were vetted and found suitable, were "to continue to serve" rather than to continue to hold or act in their offices "for the unexpired period of the term".

160. As regards section 31(2), of the Sixth Schedule the High Court expressed the view that it is broader and provides for the transition of persons holding a public office, including judges, but excluding the Attorney General, Auditor General and Chief Justice who were otherwise expressly provided for. The court made the further point that both under the former and the current Constitutions, judges fell within the definition of public officers, before concluding that the purpose of section 31(2) therefore was to transition into the new constitutional order all public officers who were not serving under a fixed period of a term, including judges. Whether under section 31(1) or 31(2), the court noted, the offices that were transited from the former Constitution were to be held under the current Constitution, meaning that the retirement age of judges would be the 70 years set by Article 167(1) of the Constitution.

161. In resolving the question of the proper interpretation of section 31(1) and 31(2) of the Schedule, a lot of light is shed by the approach that Kenya took in 1964 when it transited from the Independence Constitution of 1963 to a Republican Constitution. ***The Constitution of Kenya (Amendment) Act, No. 28 of 1964*** was passed making transitional provisions on continuity of laws and existing offices. What is significant is that whilst the relevant provision transiting offices was worded in largely similar manner to section 31(1), it contained a specific proviso to transit persons who under the Independence Constitution were supposed ***to vacate office on the attainment of prescribedretirement age***. The effect of that proviso was to save and preserve the retirement age prescribed under the old order. Under the Independence Constitution, judges did not serve for life; like under the former Constitution their retirement age was set by Parliament. The pertinent part of the Act, section 19, provided as follows:

Continuity of Offices

19.

(1) Subject to the provisions of this Section, any person who immediately before 12th December 1964 held or was acting in any office established by or in pursuance of the Constitution shall, so far as is consistent with the provisions of this Act and the amended Constitution, be deemed to have been appointed, elected, or otherwise selected on 12th December 1964 to hold or to act in the same or the equivalent office under the amended Constitution and to have taken any necessary oath under the amended Constitution:

Provided that: -

Any person who under the Constitution or under any existing law would have been required to vacate his office at the expiration of any period or on the attainment of any age shall vacate his office at the expiration of that period or on the attainment of that age;2...

162. In determining (for purposes of any law relating to pension benefits or otherwise to length of service) the length of service of a public officer to whom subsection (1) of this section applies...shall be deemed to be continuous with service as a public officer under the Republic which begins on that day.In this section "pension benefits" means any pension, compensation, gratuities or other like allowances for persons in respect of their service as public officers..."The proviso, in addition to transiting persons who were to vacate office at the expiration of a specified period (like a term) also specifically transited persons who were to vacate office on the attainment of the prescribed age and saved their retirement age under the former constitutional order. The fact that section 31(1) does not contain a similar specific provision convinces us that the distinction made by the High Court between *"term"* and *"tenure"* is not as idle a distinction or hair splitting as the appellant contends, but has considerable merit.

163. Ordinarily "term" means a period having a fixed and certain duration; it is fixed period of time that something lasts. In contrast, tenure refers to the conditions upon which something is held. Security of tenure describes a constitutional or legal guarantee that an office-holder cannot be removed from or vacate office except upon the occurrence, specified circumstance or events. Security of tenure guarantees independence by ensuring that the office-holder is not victimized or influenced in the discharge of his or her duties through conferment or denial of favours. The standard form of conferring security of tenure are constitutional provisions, such as Article 168 of the Constitution that prohibit removal from office except for cause.

164. A close perusal of the Constitution indicates that as regards judges, the Constitution uses the word "tenure", but as regards other constitutional office holders, even those who enjoy security of tenure, it uses the phrase "term of office". Examples include Article 142(1), term of the President; Article 148(6), term of the Deputy President; Article 167(3), term of the Chief Justice; Article102(1), term of the Parliament; Article 157(5), term of the Director of Public Prosecutions; Article 171(4), term of the members of the Judicial Service Commission, Article 177(4), term of Member of the County Assembly; Article 180 (7) (a), term of the Governor; Article 180(7)(b), term of the Deputy Governor;

Article 288(3), term of the Controller of Budget; Article 229(3) term of the Auditor General; Article 245(6), term of the Inspector General of Police and 250(6)(a), term of members of constitutional Commissions.

165. That the makers of the Constitution did not deem it fit to include a proviso similar to that in section 19 of the Constitution of Kenya (Amendment) Act No. 28 of 1964 must mean that the offices transited in section 31(1) of the Sixth Schedule were only those where the holders had unexpired period, if any, of their term of office (as defined by the High Court) so long as it was consistent with the Sixth Schedule. It ought to be recalled that specific submissions were made to the Constitution of Kenya Review Commission and the Committee of Experts by the Judiciary regarding judges in office on the effective date and their retirement ages, but the CKRC and the COE still did not include an express proviso or provision preserving the retirement age of judges under the former Constitution.

166. We have already noted that in the United Kingdom, Australia and Ireland, when the retirement age of judges was reduced, specific provisions were made to exempt judges in office prior to the date of reduction. We have also seen that during the transition to the Republican Constitution, a specific proviso transited judges to the new order and preserved their retirement age under the old order.

167. The absence of similar provision or proviso in the Constitution shows it was a decision, deliberately and consciously taken by the makers of the Constitution, that all judges should retire at 70 years of age as provided by Article 167(1) of the Constitution. Accordingly, there can be no basis for reading in or implying into section 31(1) and 31(2) of the Schedule an express proviso similar to that of section 19 of the Constitution of Kenya (Amendment) Act No. 28 of 1964.

168. In our view, in the circumstances of this appeal, the transitional and consequential provision of the Sixth Schedule that is applicable to judges is section 23. That provision is specific to judges as the side note shows; was tailor made for that purpose; and is clear enough without being clogged or clouded by provisions of miscellaneous provisions of the Schedule. It provides as follows:

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 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 Articles10 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."

169. Upon successful vetting, a judge who was in office on the effective date was transited to the Constitution by section 23 of the Sixth Schedule and thereafter the Constitution, rather than the other parts of the Schedule, applied to him or her. The oath of office taken by judges transited to the Constitution by section 23 of the Sixth Schedule was not, as the respondents contend, evidence of a new appointment, but was a condition precedent prescribed by Article 74 of the Constitution to be satisfied even by judges who were successfully vetted.

170. Without subscribing to the oath of office, the vetted judges could not assume their offices. By the oath of office, every state officer including a judge signals personal commitment to defend the Constitution and to faithfully exercise and discharge the duties and functions of his or her office.

171. In the final analysis, we have reached the conclusion that on the whole, the High Court did not err in holding that the Constitution did not preserve and save the retirement age of judges prescribed by section 62(1) of the former Constitution as read with section 9 of the Judicature Act and Section 31 of the Sixth Schedule to the Constitution, and that with effect from the effective date, the retirement age of all judges is 70 years. For these reasons, the appeal cannot succeed. It fails and is hereby dismissed. In view of the nature of this litigation, the circumstances giving rise to it and the fact that the retirement age of judges was not obvious and apparent, we direct each party to bear its own costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2016.

G.B.M KARIUKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR