



Tunoi & another v Judicial Service Commission & another (Civil Appeal 6 of 2016) [2016] KECA 530 (KLR) (27 May 2016) (Judgment)

Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR

Neutral citation: [2016] KECA 530 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 6 OF 2016**

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

MAY 27, 2016

BETWEEN

JUSTICE PHILIP K TUNOI 1ST APPELLANT

JUSTICE DAVID A ONYANCHA 2ND APPELLANT

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

THE JUDICIARY 2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Hon. R. Mwangi, W. Korir, H. Ongundi, C. Meoli, C. Kariuki JJ) dated 11th December 2015 in H.C. Petition No. 244 of 2014)

JUDGMENT

1. The 1st appellant, Justice Philip K. Tunoi, is a Judge of the Supreme Court of the Republic of Kenya. The 2nd appellant, Justice David A. Onyancha (now retired), was at all material times a Judge of the High Court of Kenya.

Both appellants were the petitioners in Petition No. 244 of 2014 in which the High Court delivered judgment on 11th December 2015 dismissing their main prayers in the petition and allowing some as hereinafter shown. This appeal was heard back to back with Appeal No.1 of 2016 lodged by Hon. Justice Kalpana Rawal, The Deputy Chief Justice and Vice President of the Supreme Court of Kenya whose Petition No.386 of 2015 in the High Court was heard, once more, back to back together with the appellants' said petition. Both appeals spring from the judgments in those Petitions and raise similar issues for determination.



2. The 1st respondent is the Judicial Service Commission established by Article 171 of the [Constitution](#) and is, among other functions, responsible for recommending to the President persons to be appointed as judges. The 2nd respondent is The Judiciary, provided for in Chapter 10 of the [Constitution](#).
3. In their Petition dated 26th May 2014 to the High Court, the appellants sought, in the main, declarations that their retirement age as well as that of all judges in office on 27th August 2010 was upon attainment of 74 years of age; orders of certiorari to quash the decision of the 1st respondent made on 24th March 2014 resolving that the retirement age of all judges is 70 years of age and the letters addressed to the appellants to that effect; orders of prohibition to stop the respondents from removing the appellants from office or processing their pension and retirement benefits, and pending the hearing and determination of the petition, conservatory orders prohibiting the respondents from removing them from office.
4. The above reliefs were sought on the basis of averments that the appellants were entitled by the [Constitution](#) to serve until the age of 74 years and that the respondents had among things infringed on their fundamental rights and freedoms, in particular the right to equality and freedom from discrimination under Article 27 of the [Constitution](#); the right to dignity under Article 28; the right to protection as old members of society under Article 57; the right to property under Article 40; the right to fair administrative action under Article 47; and the disregarded or violation of their legitimate expectation.
5. In opposing the petition, the respondents denied violation of any of the appellant's rights and maintained that under Article 167(1) of the [Constitution](#), which was applicable to all judges, the retirement age was 70 years and not 74 years as contended by the appellants.
6. The central issue for determination by the High Court therefore was whether the retirement age of the appellants as judges is 74 years as provided in the [Constitution of Kenya, 1969](#) (the former [Constitution](#)) and the [Judicature Act](#) or whether it is 70 years as provided in the [Constitution of Kenya, 2010](#) (the [Constitution](#)). The appellants contended that they are entitled to serve as judges up to the retirement age of 74 years provided for in the [Judicature Act](#). They contended that their security of tenure under the former [Constitution](#) was transited into the [Constitution](#) by the transitional provisions in the latter.
7. As at the date of promulgation of the [Constitution](#) on 27th August 2010 (the effective date), the 1st appellant was a Judge of the Court of Appeal and the 2nd appellant was a Judge of the High Court. Their retirement age was 74 years by dint of Section 62 (1) and 64(3) of the former [Constitution](#) and Section 9 of the [Judicature Act](#). Those provisions of the former [Constitution](#) provide –
 - “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.”
 - “64(3) The foregoing provisions of this Part shall apply in respect of the judges of appeal as they apply to puisne judges.”
8. Parliament enacted the [Judicature Act](#), which provides in Section 9 the retirement age of judges. The section stipulates –
 - “9. For the purposes of Section 62 (1) of the [Constitution](#), the age at which a person holding the office of judge shall vacate his office shall be seventy-four years.”



9. The Constitution provides in Article 167 (1) that:
- “167(1) A judge shall retire from office on attaining the age of 70 years, but may elect to retire at any time after attaining the age of sixty-five years.”
10. The transitional and consequential provisions in Chapter Eighteen of the Constitution provide in Article 262 as follows –
- “262. The transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date.”
11. The effective date is defined by Section 260 of the Constitution to mean the date that the Constitution came into force. Article 263 provides that –
- “263. This Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier.”

It is common ground that the effective date is 27th August 2010.

12. Section 31 (1) of the Sixth Schedule to the Constitution regarding existing offices as at the date of the promulgation of the Constitution stipulates that –
- “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.
- (2) Subject to subsection 7 and Section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution.”
13. 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 Article 167(1) of the Constitution.
14. The appellants were aggrieved by the decision of the High Court and lodged this appeal in which they contended that the High Court erred by holding that the retirement age of all judges is 70 years; by holding that Article 167(1) of the Constitution applies to all judges, by finding that section 31(1) of the Sixth Schedule to the Constitution did not apply to judges; by failing to uphold security of tenure for



- judges; by holding that their rights and freedoms were not violated, by ignoring comparable precedent and best practices; and by failing to determine the issue of legitimate expectation.
15. When the hearing of the appeal came up before us on 15th April 2016, learned counsel Mr. Kiragu Kimani appeared for the appellants and learned Senior Counsel Mr. Paul Muite appeared with learned counsel Mr. Mansur Issa for the respondents. Pursuant to an order of this court, both the appellants and the respondents filed written submissions and lists of authorities. The hearing of the appeal was therefore on the basis of written submissions, oral highlighting and case law.
 16. As Mr. Kimani observed, this is the first time in Kenya's history that the court was being asked to look into the issue of reduction of the retirement age of judges. He however conceded that the Constitution reflects the general will of the people of Kenya and that a judge is a judge by delegation and can be removed by the general will of the people. He correctly stated that no single Article in the Constitution should be interpreted to override another unless expressly so stated in the Constitution. Counsel urged that the interpretation and construction of the Constitution must capture the wishes and aspirations of the people of Kenya. He urged this Court at all times to examine each of the relevant Articles of the Constitution and ask itself what the people of Kenya intended to achieve in promulgating it.
 17. Mr. Kimani submitted that the core argument in this appeal is whether the appellants' tenure of office is protected under the Constitution and whether it was the intention of the people of Kenya that judges who were successful in the vetting process should serve until they attain the retirement age of 74 years. He emphasized that the intention and purpose of Section 31 (1) of the Sixth Schedule to the Constitution was to safeguard the unexpired term of the person provided the office was established under the former Constitution.
 18. Counsel pointed out that the appellants in their written submissions in this appeal identified four issues for determination as follows -
 - (a) what the true meaning, tenor and implication of Section 31 (1) and (2) of the Sixth Schedule to the Constitution is in light of Article 167 (1) of the Constitution;
 - (b) what the Commonwealth philosophy and precedent on tenure of judges is?
 - (c) whether there is protection of property contingent on constitutionally guaranteed tenure of office?
 - (d) whether there was a definite finding on the issue of legitimate expectation.
 19. It was Mr. Kimani's submission that at the core of the trial court's decision was the interpretation of Article 167 (1) of the Constitution and Section 31 (1) and (2) of the Sixth Schedule. He submitted that the trial court in considering these provisions ruled that Article 167 (1) of the Constitution applied to the appellants and assumed a retrospective colour in a sense that blotted out all vestiges of the appellants tenure and rights under the former Constitution; that the main conclusion by the trial judges was that Section 31 (1) of the Sixth Schedule was not applicable to the appellants and only Section 31 (2) applied to them when read together with Article 167 (1). Counsel contended that the trial court erred in holding that judges in office on the effective date, who under the former Constitution were entitled to a tenure of office with retirement age at 74 years, had that entitlement abrogated by Section 167 (1) because Section 62 of the former Constitution stood repealed by Article 264 and was not saved by Section 3 of the Sixth Schedule.
 20. It was the appellants' submission that the interpretation by the trial court on applicability of Article 167 (1) to the appellants was erroneous and against the principle in Article 259 (1) on interpretation of the Constitution which requires the Constitution to be interpreted in a manner that promotes its



purposes, values and principles and advances the rule of law and human rights; that the trial court's interpretation does not conform with the rule that the Constitution must be construed in a harmonious manner with no provision subverting or destroying the other.

