



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, G.B.M. KARIUKI & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO.99 OF 2016

BETWEEN

NICHOLAS RANDA OWANO OMBIJA APPELLANT

AND

VETTING OF JUDGES AND MAGISTRATES BOARD RESPONDENT

(Being an appeal lodged in in the Court of Appeal from the judgment and the decree of the High Court of Kenya at Nairobi (W. Korir, J) delivered on 14th day of April 2016

in

JR MISC APPLICATION NO.140 OF 2016)

JUDGMENT OF THE COURT

BACKGROUND

1.This appeal is by Nicholas Randa Owano Ombija, the appellant, against the decision of the Vetting of Judges and Magistrates Board, the respondent.

The record shows that the appellant has been in and out of court over issues of his vetting by the Vetting Board. The appeal before us relates to the decision of the Vetting Board dated 16th March 2016 declaring the appellant not suitable to continue serving as a judge although the appellant contends that he opted to retire from Judicial Service rather than be vetted and therefore the Vetting Board, he contends, had no jurisdiction to vet him.

2. The background to this appeal is not complicated. It relates to the litigation instituted by the appellant against the Judges and Magistrates Vetting Board. Parliament was mandated by the Constitution under section 23 of the Sixth Schedule to operationalize Articles 160, 167 and 168 (of the Constitution) by enacting legislation establishing mechanisms and procedures for vetting of judges and magistrates 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 of the new Constitution.

3. Section 23 (2) of Part 5 of the Sixth Schedule to the Constitution specifically provided that no court would have jurisdiction to question removal or a process leading to the removal of a judge from office by virtue of the operation of legislation contemplated under section 23(1) (supra).
4. In discharge of its mandate under section 23 (supra) to operationalize Articles 160, 167 and 168, Parliament, *inter alia*, enacted **The Vetting of Judges and Magistrates Act, 2011** (hereinafter referred as to “**VJM Act**”) to provide for the vetting of judges and magistrates; and to provide for the establishment, powers and functions of the Judges and Magistrates Vetting Board and for connected purposes. The VJM Act received Presidential assent on 21st March 2011 and commenced on 22nd March 2011. It consisted of nine members comprising a chairperson, a deputy chairperson and seven other members.
5. In exercising its powers or in performance of its functions under the VJM Act 2011, the Judges and Magistrates Vetting Board was enjoined under section 5 of the VJM Act to be guided at all times by the principles and standards of judicial independence, natural justice and international best practice.
6. In addition, the Board members were bound by the National values and principles enshrined in Article 10 of the Constitution which include the rule of law, equity and human dignity.
7. The appellant, Nicholas Randa Owano Ombija, served as a judge of the High Court of Kenya. He was vetted by the Judges and Magistrates Vetting Board (“**the Board**”) which found him unsuitable to serve following which he instituted legal proceedings in the High Court against the Board in a Petition (No.406 of 2015) in which he sought reliefs for threatened or apprehended violations of his rights to fair administrative action, right to fair hearing and the right to equal protection and equal benefit of the law under Articles 47, 50 and 27 as well as section 23 of the Sixth Schedule to the Constitution. He sought in the petition declarations that the respondent’s determination of his vetting on 21st December 2012 after his earlier determination of vetting on 10th September 2012 was unconstitutional; that the respondent’s determination of the appellant’s vetting made on 10th September 2016 resulting in a tie in a vote of 4 to 4 was final and that the respondent was in that determination found to be suitable to continue to serve as a judge in the Judiciary; that upon the review application being upheld by the respondent’s decision of 20th March 2013, the appropriate and legitimate order that the respondent was constitutionally and statutorily bound to make was that the petitioner was suitable to serve as a Judge in the Judiciary; that the respondent had no authority under the Constitution or any Act of Parliament to order the petitioner to be vetted afresh; that the petitioner’s right to fair hearing by the respondent as an impartial and independent tribunal had been infringed; that the respondent’s invitation of the petitioner for fresh vetting for complaints not previously made within time or at all was in violation of Articles 47 and 50(1) of the Constitution.
8. The High Court (Onguto J) declined to entertain the appellant’s petition and struck it out on the ground that the court lacked jurisdiction contending that the decisions and processes of the Board were not open to challenge before the court and that the court’s hands were tied.
9. The appellant was undeterred. He filed appeal No.281 of 2015 in this court impugning the judgment of the High Court on law. In its judgment delivered on 14th December 2015, this court allowed the appellant’s appeal and reversed the High Court order striking out the appellant’s petition and declared that the appellant was found suitable to continue to serve as a judge in the Judiciary in Kenya in the determination of the Board of 10th September 2012. The effect of this decision was that the appellant remained in the Judiciary as a judge of the High Court of Kenya.

SUPREME COURT ORDERS

10. In what seemed like the war of attrition, the respondent lodged appeal against that decision in the Supreme Court in Petition No.1 of 2016. On 7th March 2016, the Supreme Court issued orders in the appeal as follows –

“we have formulated a judgment that will be issued on notice, but the specific Orders of which

we now issue, as follows-

- (1) The petition is allowed, on the following specific terms.**
- (2) The process of vetting by the petitioner had commenced before 31st December, 2015.**
- (3) The petitioner shall proceed with the process of hearing, and shall conclude the vetting of the respondent without any further delay.**
- (4) To accord the respondent full opportunity to partake of his rights to a fair hearing, as well as his right of review, the vetting shall proceed on a day-to-day basis, until concluded by 31st March, 2016, in accordance with the law.**
- (5) As established in the precedents of this Court, the vetting process shall be limited to matters arising upto 27th August, 2010.**
- (6) As the petitioner had annulled its decision of 21st December, 2012 and the proceedings leading thereto, the parties legally revert to the position prevailing as at 30th July, 2012.**
- (7) The parties shall bear their respective costs, in respect of the appeal herein.”**

VETTING ON 15TH MARCH 2016

11. On the strength of the said orders, the respondent set out to vet the appellant and served on him a notice dated 10th March 2016 requiring him to appear for vetting on Tuesday the 15th day of March 2016 at 10.00 o'clock in the morning. The respondent warned in the notice that it would proceed to make a determination or to take such action as it deemed just and prudent, ostensibly in the event that the appellant failed to appear before it. Although the Board did not indicate in the notice that it attached complaints against the appellant, it seems to have done so because, the appellant through his advocate, Mr. Rogers Sagana, did file a response to answer the complaints.

12. At the hearing on 15th March 2016, the appellant's said advocate appeared before three members of the Board and stated that he had been instructed to withdraw the response to the complaints because the same had been overtaken by events, the appellant having voluntarily retired from judicial service. The appellant's advocate then placed before the panel the appellant's letter dated 8th March 2016 addressed to the Chairman of the JMV Board. The letter stated –

“RE: EARLY RETIREMENT”

Pursuant to the provisions of section 24(1)(b), (2), and (3) of the Vetting of Judges and Magistrates Act No 2 of 2011, I hereby elect not to be subjected to the vetting process and instead leave the Judicial Service voluntarily. Be accordingly guided.

Yours faithfully,

Hon. Justice Nicholas R. O. Ombija c.c.

The Chairman

Judicial Service Commission NAIROBI

The Chief Justice

Supreme Court

NAIROBI

13. The record of appeal which we have perused does not show whether advocate Rogers Sagana remained in the tribunal (the Panel) after withdrawing the appellant's response and submitting the appellant's letter. The record does not show whether the scheduled hearing on 15th March 2016, proceeded but as the response to the complaints had been withdrawn and the Determination by the Board dated 16th March 2016, states that the hearing proceeded and the appellant and his advocate did not participate in the hearing, the ensuing process was one sided.

14. One copy of the determination by the respondent that ensued was not dated and had only two signatures, one of Mr. Sharad Rao, the Chair of the Board, and the other of Mr. Abdirashid Abdullahi, a member of the Board while another copy of the Determination was dated 16th March 2016 and was signed by the Chairman and two members, Mr. Abdirashid Abdullahi and Justice A. Mpagi-Bahegeine.

15. In the Determination, the members of the panel stated in paragraphs 19, 34, 35, 36, 37, 42 and 43 on behalf of the Board -

“(19) The Judge did not this instance avoid himself for an interview nor did he file a response. See Paragraphs 34, 35 and 36.

34. Pursuant to the Supreme Court decision the Judge was invited to appear for interview on 15th March, 2016. On the interview date the Judge through his counsel Rogers Sagana filed response five minutes before the interview was scheduled to begin, and did not appeal. His Counsel Rogers Sagana appeared on his behalf and informed the Board that the Judge did not wish to be subjected to vetting and had voluntarily retired in accordance with the provisions of section 24(1)(b), (2) and (3) of the Vetting of Judges and Magistrates Act, Cap 7B Laws of Kenya.

35. Counsel produced a letter dated 8th March, 2016 addressed to the Chairperson of the Judges and Magistrates Vetting Board and copied to the Judicial Service Commission and the Chief Justice of Kenya, in which he partially states that;

“Pursuant to the provisions of section 24(1) (b), (2) and (3) of the Vetting of Judges and Magistrates Act No.2 of 2011 I hereby elect not to be subjected to the vetting process and instead leave the judicial service voluntarily.”

36. Counsel sought to withdraw the response filed that morning, on the ground that it had been overtaken by events, as the Judge had voluntarily retired before the vetting.

37. The Board is of the view that the Judge's decision not to subject himself to fresh vetting and to opt instead to retire pursuant to section 24(1)(b), and (3) of the Judges and Magistrates Vetting Act 2011 relied upon by the Judge does not enable the Board to exempt the Judge from being vetted. Section 24 provides as follows;

24. (1) A Judge or Magistrate shall, within three months of the commencement of this Act, elect –

(a) whether to be subjected to the vetting process; or

(b) to leave the judicial service voluntarily

(2) A judge or Magistrate who elects to leave the judicial service voluntarily or is found unsuitable after vetting shall be entitled to terminal benefits for early retirement.

(3) For the avoidance of doubt, a Judge or Magistrate who voluntarily leaves service or is

found unsuitable after vetting shall be deemed qualified for early retirement.

42. In the circumstances the Board having carefully considered the complaints and all the material available to it, and forming part of the record, find that the complaints have not been effectively refuted, and that they raise substantial issues to merit a finding of suitability.

DETERMINATION

43. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No.2 of 2011, the Board determines that the Honourable Nicholas Randa Owano Ombija is NOT SUITABLE to continue serving as a Judge. The Judge has a right to apply for review of the said determination within 7 days of the date of this determination.”

16. The record of appeal contains a letter dated 18th March 2016 by the CEO of the Board, Reuben K. Chirchir, to the appellants' advocate, Roger O. Sagana which we reproduce hereunder in extenso -

RE: BOARD'S DETERMINATION DATED 16TH MARCH 2016

My attention is drawn to a report in an article at page 6 of Daily Nation of 18th March 2016 where you are quoted as saying:

“...he dismissed the verdict saying it was only signed by two panelists instead of all three”.

I wish to point out that the Determination was duly signed by all three members of the Panel following a unanimous decision of six members of the Board including all three Commonwealth Judges. Three members who had earlier recused themselves were not part of the Board meeting.

Your advocate Rogers Sagana was served with two copies of the Determination which to the best of my knowledge were duly dated, sealed and signed by the three members who conducted the interview. If one of the copies that was served on your Advocate did not have all three signatures, that was inadvertent. However, I wish to inform and assure you that all the three panelists were unanimous in their finding and signed the Determination.

Copies of the Determination with all the three signatures were also served on Hon. the Chief Justice/Chairman, Judicial Service Commission and

Chief Registrar of the High Court as is the Board's practice.

I further wish to inform you that the Determination was announced to the public on 17th March 2016 in the presence of the three Panelists who heard your matter. The announcement quoted verbatim from the signed Determination.

That notwithstanding, and because we are unable to verify what was served on your Advocate, I do hereby serve you an additional signed copy of the Determination.

I also take this opportunity to remind you of your right of review and the strict timelines in your matter as directed by the Supreme Court Order in Supreme Court of Kenya Petition NO.1 of 2016 Judges and Magistrates Vetting Board versus Nicholas Randa Owano Ombija.

REUBEN K. CHIRCHIR

Copies to:

Hon. Chief Justice/Chairman

Judicial Service Commission

The Chief Registrar of Judiciary

17. The appellant, aggrieved by the decision of the Board, moved to the High Court and filed Judicial review proceedings by notice of motion dated 22nd March 2016 seeking an order of certiorari to remove into the High Court and quash the Determination dated 16th March 2016 which was pronounced on 17th March 2016 declaring the appellant's unsuitability to continue to serve as a judge of the High Court.

18. Upon hearing the appellant's said application, the High Court (Weldon Korir J) in its impugned judgment dated and delivered on 14th April 2016 made a finding and concluded that the Board "*was correct in finding that as the applicant was a judge at the time of his vetting, it followed that the court had no jurisdiction to consider all the other issues raised by the applicant regarding his removal or the process leading to his removal from office under the Vetting of Judges and Magistrates Act*" which commenced on 22nd March 2011.

Accordingly, the learned judge dismissed the appellant's notice of motion dated 22nd March 2016 with no order as to costs. This is the decision that gave rise to this appeal.

MEMORANDUM OF APPEAL

19. In his memorandum of appeal dated 18th May 2016, the appellant proffered six (6) grounds of appeal which can be summarized as follows, namely that the learned judge erred in his judgment –

(i) by misdirecting himself by holding that he had no jurisdiction to hear the judicial review motion when the legal grounds pleaded by the appellant in the motion showed that the appellant had voluntarily retired from judicial service and had ceased to discharge the functions of a judge.

(ii) in failing to hold that the determination by the Board dated 16th March 2016 which was pronounced on 17th March 2016 was not valid in law.

(iii) in failing to find and hold that there were defects in the proceedings and the determination by the respondent rendering the determination a nullity.

(iv) in not finding that there was no process appertaining to the appellant's removal or leading to the appellant's removal from office as a judge

(v) in not finding that the appellant having made a decision not to continue serving, the Board ceased to have jurisdiction over him and had no jurisdiction to determine the validity of the letter of retirement by the appellant.

20. Both the learned counsel for the appellant, **Mr. Wasuna** and the learned counsel for the respondent, **Mr. Lubulella**, filed written submissions following directions requiring them to do so.

21. The appeal came up for hearing before us on 26th September 2016 when both counsel highlighted their respective submissions. Mr. Wasuna, learned counsel for the appellant relied on his written submissions filed in court on 24th June 2016 and on his bundle of authorities filed on the same date in court. He contended that the appellant was not vetted as the Board did not convene to vet him and only a panel which had no power to do so did. He urged us to find that if only 2 or 3 members of the Board sat or signed the determination, as was the case, there was no valid determination. The issue of whether the members who sat to vet the appellant constituted a Board under the JMV Act, he said, were matters of competence or otherwise of the Board which had nothing to do with the removal or process leading to the removal of a judge from office. Consequently, the learned judge should not have declined jurisdiction, contended counsel.

22. The issue also whether a determination by the Board was valid did not amount to a determination of removal or process of removal of a judge from office. In short, said Mr. Wasuna, the Board was governed by a statute and was enjoined to operate within the confines of the provisions of the VJM Act and breach of the provisions of the Act could be challenged in court as *ultra vires* the said Act. It was his contention that the Determination by the respondent was invalid as it was not by the Board but instead was by a panel of two or three members. It was Mr. Wasuna's submission that the full Board of the members of the Board did not sit to make the determination because if they had, the respondent would have had the Determination signed by the members. Nothing to that effect was shown. What the respondent exhibited was the Determination signed by two or three members of the panel. If a

Determination of the full Board existed, said Mr. Wasuna, the respondent would readily have relied on it and produced it. It was Mr. Wasuna's further submission that the High Court should have found that it had jurisdiction, not to delve into the issue of removal or process leading to removal of the appellant from office, but rather, whether the 2 man or 3 man panel that vetted the appellant was competent to do so and whether the determination that ensued which was bereft of the membership of the Board was valid in law.

23. On the issue of the appellant's retirement from judicial service, and his opting not to be vetted, Mr. Wasuna submitted that it was not open to the Board to deliberate on the appellant's intention to leave the Judiciary. In Mr. Wasuna's view, all that the Board needed was to see if the appellant had left the Judiciary. Counsel attributed bad faith to the Board in purporting to vet the appellant even after he had shown that he had retired from the Judiciary. It was Mr. Wasuna's further submission that the respondent was wrong in law in proceeding on the basis that the appellant's resignation or retirement from the Judiciary did not except him from the vetting process-especially considering that the appellant's counsel had before the panel withdrawn the response to the charges and from acting. It was counsel's submission that the panel could not in good faith thereafter proceed to vet the appellant after his withdrawal and removal of the response to the charges and after showing that he was no longer in the Judiciary. It was his view that if the Board was intent on conducting a proper vetting, it should have had regard to the appellant's response to the charges.

24. Our attention was drawn by Mr. Wasuna to paragraph 19 of the Determination by the Board dated 16th March 2016 stating that "*the judge did not ... avail himself for interview nor did he file a response.*" This, said counsel, was inconsistent with what transpired and further the allegations to the effect that the appellant did not refute the charges as stated in paragraph 42 of the Determination were at variance with what happened on the day of the hearing. In counsel's view, there was no process conducted before the Board and consequently there could be no Determination or valid Determination.

25. Our attention was also drawn by the appellant's counsel to sections 14, 18 and 33 of the VJM Act which, in counsel's view, show that the Board had no power to determine whether retirement was valid as this was a matter between the appellant, the Judicial Service Commission and the President of the Republic of Kenya.

26. We were told by the appellant's counsel that the Supreme Court did not deliver a judgment and that the orders it made leading to the impugned vetting were not extracted from a decision made in the appeal to the Supreme Court. Mr. Wasuna told us from the Bar that the Supreme Court made the orders that enabled the Board to purport to vet the appellant but at no time did it deliver a judgment, ruling or any decision in the appeal.

27. On his part, **Mr. Lubullellah**, learned counsel for the respondent, relied on his written submissions and on his bundle of authorities.

28. At the outset, Mr. Lubullellah submitted that the Board in the VJM Act includes panels that act on behalf of the Board when exercising the power of the Board. He conceded that one determination was signed by two members while the other was signed by three but went on to urge that as three members had signed, the question of error did not arise. In his submission, the issue was whether as of 15th March 2016, the appellant had retired from the Judiciary. It was his view that the appellant's letter dated 8th March 2016 addressed to the Board was not a resignation letter as it was not addressed to the appellant's

employer, the Judicial Service Commission. It was commonsensical, he said, to look at the appellant's letter of resignation and ask if it complied with the law.

29. Referring to section 24(1) of the VJM Act, Mr. Lubulellah submitted that if the appellant did not wish to be vetted, he should have complied with the said section by electing to leave the judicial service voluntarily within the time therein stipulated. Under section 24(2) of the VJM Act, "*a judge who elects to leave the judicial service voluntarily is entitled to terminal benefits as is also a judge who is found unsuitable to serve after vetting.*" We were told by Mr. Lubullelah that after withdrawal of the appellant's counsel from the panel, the record does not show that the advocate physically left the scene. Mr. Lubulellah expressed the view that the resignation letter did not constitute moving out of the hearing and the Board treated the matter as one in which there was no defence to the charges and thus the Board had the discretion to hear and determine the matter or to adjourn it to another specific date. Mr. Lubulellah drew support from the Supreme Court orders made of 7th March 2016. He urged us to find that an intention to retire is not enough; that there has to be a valid resignation. He conceded, however, that the Board would have no jurisdiction to vet a non-judge. In his view, the appeal has no merit and should be dismissed with costs.

30. In his reply, Mr. Wasuna contended that there was no judgment from the Supreme Court. He told us that his client did not know on what basis the orders were given. In further reply, counsel told us that the VJM Act did not confer on the Board power to interpret the validity of resignation letter of a judge from office. That, he said, is a matter of law and is not commonsensical.

31. The timelines in this appeal has put a strain on the court. It was heard in the afternoon of Monday, the 26th day of September 2016. We gave a date for delivery of judgment on 29th September 2016 as we realized that this litigation might become an academic exercise if judgment is not delivered before the life of the respondent comes to an end at midnight on Friday, the 30th day of September 2016.

ANALYSIS AND DETERMINATION

32. We have perused the record of appeal including the appellant's written submissions and the bundle of authorities both of which were filed on 24th June 2016. We have also perused the respondent's written submissions and the bundle authorities both of which were filed on 17th June 2016. We thank both Mr. Wasuna and Mr. Lubulellah, counsel for the appellant and the respondent respectively for the submissions and authorities and for throwing light on the issues for determination including the issue of the orders on the basis of which the respondent required to vet the appellant.

33. Time constraints has compelled us to prepare this judgment rashly focusing on the main issues on which the appeal turns. In our view, the appeal turns on the following issues -

(i) whether the appellant had resigned or retired from judicial service at the time of the vetting and whether he was liable to be vetted by the Board and whether the latter was competent to interpret or challenge the retirement or resignation letter by the appellant.

(ii) whether the appellant was vetted by 2 or 3 members of the Board and whether there was compliance by the Board with the provisions of the VJM Act; in short, whether the Determination dated 16th March 2016 was a competent and valid decision under the JMV Act 2011.

(iii) whether the Board had a decision from the Supreme Court requiring the vetting of the appellant and whether the orders on the strength of which the Board relied were extracted from such decision.

(iv) Whether the Board acted in compliance with the law or not.

34. Had the appellant retired from judicial service at the time of the said vetting? It is common ground that the appellant communicated to the panel before which his counsel, Rogers Sagana, appeared on 15th March 2016 that the appellant had opted to resign from judicial service. The record of appeal shows that

the appellant saw no need therefore to respond to the charges and his counsel accordingly proceeded to withdraw the response to the charges. He also withdrew from the matter. There is no indication from the record that the Panel did not allow the appellant's counsel to withdraw from the matter or to withdraw the appellant's response to the charges. However, the respondent in its Determination dated 16th March 2016 states that the appellant "*did not avail himself for the vetting nor did he file a response.*" Yet in the affidavit sworn on 29th March 2016 by Reuben Chirchir, the Chief Executive Officer of the respondent, the deponent averred that the appellant's advocate, Rogers Sagana, appeared and filed a response to the complaints and then informed the panel that he had instructions to withdraw the response on the ground that the vetting had been overtaken by events as the appellant had voluntarily retired from judicial service. The deponent also averred in the affidavit that the appellant's said advocate produced a letter dated 8th March 2016 showing that the appellant had elected to not to be subjected to vetting. There are allegations by the deponent that the appellant's advocate promised to furnish a copy of the appellant's letter of resignation to the Hon. The Chief Justice which the deponent averred was not done. These averments are at variance with the allegations in the Determination dated 16th March 2016.

35. The VJM Act does not give power to the Board to vet non-judges and non-magistrates. The respondent had no jurisdiction to vet the appellant if the latter had left judicial service. The VJM Act 2011 was enacted to provide for the vetting of Judges and Magistrates pursuant to section 23 of the Sixth Schedule to the Constitution. The provisions of section 24(1) of the VJM Act show that a judge could elect whether to be subjected to the vetting process or to leave the judicial service voluntarily. The Act does not delve into the mechanics of leaving the judicial service, nor does it provide what a judge must show to indicate that he or she has left the judicial service voluntarily.

36. In the instant appeal, the Panel that set out to vet the appellant on 15th March 2016 was informed by appellant's advocate, Rogers Sagana, that the appellant had elected to voluntarily retire from the judicial service. The respondent's Chief Executive Officer probed for evidence of retirement or resignation even though the appellant's letter of 8th March 2016 stated "*I hereby elect not to be subjected to the vetting process and instead leave the judicial service voluntarily*". That letter was to the Chair of the Board. It did not purport to be the resignation letter. The author was a judge of the High Court and it goes without saying that he must be taken to know that a resignation letter would be addressed to the President of the Republic of Kenya under Article 167 (5) of the Constitution. The letter seems to have been appropriately addressed to the Board to give information and was copied to the Chief Justice and the chair of the Judicial Service Commission. Although the law under the VJM Act required the appellant to make an election within three months of the commencement of the Act, it is patent that the appellant communicated the fact of his leaving the Judiciary long after that period. The effect of the late election to leave the Judiciary voluntarily would not give the respondent power to vet the appellant after he had ceased to be a judge. The jurisdiction of the Board did not extend to non-judges any more than the Board had power to prescribe the manner in which a judge must resign from or leave the Judiciary. It was enough that the judge had taken steps resulting in his ceasing to hold office as a judge. The view taken by the Board in paragraph 38 of its Determination dated 16th March 2016 is not in accord either with general principles of the law or the Constitution. All that the Board required was a solemn statement of fact whether the appellant had left the Judiciary.

37. The Board had no jurisdiction to probe into the manner in which the Appellant left the judicial service. The amplitude of the provisions of Section 33 (4) of the JMV Act 2011 could not extend to acts that were not necessary in implementing the Act or were not for meeting the ends of justice. Clearly the issue of the said interpretation was the prerogative of the courts. At any rate, there was no risk that the appellant might sneak back into the Judiciary unless the Board sent him home after vetting. It sufficed that the appellant was not discharging the functions of a judge having left office. At the time of the vetting, the appellant was not discharging the functions of a judge as he had left office as a judge. The purported vetting was unnecessary. We so find. This answers issue No.(1).

38. There is no dispute that only 3 members of the Board sat in the vetting of the appellant. These were the Chair, Mr. Sharad Rao, and Mr. Abdirashid Abdulahi and Justice (Rtd DCJ) Alice Mpagi-Bahegeine, both members of the Board.

39. The Board consists of nine members as provided by **Section 7** of the **VJM Act 2011**. The record of appeal does not show that after the sitting by the panel of the three members, the matter was ever referred to a plenary of the full Board. Section 21 of the VJM Act 2011 confers the jurisdiction to vet Judges and Magistrates upon the nine-member Board. It does not confer the jurisdiction upon a panel of three or more members of the Board. It was not suggested by the respondent that the 3 members of the Board who vetted the appellant sat as a Board. If they purported to do so, they would be in breach of the VJM Act. Mr. Lubulellah submitted that the panel of 3 sat on behalf of the full Board and that whatever they did must be seen as done by the full Board. It is quite clear upon reading the provisions of the VJM Act 2011 **that such panel would be acting contrary to the law and would be usurping the power of the full Board** to vet Judges and Magistrates. Issuance of determinations of suitability or unsuitability to serve in the Judiciary by such panel would be invalid.

40. The reference of the term “**the Board**” used by the three members of Board in the Determination dated 16th March 2016 was improper because clearly, the Board did not at any time sit in a plenary to consider the appellant’s case as required by the provision of the VJM Act 2011. Section 18(1) of the VJM Act shows that the Board was enjoined to consider the matters set out therein and take into account the matters set out in S.18(2)(a) to (h) and further, to consider information as required by section 19(1) of the Act and apply the rules of natural justice.