21. Further, counsel submitted that the trial court's findings and interpretation is contrary to the national values in Article 10 of the Constitution and the principle of independence of the judiciary in Article 160 of the Constitution; that the trial court erroneously interpreted Article 264 of the Constitution as having repealed Section 62 of the former Constitution and erroneously came to a finding that Section 62 of the former Constitution as read with Section 9 of the Judicature Act was not saved by Section 31 of the Sixth Schedule.
22. Counsel contended that the learned trial judges erred in adopting a narrow, restrictive and formalistic interpretation of the Constitution and failed to heed the caution against legal formalism as expressed by the Supreme Court In Re The Matter of the Interim Independent Electoral & Boundaries Commission, Advisory Opinion, Reference No. 2 of 2011; it was further submitted that the trial judges erred in finding that the express omission or lack of mention of Section 62 in Section 3 of the Sixth Schedule means that the drafters of the Constitution did not intend to extend or save the former Constitution's protection of tenure of judges; that the interpretation of the trial judges eroded the appellants' right to property contrary to Articles 260 and 259 (1) which sanction the promotion and advancement of the right to property and human dignity when interpreting the Constitution.
23. Counsel also submitted that the trial court adopted legal formalism in finding that Section 9 of the Judicature Act was unconstitutional and in their finding of unconstitutionality, the trial judges did not consider the purport and purpose of Section 7 (1) of the Sixth Schedule; that the Supreme Court has stated that Section 7 (1) (*supra*) is a mandatory constitutional injunction where interpretation of pre-constitutional laws are involved and courts must construe such legislation with necessary adaptations, qualifications, alterations and exceptions necessary to bring it into conformity with the Constitution and to declare it unconstitutional only where that is not possible without parliamentary intervention; that protection of tenure of the office of judge in Section 9 of the Judicature Act is a conventional constitutional norm and such a constitutional foundation cannot be expressly suspended or abrogated by Article 264 of the Constitution.
24. Arguing that the trial judges erred in law in failing to adopt a harmonious interpretation of the Constitution, Mr. Kimani cited persuasive *dicta* in the Uganda case of Tinyefunza-v- Attorney General(1997) UGCC 3; he submitted that a Constitution should be read as an integrated whole with no one particular provision destroying the other but each sustaining the other.

In support of the same point, counsel cited the decision of the Supreme Court In the Matter of Kenya National Commission on Human Rights, Advisory Opinion Reference No. 1 of 2012; where it was stated that a holistic interpretation of the Constitution must be made in context and a contextual analysis reading alongside other provisions is necessary so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history.
25. Based on holistic interpretation of the Constitution, it was the appellants' submission that the High Court judges were selective in their finding that Section 31 (2) and not 31 (1) applied to judges in office before the effective date; that the trial judges erred in adopting a disjunctive, non-harmonious approach to constitutional interpretation. It was submitted that the trial judges read Section 31 (1) in isolation from section 31 (2) leading to an absurd result where judges are excluded from the purview of Section 31 (1) thus denying them the constitutional benefit of extension of term.
26. The conclusion that only unexpired term and not tenure were extended under the Constitution is erroneous because it singles out and segregates judges from other public officeholders and



- disenfranchises and disentitles them to the full benefit of the law that guarantees extension of unexpired period of constitutional office holders. In support of this submission, counsel cited the South African case of *Justice Alliance v President of South Africa*(2011) ZACC 23 where the South African Constitutional Court declared the President's act unconstitutional because it singled out extension of term of the Chief Justice whereas the *Constitution* only provided for extension of term of service of a judge of the constitutional Court.
27. The proper interpretation of Section 31 (1) and (2) of the Sixth Schedule, according to Mr. Kimani is that the *Constitution* intended to extend the unexpired period of "persons" holding public office; that the *Constitution* did not lay down differentiation between judges and other public officers as was done by the trial judges; that if the *Constitution* intended to single out judges in office before the effective date and preclude them from the benefit of extension of the unexpired period in public office under Section 31 (1), it would have stated so plainly, categorically and deliberately. It was submitted that the distinction made by trial judges between term and tenure was artificial, mechanistic and facile and flies in the face of a holistic interpretation of the *Constitution*.
 28. It was the appellants' case that at all times, they have occupied the office of judge of superior court in Kenya, that their tenure as judges of superior court was protected and secured under the former *Constitution* and transited into the *Constitution*; that the essence of security of tenure is that the tenure is secure from interference by the Executive or any other appointing authority; that through Section 31 (1) of the Sixth Schedule, the people of Kenya allowed a transition bridge for the unexpired period of service; that the unexpired period is to be preserved and nowhere in Section 31 (1) does it say that unexpired term must be defined or set by the *Constitution*; that there is no gap or limit to a transition period; that a transition period can be permanent.
 29. There is nothing in Section 31 (1) of the Sixth Schedule that suggests that judges were not to be covered by the Section, stated counsel; that if there is any ambiguity in the section, the ambiguity should be interpreted in favour of the individual judge. It was fervently submitted that there is no legal foundation in excluding judges from the ambit of Section 31 (1) of the Sixth Schedule.
 30. In concluding his submissions, Counsel urged this Court to find that the Oath of office taken by the appellants had nothing to do with the term or tenure of their office; that the Oath purely related to the manner of exercise and discharge of their functions.
 31. Senior Counsel Mr. Paul Muite with learned counsel Mr. Issa Mansur on behalf of the respondents opposed the appeal and urged us to draw a distinction between a retirement age that is prescribed by law and a situation where a different retirement age is brought about by a new constitutional order; that this Court should also bear in mind that amendment in an existing constitutional order is different from one prescribed by a new constitutional order. He postulated, in agreement with Mr. Kimani, that the issue in this appeal to be the correct interpretation of Article 167 (1) as read with Section 31 (1) and (2) of the Sixth Schedule, to determine if judges who were in office on the effective date are to retire at the age of 74 or 70 years. He emphasized that under the *Constitution*, transiting judges were governed by Section 23 and not Section 31 of the Sixth Schedule.
 32. Mr. Muite pointed out that in their written submissions, the respondents urged that the age of retirement for judges was not fixed by Section 62 (1) of the former *Constitution* and the contention that the Sixth Schedule preserved the appellants' constitutional right to retire at 74 is misconceived. It was his submission that Section 31 (1) of the Sixth Schedule should be read in tandem with Section 23 (1) of the Schedule that provided for vetting of judges; that Article 167 (1) of the *Constitution* was intended to apply to all serving judges save for judges who were found unsuitable to continue to serve and who would be removed from office before the retirement age. Counsel submitted that Section 24



- of the Sixth Schedule specifically applied to the Chief Justice and therefore, Section 31 (2) applied to all judges serving on the effective date; that all judges in office continue to hold office as if appointed under the Constitution and are to retire on attainment of 70 years.
33. Responding to the appellants' contention that there is only one judiciary, the respondents submitted that if this is so, then there is only one retirement age in the judiciary for all judges except those who opt to retire early as provided in Article 167 (1) of the Constitution. It was submitted that the only judicial officer excluded in the transition to the new constitutional order under Section 31(1) & (2) of the Sixth Schedule was the then Chief Justice who pursuant to Section 24 (1) was required to vacate office; that ipso jure all other judges continue to hold office as if appointed under the Constitution; that in respect of the 1st appellant, he was appointed to serve as a Supreme Court judge under the Constitution and his retirement age is 70 years.
 34. The respondents submitted that the argument that Article 167 was not intended to have a retrospective effect is misplaced and ignores the spirit and wording of the Constitution; that Article 167 makes no distinction between serving judges on the effective date or newly appointed judges; that Section 3 of the Sixth Schedule identifies Sections of the former Constitution that were to continue in force and Section 62 is not one of them. It was submitted that the trial judges correctly interpreted and distinguished between the word term and tenure; that under Section 31 (1) of the Sixth Schedule, reference is to "unexpired period of the term of the person" and such reference cannot apply to judges since judges do not have a fixed term in years.
 35. The respondents further urged that Section 31 (1) of the Sixth Schedule has the phrase "Unless this Schedule provides otherwise..."; that this phrase is a limiting provision and when read with the phrase "so far as is consistent with this Constitution" in Section 32 (2) of the Sixth Schedule, the tenure of judges was not extended as Section 9 of the Judicature Act is inconsistent with Article 167 (1) of the Constitution. The respondents submitted that in the Final Report of the Committee of Experts on Constitutional Review at page 72, it was observed that "when a new constitution is introduced, a range of provisions are needed to ensure that the move from the old order to the new order is smooth and in particular, that the changes expected by the new Constitution are implemented effectively."
 36. It was the respondents' submission that the appellants have willfully ignored the provisions of Section 7(1) of the Sixth Schedule which provide that all law in force immediately before the effective date shall be construed with such alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution; that Section 9 of the Judicature Act in so far as it is inconsistent with the Constitution is void to the extent of the inconsistency.
 37. The respondents further submitted that there is no doubt that the Kenyan people intended judges to henceforth retire at 70 years of age and this was never a contentious issue.
 38. Counsel submitted that the learned trial judges correctly held that Commonwealth precedent, best practices and traditions cannot override the actual provisions of the Constitution or form the basis for interpreting the Constitution. The respondents cited the Supreme Court *dicta* in Judges & Magistrates Vetting Board -v- Centre for Human Rights and Democracy & 11 others, Petition Nos. 13A, 14 & 15 of 2013 where the Court emphasized that the Country's history has to be taken into consideration while interpreting the Constitution and discouraged a stereotyped recourse to foreign precedents.
 39. It was the respondents' submission that the United Kingdom and Commonwealth experience cited by the appellants has no relevance to Kenya in the interpretation of the retirement age of judges. The respondents also cited the *dicta* by the Supreme Court in Jasbir Singh Rai & 3 others-v- Estate of Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012, where it was stated that it is not appropriate to pick a precedent from other countries merely because they seem to suit the immediate occasion.



40. In support of the concept of mandatory retirement age in various jurisdictions, the respondents cited the case of *Rene Paquet v Attorney General of Quebec & another* [2010] QCCS 3185; *Gregory v Ashcroft* [1991] 501 US and *Senior Judge Benjamin Lerner et al – v- Thomas Corbett* (2013) 1: 12-cv-2577.
41. As regards the appellants' contention that their constitutional rights were violated, the respondents submitted that the trial judges correctly held that the office of a judge is an office held in public trust and has no vested right; they cited various persuasive authorities to the effect that a public office is not property; see Philippines case of *Cornejo v Gabriel*, G.R. No. L-16887 [1920]; see also USA case of *Taylor v Beckham* [1899], 178, U.S., 548).
42. Further the respondents submitted that judicial authority is derived from the people of Kenya as per Article 159(1) of the *Constitution* and there can be no vested rights capable of accruing to the appellants by virtue of their appointment as judges under the *Constitution*. As regards the four (4) years alleged to be protected under the *Constitution*, it was submitted that the said four (4) years was prescribed under the *Judicature Act* and remuneration of judges under Section 104 (3) of the former *Constitution* was only protected during their tenure and was not saved and extended by Section 3 of the Sixth Schedule.
43. On discrimination, the respondents submitted that the learned judges correctly held that there was no discrimination practiced on the appellants; that notification of an impending retirement is not a violation of Article 47 on Fair Administrative Action and there can be no estoppel against the *Constitution*; that the decision to retire the appellants was made under Article 167 (1) of the *Constitution* and that this cannot amount to discrimination; that an earlier incorrect interpretation by the 1st respondent of the import of Article 167 (1) cannot be the foundation or basis of claim of alleged discrimination; that the only right of the appellants that is protected is the right to retire at 70 years of age.
44. On legitimate expectation, the respondents submitted that the trial judges considered the circular dated 24th May 2011 against the mandate of the 1st respondent. It was submitted that the appellants cannot rely on the circular as the 1st respondent is not competent to make any binding representation on the retirement age for judges; that there cannot be a legitimate expectation against clear provisions of law and the *Constitution*; that there can be no legitimate expectation in violation of Article 167 of the *Constitution*.
45. We have duly considered the record, the grounds of appeal, submissions by counsel, the authorities cited 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*.
46. The appellants identified four issues for determination, namely the true meaning, tenor, and implication of section 31(1) and (2) of the Sixth Schedule to the *Constitution* in light of Article 167(1) of the *Constitution*; whether the judgment of the High Court was in tandem with Commonwealth philosophy and precedent regarding tenure of judges and reduction of their retirement age; whether the appellant's right to property contingent on constitutionally guaranteed tenure of office was violated; and whether the High Court erred by failing to make a definite issue on the appellants' legitimate expectation. We would add two other issues that were raised and canvassed in the appeal, namely, whether the appellants' right to equality and freedom from discrimination under Article 27 of the *Constitution* and their right to fair administrative action under Article 47 were violated. For



convenience, we propose to address the question regarding interpretation of Article 167(1) and section 31(1) and (2) of the Sixth Schedule last.

47. Regarding the issue whether the High Court erred by ignoring comparative international jurisprudence on tenure of judges and 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.
48. 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, as they say, 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.
49. While at a theoretical level it may be asserted, as counsel for the respondents' did, 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, 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 considerations, among others, of other peoples experiences, their obligations under international law, and accepted practices in other nations.
50. 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, (*supra*) 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.”

51. 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.’”



52. The experience of the United Kingdom in 1959 and 1993; Australia in 1977 and Ireland in 1995 as regards reduction of the retirement age of judges is worth considering. 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. 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 and Retirement Act of 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.
53. 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.
- 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.
54. 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*](#), Civ. No. 444591, June 20, 1975) 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 iron. Even in Kenya, the retirement age of judges has been altered previously, only that the alterations resulted in increase rather than reduction of the retirement age.
55. 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. The examples of the United Kingdom, Australia and Ireland which we have cited show nothing more than the conscious choices made by those 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.
56. In our view, 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.
57. Regarding the right to property, the appellants argue that retiring them at 70 years of age constitutes a violation of their 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 appellants 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 appellants claim to have been denied the opportunity to work, receive personal emoluments until the age of 74 years and thereby increase their pension. That claim raises the further question whether the appellants have proprietary rights to the office of judge or the personal emoluments accruing therefrom up to retirement age, whatever it is.

58. 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. In Gorman v. City of New York (280 App. Div. 39(NY. App. Div. 1952) 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.
59. 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.
60. 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).

61. 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.”

62. 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.



63. Closely related to the issue we have addressed above is the question of the appellants' pension, and whether the same will be diminished by four years if they were to retire at 70 years, thus violating their right to pension. The question here raises two issues, namely, entitlement to pension for the period served and the right to earn future pension.
64. 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.
65. 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 Srivastava & 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).
66. 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).
67. 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.
- 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 pension and gratuity an absolute right.



68. Other than the pension that the appellants claim they could have earned if they were to serve for 4 years, how is the appellants' 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.
69. 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. Regan* 82 NY2d 534 604; and *Allen v. City of Long Beach*, Cal. 1995).
70. Section 32 of the Sixth Schedule 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.
71. 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 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*.
72. We therefore harbour no doubt that pursuant to the above provisions the pension formula as well as the appellants' 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 appellants can claim under section 32 of the Sixth Schedule is the right not to have the pension formula varied to their disadvantage or detriment. Ultimately therefore, the lowering or increasing of the age of retirement does not alter the pension formula while the appellants' 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*.
73. 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 appellants 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.
74. As regards the appellants' complaint founded on legitimate expectation, the complaint is that the 1st respondent made a written commitment, from which it later arbitrarily resiled. The appellants' additional complaint is that the High Court framed legitimate expectation as one of the issues for



determination, but ultimately failed to determine the issue. It is patently clear from page 25 of the judgment that the High Court framed legitimate expectation as one of the issues for determination and extensively considered the doctrine of legitimate expectation. A proper reading of the judgment makes it palpably clear that the High Court rejected the claim that the appellants' legitimate expectations were violated.

75. At page 102 of the judgment, the High Court expressed itself as follows:

“254 in light of the foregoing, the petitioners cannot hold onto or rely on the contents of the circular dated 24th May 2011, to claim that their retirement age was seventy four years as stated therein. Further, the Petitioners cannot rely on the doctrine of legitimate expectation or estoppel, as the JSC was not competent to make any binding representation.” (Emphasis added).

76. Be that as it may, we shall address the issue, not the least because the appellants are entitled to expect 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, 14A, 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.

77. The appellants' 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 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 appellants claim that the 1st respondent changed goalposts and took a diametrically opposite position and violated their legitimate expectation to retire at the age of 74 years.

78. The decision of the Supreme Court that we have just cited stresses 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* [199] 4 All ER 801 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 made ultra 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).

79. A pertinent question in this ground is whether the 1st respondent's decision of 24th May 2011 created a legitimate expectation on the part of the appellants that they would retire at 74 years. Was this decision a promise to the appellants that they would serve and hold office as judges 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 the section 31 (1) of the Sixth Schedule to the [Constitution](#) and Article 167 (1) of the [Constitution](#), which under the [Constitution](#) could not be final and authoritative. That the 1st appellant could not possibly have been misled into believing that he would retire at 74 years of age is also evident from the advertisements that the respondents caused to be published regarding vacancies in the office of office of judge 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 after the decision of 24th May 2011 that the 1st appellant claims to have constituted the basis of his legitimate expectation that he would retire at 74 years of age.

80. 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).

81. 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.

82. A pre-requisite to successful invocation of the doctrine of legitimate expectation, we reiterate, 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 appellants have not demonstrated how they relied on the 1st respondent’s decision to their 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).

83. 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 appellants’ claim founded on legitimate expectation was not sustainable.



84. The next issue is whether the High Court erred by finding that the respondents did not violate the appellants' right to fair administrative action under Article 47 of the *Constitution*. The appellants' complaint in this ground of appeal is that the 1st respondent did not afford them an opportunity to be heard before taking an adverse decision, and also did not give them written reasons for its decision. 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*.
85. Having carefully re-evaluated and re-appraised the evidence, we agree with the appellants that the High Court erred when it concluded, on the facts of this appeal, that the 1st respondent heard the appellants 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 1st 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 appellants' 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 appellants' representations.
86. On the second issue, there is no dispute that the 1st respondent did not give the appellants any written reasons for its decision that was communicated on 27th March 2014. Section 6(4) of the *Fair Administrative Action Act* provides that where reasons for a decision are not given, a presumption arises that the decision was taken without good reason.
87. The crux of the matter is however, the consequence of the 1st respondent's failure to hear the appellants and to give them written reasons. Since 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), does not lie with the 1st respondent, its failure 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. Again, we are satisfied that the High Court did not err in its conclusion that whether the 1st respondent gave the appellants a hearing or not or whether it gave them 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.
88. We now turn to consider the appellants' argument that the respondents violated their right to equality and freedom from discrimination under Article 27 of the *Constitution*. 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.”

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.



89. Judge Tanaka, of the International Court of Justice powerfully articulated the essence of equality in his dissenting opinion in the *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Second Phase*, International Court of Justice, 18th July 1966) as follows:

“The most fundamental point in the equality principle is that all 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 all 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.

...

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.”

90. 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 qualification criteria, without the slightest suggestion of discrimination, irrationality or unreasonableness.
91. 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.
92. 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.
93. The more substantial issue is whether the fact that the respondents allowed two judges, Aganyanya and Onyango Otieno, JJA, who were appointed under the former Constitution to retire at the age of 74 years, constitutes differential and unconstitutional treatment of the appellants. 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. 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).

94. 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.
95. 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 appellants to unequal and discriminatory treatment.

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.

96. 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.

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.

97. Accepting the appellants' 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 appellants to be treated in like manner as their 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 appellants do not have a right to retire at an age that is determined by the respondent, even if it is not set by the Constitution.
98. 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 Schedule is sound, has several permutations which were are obliged to address first.
99. First is the appellants' contention that they were appointed to the Judiciary and have been holding the offices of judge in the superior courts of Kenya, which are offices of judge in the Judiciary. They argue that prior to the effective date, they were appointed respectively as judge of the Court of Appeal and judge of the High Court, which are superior courts. As regards the 1st appellant who was appointed a judge of the Supreme Court after the effective date, it is argued that under the Constitution, a judge of the Supreme Court is a judge of a superior court. Consequently, the appellant's submit that their status as judges of the superior courts is continuous and uninterrupted under both Constitutions



and that being judges of the superior courts, their 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. They contend further that the Judiciary as re-established under the *Constitution* is the successor institution to the Judiciary that existed under the former *Constitution*.

100. This line of submissions was made to counter the contention by the respondent that the 1st appellant was appointed to the office of judge of the Supreme Court under the *Constitution* because that office did not exist under the former *Constitution*.
101. The appellants' argument begs the question whether a judge holds office in the Judiciary or is appointed to a particular superior court. The appellants' 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.
102. Under the former *Constitution*, a judge was appointed to a specific judicial office either, as Judge of the High Court or the 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 Ndwiiga 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.
103. 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 appellants' submission that they were appointed in the Judiciary, which is a successor institution to the former Judiciary, is not tenable in law. Under the former *Constitution*, the appellants were appointed to the specific constitutional office of judge of the Court of Appeal and judge of the High Court. It is the office of a judge in the Court of Appeal or High Court that was a constitutional office under the former *Constitution* and the holder thereof a constitutional office holder.
104. 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*).
105. 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 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.



106. 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.
107. Second is whether the 1st appellant was promoted from office of judge of appeal to office of 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.
108. The 1st appellant contends that after the effective date, he was promoted to a judge of the Supreme. 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.
109. A reading of Article 166 (3) (a), (b); Article 166 (4) (a) and Article 166 (5) (a) shows that one of the criterion 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 carry 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.
110. 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.
111. Accordingly we are satisfied that in Kenya a judge is appointed to a specific court and that he or she is not promoted or elevated from one court to another. A person who is appointed a judge of the High Court or of 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 or elevation 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*.
112. The 1st appellants’ submission that having been appointed a judge of a superior court under the former *Constitution*, it does not matter in which superior court he subsequently 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 appellants further assert that the Judiciary existing before the effective date was re-established under the Constitution and that re-established Judiciary is the successor to the former Judiciary. In the premises they argue that they continue to hold office as judges of a superior court in the re-established successor Judiciary.

113. 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.”

114. 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.

115. It follows that neither the Supreme Court nor 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.

116. Third is the question 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.

117. For convenience we reproduce those three provisions below. 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.”

118. The purpose of the 7 section 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. Kyratas Brothers [1968] EA 542 and Royal Media Services Ltd v. Attorney General & 2 Others HC Petition No. 346 of 2012.
119. 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? 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 effects 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.
120. 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 an existing law.
121. 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.
122. 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?
123. 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 Scheduled. 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.
124. As we now 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.



125. Upon the promulgation of the *Constitution*, among others, a devolved system of government was introduced dismantling power that hitherto were 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 replacement 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.
126. 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.
127. 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.
128. *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).

129. 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.

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).



130. 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.)

131. 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.

132. 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.
2. Subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution.
3. 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).
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.
5. 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.
6. The functions of the Controller of Budget shall be performed by the Auditor-General until a Controller of Budget is appointed under this Constitution.



7. 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.

133. 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.”

134. 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”.

135. As regards section 31(2), 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*.

136. 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 constitutional of Kenya (Amendment) Act, No. 28 of 1964 was passed making transitional provisions on continuity of laws and existing offices.

137. What is significant is that whilst the relevant provision transiting offices was worded in largely similar 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 prescribed retirement age. The effect of that proviso was to save and preserve the retirement age prescribed under the old order.



138. 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: -

- (a) 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;
- (b)
- 2 ...
3. 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.
4. In this section “pension benefits” means any pension, compensation, gratuities or other like allowances for persons in respect of their service as public officers...”

139. 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 distinction or hair splitting as the appellant contends, but has considerable merit.

140. 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.

141. 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; Article 02(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.
142. 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.
143. 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. 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.
144. 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 Articles 10 and 159.



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

145. 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. 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.
146. 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