41. Although the Determination dated 16th March 2016 is said to be signed by the three members “*by order of the Board in Nairobi*”, there is not a whisper as to who the other three Board members were nor is there a shred of evidence that a meeting of the full Board was ever convened or was held to consider the appellant’s vetting. There was no good reason for not disclosing the identity of the other three members if a plenary had been held. In short, the purported Determination is not in accord with the requirements of the VJM Act 2016. It is invalid. We so find. This answers issue No. (ii).

42. On the question of the orders of the Supreme Court on the strength of which the respondent relied to “**vet**” the appellant, we start by stating that under **Article 163(7)** of the Constitution, all courts other than the Supreme Court are bound by the decisions of the Supreme Court. Pursuant to section 21(3) of the Supreme Court Act No. 7 of 2011, the Supreme Court may make any order necessary for determining the real question in issue in an appeal before final judgment in the appeal. Such order must be distinguished from final orders after judgment and from ancillary or interlocutory orders that the Supreme Court may make in any proceeding by dint of section 21(2) of the Supreme Court Act. They must also be distinguished from interlocutory orders and directions by the Supreme Court made in proceedings in the Supreme Court under section 24 of the Supreme Court Act.

43. We observe that the respondent’s appeal to the Supreme Court which gave rise to the orders on the strength of which the respondent “**vetted**” the appellant was not allowed as prayed but rather, on the specific terms contained in the orders themselves. The specific terms could only be verified against the judgment of the court which the Supreme Court had formulated as at the time of issuing the orders. Neither the appellant nor the respondent showed us the judgment from which the orders were extracted yet the Supreme Court clearly stated in the orders that the judgment had been formulated and would be issued on notice.

44. We observe that the orders were silent on the vetting of the appellant on 10th September 2015 which this Court deemed a determination of suitability –entitling the appellant to continue serving as a Judge. That was the main issue in the appeal. The fact that the Supreme Court ordered vetting would contradict that finding but in absence of the judgment of the Court to verify the correctness of the orders and to show that they were in accord with the judgment, it seems to us that the appellant is entitled, as a matter of law, to rely on findings that are not shown to have been reversed which include the finding on vetting of 10th September 2015, unless following the vetting ordered by the Supreme Court, there has been a valid determination of unsuitability which there is not. In absence of a judgment which was the final decision by the Supreme Court on the appeal from which the orders ought to have been extracted, the findings made in the judgment of this Court in C.A. No.281 of 2015 to the extent to which they have not been reversed remain intact. It is our finding that the decision of the Supreme Court on the respondent’s appeal against this Court’s said Judgment was not shown to exist. That answers issue number (iii).

45. The respondent has in the Determination dated 16th March 2016 reflected distortions and contradictions on matters of facts relating to what transpired before the panel carrying out the vetting of the appellant on 15th March 2016. The appellant’s counsel inevitably read bad faith on the part of the three members of the panel that sat on 15th March 2016.

46. The picture which the respondent attempted to paint, namely, that the appellant was absent and had not filed any response to the complaints was incorrect. The facts in the Determination in relation to the vetting on 15th March 2016 were inconsistent with the averments in the affidavit of the Chief Executive Officer of the Board and of the appellant. In addition, the assertion that the Board vetted the appellant when the record shows that only a panel of three members did, and that the matter never found its way to the plenary is a further distortion. In effect, the provisions of the VJM Act 2011 were not adhered to. Had the Board exercised greater probity it would not have been necessary to dissipate time and waste public resources in a needless exercise

that is akin to a parting shot to the appellant. It is our finding that the provisions of the VJM Act were not complied with and the Determination dated 16th March 2016 is a nullity. That answers issue (ii).

47. It is our finding in this appeal that the respondent did not implement the provisions of the VJM Act 2011 as required and, in particular, did not apply or follow principles of natural justice or follow international best practices. This answers the last issue.

48. The upshot of this is that the appeal succeeds. The decision of the High Court (*Weldon Korir, J.*) is hereby set aside. The appellant’s notice of Motion to the High Court dated 22nd March 2016 is allowed with costs.

49. The costs of the appeal are awarded to the appellant.

Dated and delivered at Nairobi this 30th day of September 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

G.B.M. KARIUKI, SC

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR