Mongare v Attorney General & 3 others (Civil Appeal 123 of 2012)
[2014] KECA 887 (KLR) (24 January 2014) (Judgment)

Dennis Mogambi Mong'are v Attorney General & 3 others [2014] eKLR

Neutral citation: [2014] KECA 887 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 123 OF 2012

PO KIAGE, AK MURGOR, F SICHALE, J MOHAMMED & JO ODEK, JJA

JANUARY 24, 2014

BETWEEN

DENNIS MOGAMBI MONGARE ..... APPELLANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS .... 2ND RESPONDENT

JUDGES AND MAGISTRATE VETTING BOARD ..... 3RD RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 4TH RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ngugi, Majanja & Odunga, JJ.) dated 18th November, 2011) in H.C Petition No. 146 of 2011)

The constitutionality of the vetting process carried on by the Vetting of Judges and Magistrates Board.

Reported by Beryl A Ikamari

Constitutional Law *- transitional provisions - whether provisions contained in the Schedule to the Constitution could be said to be unconstitutional or to contradict other substantive provisions of the Constitution - Constitution of Kenya 2010; article 262.*

Constitutional Law *- judiciary - independence of the judiciary - security of tenure of judges and magistrates - whether removal from office as the culmination of a vetting process would undermine the Judiciary by interfering with the security of tenure of judges and magistrates - Constitution of Kenya 2010; articles 167(1), 168 & section 23 of the Sixth Schedule.*

Constitutional Law *-fundamental rights and freedoms - enforcement of fundamental rights and freedoms- freedom from discrimination on any prohibited ground - whether it was discriminatory to subject the judicial*

arm of government to a vetting process without subjecting the other arms of government to vetting - Constitution of Kenya 2010; articles 27 & section 23 of the Sixth Schedule.

***Constitutional Law** - interpretation of constitutional provisions - retroactive application of constitutional provisions - the constitutionality of a vetting process based on the past conduct and decisions of judges and magistrates - whether constitutional provisions could have retroactive applicability and could ordain the retroactive applicability of certain statutory provisions - Constitution of Kenya 2010; section 23 of the Sixth Schedule, Vetting of Judges and Magistrates Act, No 2 of 2011; section 18, and Interpretation and General Provisions Act (cap 2); section 2.*

***Constitutional Law** -fundamental rights and freedoms - enforcement of fundamental rights and freedoms - the right to a fair trial and the right to fair administrative action - whether the vetting process carried on by the Judges and Magistrates Vetting Board met fair trial requirements and fair administrative action requirements - Constitution of Kenya 2010; articles 47 & 50, and Vetting of Judges and Magistrates Act No 2 of 2011; sections 19(3), 19(4) & 19(6).*

***Constitutional Law** - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - freedom from torture, cruel, inhuman or degrading treatment - whether the vetting process carried on by the Judges and Magistrates Vetting Board subjected judges and magistrates, who were being vetted, to torture, cruel, inhuman or degrading treatment - Constitution of Kenya 2010; articles 29(d) & 29(f).*

***Constitutional Law** - prescribed time-frame - whether the vetting process carried on by the Judges and Magistrates Vetting Board was unconstitutional as it had extended beyond the prescribed time - frame provided for in law - Vetting of Judges and Magistrates Act No 2 of 2011; section 23.*

***Constitutional Law** - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to fair administrative action - absence of a right to appeal or challenge the decision of the Judges and Magistrates Vetting Board - whether the decisions of the Judges and Magistrates Vetting Board were subject to the supervisory jurisdiction of the Court and could be the subject of a human rights action or judicial review proceedings - Constitution of Kenya 2010; section 23(2) of the Sixth Schedule, and Vetting of Judges and Magistrates Act No 2 of 2011; section 22.*

***Words and Phrases** - judicial independence - independence does not mean detachment, isolation or disengagement from other players in public governance.*

Brief facts

The Petitioner sought to challenge the constitutionality of the process of vetting judges and magistrates as provided for in section 23 of the Sixth Schedule to the Constitution of Kenya 2010.

Prepositions that the provision went contrary to the mode of removal of judges under the Constitution, did not guarantee the rights to a fair trial, was discriminatory and amounted to torture, cruel, inhuman and degrading treatment, were amongst the grounds of challenge relied on by the Petitioner.

Issues

i. Whether section 23 of the Sixth Schedule to the Constitution of Kenya 2010 was unconstitutional and contradicted other substantive provisions of the Constitution.

ii. Whether section 23 of the Sixth Schedule undermined the independence of the judiciary.

iii. Whether the vetting process established in section 23 of the Sixth Schedule to the Constitution of Kenya 2010, which subjected the judicial arm of government to vetting while not providing for the vetting of other arms of government, was discriminatory.

iv. Whether section 18 of the Vetting of Judges and Magistrates Act, No 2 of 2011 was unconstitutional to the extent that it sought retroactive application, by subjecting judges and magistrates to vetting based on their past conduct and decisions made prior to the existence of the applicable law.

v. Whether the Bangalore and Latimer Principles could be said to be part of the general rules of international law under article 2(5) of the Constitution.

vi. Whether the vetting process provided for in the Vetting of Judges and Magistrates Act No 2 of 2011 violated the right to fair administrative action and the right to a fair trial.

vii. Whether section 22(3) of the Vetting of Judges and Magistrates Act No 2 of 2011 was unconstitutional as it provided that the decisions of the Judges and Magistrates Vetting Board would not be subject to appeal.

viii. Whether the provision of the right to seek review in section 22(1) of the Vetting of Judges and Magistrates Act No 2 of 2011 before the same panel, which made the decision against which review was being sought, was a violation of the principle that no man should be a judge in his or her own cause.

ix. Whether the vetting process before the Judges and Magistrates Vetting Board subjected the judges and magistrates, who were to be vetted, to torture or inhuman or degrading treatment.

x. Whether the vetting process carried on by the Judges and Magistrates Vetting Board was unconstitutional as it had extended beyond the time-frame provided for in law.

Held

1. One particular provision of the Constitution could not be said to be unconstitutional or contrary to another provision of the same Constitution. The principle of harmonization required that the Constitution would be read as a whole with each part contributing towards the purposes of the Constitution.
2. The Sixth Schedule to the Constitution of Kenya 2010 was to be read together with the substantive provisions of the Constitution and be deemed to constitute a coherent, indivisible and inseparable package of rights and principles.
3. No single article or schedule to the Constitution of Kenya 2010 would be interpreted to override other provisions of the Constitution, unless the Constitution expressly provided for such an interpretation.
4. The provisions of the Sixth Schedule to the Constitution of Kenya 2010 were part of the transitional and consequential provisions, which within the terms of article 262 of the Constitution of Kenya 2010, would be deemed to be an integral part of the Constitution. In their placement in schedules, there was no intent to relegate the transitional provisions to a status inferior to other provisions of the Constitution.
5. While it was possible for the removal of a judge to be done by mechanisms provided for in article 168 of the Constitution of Kenya, 2010, and section 23 of the Sixth Schedule to the Constitution, the two mechanisms served distinct purposes. Section 23 served to boost public confidence in the judiciary and to assess the suitability of the judges and magistrates who were in office prior to the promulgation of the Constitution, in the transitional period, while article 168 provided a mechanism for the removal of judges from office on specific grounds on a basis that was not transitional.
6. Effectively, section 23 of the Sixth Schedule to the Constitution of Kenya 2010, introduced a transitional mechanism which could lead to the removal of a judge from office on grounds of unsuitability to continue serving. It would not contradict with the separate mechanism provided for the removal of a judge from office in article 168 of the Constitution of Kenya, 2010, which was not a transitional provision. Furthermore, article 168 would not provide the basis for the proceedings before the Judges and Magistrates Vetting Board.
7. Section 23 of the Sixth Schedule to the Constitution of Kenya 2010 was not unconstitutional but had a specific and sufficiently defined purpose. Its purpose was to establish a process for the vetting of judges and magistrates, who were in office at the time of the promulgation of the Constitution, in order to determine their suitability. It was made in response to the clamor for a new constitutional dispensation in which various concerns about the state of the judicial arm of government had been raised.
8. The import of a finding that a judge or magistrate was unsuitable, under section 21(2) of the Vetting of Judges and Magistrates Act No. 2 of 2011 and section 23 of the Sixth Schedule to the Constitution of Kenya 2010, was that the judge would not continue to hold office and would be removed from office. In the context of vetting, there was no difference between the terms “removal from office,” and

"unsuitable to serve." The vetting process was capable of culminating in the removal of a judge from office.

9. The Latimer and Bangalore Principles touching on the independence of the judiciary, formed part of the general principles of international law applicable to Kenya under article 2(5) of the Constitution of Kenya 2010. The independence of the judiciary included the independence of individual judges to make decisions freely without the influence or control of any other person. Within the concept of decisional independence a judge had the right to err and any error made could be corrected through the appellate process.
10. Decisional independence would only allow a judge to function within the limits of the law. It would not protect personal or political interests or bias or decisions which were made in flagrant disregard of established principles of law.
11. The interrogation of judges for explanations about decisions made by them, as carried on pursuant to section 18(1)(b) of the Vetting of Judges and Magistrates Act, No. 2 of 2011, would not be an interference with the independence of the judiciary.
12. It would not be unconstitutional to interrogate a judge if an evidential basis had been laid to show that a ruling or judgment revealed misconduct or improprieties impacting on the integrity and conduct of the judge. Such interrogations would be part of the concern of the Judges and Magistrates Vetting Board in determining the suitability of judges.
13. Section 18 of the Vetting of Judges and Magistrates Act No. 2 of 2011 provided for the criteria for the vetting of judges and magistrates in accordance with the national values and principles enshrined in article 10 of the Constitution of Kenya. The provisions of section 18 were constitutionally sound.
14. The vetting process was intended to entrench a new constitutional order in which constitutional principles for an independent and credible judiciary were actualized. The vetting process would serve to strengthen the judiciary.
15. Removal from office after a finding of unsuitability in the vetting process would not be an interference with judicial independence by negating a judge's security of tenure. The security of tenure provided to judges under article 167(1) of the Constitution of Kenya, 2010, was not absolute but was subject to competence, good conduct and also solvency on the part of an individual judge.
16. The tenure of judges and magistrates serving at the effective date was made subject to the vetting process established in section 23 of the Sixth Schedule to the Constitution of Kenya 2010.
17. Section 23 of the Sixth Schedule to the Constitution of Kenya 2010 was not discriminatory as all arms of government had been treated equally by being subjected to different modes of appraisal. For the judiciary, the vetting process was established while the executive and the legislature were subjected to a general election and to legislative and constitutional provisions touching on the ethics and integrity of candidates seeking to vie for elective office in those arms of government.
18. The general principle of law was that statutes were of prospective and future application. However, where the Constitution or statute expressly stated that retroactivity was required, that intention on retroactivity would prevail as an exception to the general principle.
19. As stated in section 2 of the Interpretation and General Provisions Act (Cap 2), generally, the rules of statutory interpretation including rules on non-retrospective application would not apply to the Constitution. A Constitution could look forward and backward, vertically and horizontally as it sought to engineer social order.
20. The Constitution of Kenya 2010 intended that the vetting process would be retroactive in its application, in the sense that findings on the suitability of a judge or magistrate to continue serving in office would entail an evaluation of a judge's or magistrate's past conduct and decisions.
21. The retroactive nature of the Vetting of Judges and Magistrates Act No. 2 of 2011 was ordained by the Constitution, and as such, it was not unconstitutional.

22. In establishing vetting concerning a judge's or magistrate's integrity, section 23 of the Sixth Schedule to the Constitution of Kenya 2010 gave a constitutional underpinning to questions of integrity within the judiciary but it was not retrospective. Questions of integrity and the conduct of judicial officers were sanctioned by pre-existing laws including the Public Officers' Ethics Act No. 4 of 2003 and the Judicial Service Code of Conduct and Ethics, Legal Notice No. 50 of 2003.
23. In the vetting process, the judges and magistrates were entitled to the right to fair administrative action and the right to a fair trial protected in the Constitution of Kenya 2010, under article 47 and article 50, respectively. However, what fairness required was not perfection; the essential question was whether a judge or magistrate had a fair chance of dealing with the allegations made against him or her.
24. Fairness required that a person affected by a decision would be informed of the case made against him or her and would also be afforded a fair opportunity to make a response. Section 19(6), 19(3) and 19(4) of the Vetting of Judges and Magistrates Act No. 2 of 2011, gave every affected judge the right to an adequate notice of the allegations or complaints made and an opportunity to respond to the complaints.
25. The vetting process established in the Vetting of Judges and Magistrates Act No. 2 of 2011 entailed a quasi-judicial process which observed the rules of natural justice and the requirements as to a fair trial.
26. Section 23(2) of the Sixth Schedule to the Constitution of Kenya 2010 and section 22(5) of the Vetting of Judges and Magistrates Act No. 2 of 2011 entailed a constitutional ouster clause which provided that determinations on suitability of judges or magistrates to continue serving in office would not be subject to question or review by any court.
27. It was the Judges and Magistrates Vetting Board that had the exclusive jurisdiction to determine questions about the suitability of a judge or magistrate to continue serving in office and such jurisdiction was exclusive of the appellate or original jurisdiction of any court in Kenya.
28. Neither section 23(2) of the Sixth Schedule to the Constitution of Kenya 2010 nor section 22 of the Vetting of Judges and Magistrates Act No. 2 of 2011 made reference to judicial review. The word "review" could not be interpreted to include the word "judicial review."
29. The general rule in statutory interpretation was that, except for drafting and typographical errors, courts would not add or subtract any word or punctuation mark from a statute. Accordingly, the court would not add the word "judicial" before the word "review" as placed in section 23(2) of the Sixth Schedule to the Constitution of Kenya 2010.
30. There would be no right of appeal from the decisions of the Judges and Magistrates Vetting Board before any other court. However, the right to seek judicial review, even in the case of determinations on suitability, would be exercised as part of the supervisory jurisdiction provided in article 165(6) of the Constitution of Kenya 2010.
31. It was common practice that a review of a decision would be sought before the same judge or magistrate who made it and it would not be against the principles of natural justice to have a review of a determination on suitability carried on by the same panel which made the decision.
32. The vetting process was not intended to inflict pain or suffering to judges and magistrates. While some anxiety could be occasioned, the process did not generally create a situation whereby judges and magistrates would experience torture, cruel, inhuman or degrading treatment.
33. Pursuant to the provisions of section 23 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the vetting process was required to be concluded within one year, however, various amendments had extended the period allowed for vetting. It was not shown that by continuing with the vetting process there had been a violation of the Constitution by the Vetting of Judges and Magistrates Board.

Appeal dismissed.

Citations

East Africa

1. *Anarita Karimi Njeru v Republic (No 1)* [1979] KLR 261; [19761980] 1 KLR 1272 - (Followed)

2. *AOG v SAJ & another* [2011] 2 KLR 461 - (Explained)

3. *Centre for Rights Education & Awareness (CREAW) & another v John Harun Mwau & 6 others* Civil Appeal Nos 74 & 82 of 2012 - (Explained)

4. *Centre for Rights Education and Awareness (CREAW) and 7 others v Attorney General [2011] 1 KLR 458 - (Considered)*

5. *Damodar Jihanbhai & Co Ltd v Eustace Sisal Estates Ltd [1967] EA* 153 - (Varied)

6. *Davies & another v Mistry* [1973] EA 463 - (Followed)

7. *Dry Associates Limited v Capital Markets Authority & Nairobi Petition No 328 of 2011 - (Mentioned)*

8. *Jagat Singh Rains v Choglev* (1949) 16 EACA 27 - (Distinguished)

9. *Law Society of Kenya v Centre for Human Rights & Democracy* Civil Appeal No 308 of 2012 - (Explained)

10. *Matiba, Kenneth Stanley Njindo v Attorney General* Miscellaneous Application No 666 of 1990 - (Followed)

11. *Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] 3 KLR 199 1 - (Applied)

12. *Msagha v Chief Justice & 7 others* [2006] 2 KLR 553- (Explained)

13. *Musera v Mwechelesi and another* [2007] 2 KLR 159 - (Explained)

14. *Muranda v Wabuko* [2008] KLR 265 -(Followed)

15. *Njoya & 6 others v Attorney General & 4 others [2004] 1 KLR 232;* [2004] 1 EA 194 - (Explained)

16. *Ngobit Estate Limited v Carnegie* [1982] KLR 437 - (Followed)

17. *Odd Jobs v Mubia* [1970] EA 476 - (Mentioned)

18. *Olum & another v Attorney General* [2002] 2 EA 508 - (Mentioned)

19. *Omanga, Charles & another v Independent Electoral & Boundaries Commission & 2 others Petition No 2 of 2012 - (Explained)*

20. *Omolo, Grace A v Attorney General and 3 others* Petition No 252 of 2011 - (Explained)

21. *Onyango v Attorney General* [1987] KLR 711 - (Explained)

22. *Republic v Mann* [1969] EA 357 - (Explained)

23. *Republic v Minister for Home Affairs & others ex parte Sitamze* [2008] 2 EA 323 - (Considered)

24. *Rono v Rono & another* [2005] 1 KLR 538; (2008) 1 KLR (G&F) 803 - (Explained)

25. *Sumaria & another v Allied Industries Ltd* [2007] 2 KLR 1 - (Explained)

26. *Tinyefunza v Attorney General of Uganda* [1977] UGCC 3 - (Explained)

27. *Tononoka Steels Limited v Eastern and Southern Africa Trade Development Bank* Civil Appeal No 255 of 1998 - (Explained)

28. *Uganda v Commissioner ofPrisons ex parte Matovu [1966] EA* 514 - (Considered)

29. *Vyas Industries v Diocese of Meru* [1982] KLR 114 - (Considered)

30. *Wakaba & 20 others v Attorney General* [2010] 2 KLR 524 - (Explained)

31. *Waga, Duncan Otieno v Attorney General* Petition No 94 of 2011 - (Explained)

Namibia

1. *Minister ofDefence, Nambia v Mwandinghi* (1992) 2 SA 355 - (Explained)

South Africa

2. *S v Makwanyane and another* [1995] ZACC 3; 1995(6) BCLR 665 - (Explained)

Canada

3. *Suresh v Canada (Minister of Citizenship and Immigration [2002] SCC 1 - (Explained)*

4. *Reference re Secession of Quebec* [1998] 2 SCR 217 - (Mentioned)

India

1. *Hamrardda Wakhama v Union of India* AIR 1960 - (Applied)

Malaysia

2. *Malaysian Bar & another v Government of Malaysia [1987] 2 MLJ* 165 - (Explained)

United Kingdom

3. *Black-Clawson Limited v Papierwerke WaldhofAschaffenberg AG* [1975] AC 591 - (Explained)
4. *Chartbrook Limited v Persimmons Homes Limited* [2009] UKHL 38 - (Applied)
5. *Direct United States Cable Co v Anglo-American Telegraph Co [1877]* 2 AC 394 - (Explained)
6. *Fothergill v Monarch Airline*s [1980] 3 WLR 209 - (Followed)
7. *General Medical Council v Sparkman* [1943] 2 All ER 337 - (Explained)
8. *Houlden v Smith* 14 QB 841 - (Explained)
9. *Inco Europe Ltd v First Choice* [2000] 1 WLR 586 - (Explained)
10. *Lord Simmons in Magor and St Mellons Rural District Council v Newport Corporation* [1951] 2 All ER 839 - (Mentioned)
11. *Moon v Durden* (1848) 2 Exch 22 - (Mentioned)
12. *Penn v Simmonds* [1971] 3 All ER 237 - (Explained)
13. *Polley v Fordham* [1904] 2 KB 345 - (Explained)
14. *Pre-Pepper v Hart* [1992] 3 WLR 1032 - (Explained)
15. *Pyx Granite & Co Ltd v Ministry of Housing and Local Government [1960] AC 26 - (Applied)*
16. *R v Race Relations Board ex parte Setrarajan* [1976] 1 All ER 12 - (Explained)
17. *R v Big M Drug Mart Ltd* [1985] I SCR 295 - (Explained)
18. *Ridge v Baldwin* [1963] 2 All ER 66; [1964] AC 40 - (Explained)
19. *Viscont Dilhorne in Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 - (Explained)
20. *West v Gwynne* (1911) 2 ChD 1 - (Explained)

United States

1. *Brown v Walter* (1933), 62 F 2d 798 - (Explained)
2. *Marbury v Madison,* 5 US 137 (1803) - (Explained)
3. *Plamer v Crone* (1927) 43 TLR 265 - (Explained)
4. *South Dakota v North Carolina,* 192 US 268 (1940) - (Explained)

Former Yugoslavia

1. *Judge Shahabuddeen in Prosecutor v Slobodan Milosevic Case No IT-02-54-AR 734 - (Mentioned)*

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5. Maxwell, SPB., (Ed) (1953) *The Interpretation of Statutes* London: Sweet & Maxwell 10th Edn
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East Africa

1. Civil Procedure Act (cap 21) section 65, 66, 71A, 72-79 - (Interpreted)
2. Civil Procedure Rules (cap 21 Sub Leg) order 45 - (interpreted)

3. Constitution of Kenya, 2010 articles 1(1)(3)(c); 2(3)(5)(6); 10(1); 19(1), (2)(3); 20(1); 21(1); 22(1)(2); 23(3); 24(2)(a)(b)(c); 25(a) (c); 27(1)(2)(4)(5); 28; 29(f); 40(1)(2); 47(1)(2); 50(1)(2); 99(1) (b)(h); 137(1)(b); 159(2) (a)(b); 160; 165(3)(5)(6); 168(8); 169(1); 172(1)(c); 255(1)(g); 256; 259; 262; 264 - (Interpreted)

4. Constitution of Kenya, 2010 Sixth Schedule sections 13, 17, 23, 24(1)(b) - (Interpreted)

5. Constitution of Kenya (Repealed) section 62(3)(5) - (Interpreted)

6. Criminal Procedure Code (cap 75) sections 348, 379 - (Interpreted)

7. Evidence Act (cap 80) section 68 - (Interpreted)

8. Interpretation and General Provisions Act (cap 2) section 2 - (Interpreted)

9. Judicature Act (cap 8) sections 6, 3 - (Interpreted)

10. Public Officer Ethics Act, 2003 (Act No 4 of 2003 - (Interpreted)

11. Vetting of Judges and Magistrates (Procedure) Regulations, 2011 (Act No 2 of 2011) sections 2-4, 15, 17-23 - (Interpreted)

12. Vetting of Judges and Magistrates (Procedure) Regulations, 2011 (Act No 2 of 2011 Sub Leg) regulations 9, 10 - (Interpreted)

JUDGMENT

Judgment of Kiage J.A

1. This Appeal is inextricably linked to a related appeal dealing with the question of vetting of judges and magistrates, to wit, *Law Society of Kenya v The Centre for Human Rights and Democracy & 13 others* [2013] eKLR, Civil Appeal No 308 of 2012, which this very bench of the Court decided on 18th October 2013.

2. Indeed, there is a general commonality of the main issues and of some of the parties and counsel who appeared in both matters.

3. Though variously formulated and attacked from a multiplicity of angles in the memorandum of appeal and in the submissions made on behalf of the Appellant, the central issue herein appears to me to be the constitutionality or otherwise of the *Vetting of Judges and Magistrates Act* and of the entire vetting process.

4. My learned brother Odek, JA has painstakingly captured the myriad arguments made on the various emanations of the central issue aforesaid in his thorough and exhaustive judgment which I had the advantage of reading in draft. I am persuaded by his learned reasoning and am in agreement with the conclusions he arrives at. Being so agreed, and having rendered myself in expansive terms in *Civil Appeal No 308 of 2012* aforesaid which was dealing with matters that arose from live vetting cases as opposed to the potential or anticipatory nature of the case leading to the present appeal, I do not find it necessary to add to what Odek JA has expressed.

5. In the result, this Appeal fails in entirety and is accordingly dismissed. Given the great public interest nature of the matter at hand, and as Murgor, J Mohammed and Odek JJ A agree, we make no orders as to costs.

6. Those shall be the orders of the Court.

Judgment of Murgor, JA

7. This Appeal is concerned with constitutionality of the process of the vetting of Judges and Magistrate's as provided for under section 23 of the Sixth Schedule of the *Constitution* of Kenya 2010, as read together with the *Vetting of Judges and Magistrate's Act* No 2 of 2011 (the *Vetting Act*).

8. I have had the benefit of reading the judgment of my learned brother Odek JA, and whereas I have reached the same conclusion, albeit through different reasoning and conclusions. I will now proceed to render my own decision as hereunder.

9. The Petition, the subject of this Appeal is dated 26th August, 2011, and was filed on 29th August, 2011, by the Appellant who is an advocate of the High Court of Kenya. Instructively, the Petition was filed before the vetting process commenced and following the Appellant's application for stay of execution of the judgment in the High Court in Civil Application No Nairobi 265 of 2011 (UR 175/2001). This Court declined to grant a stay of the proceedings in the public interest, and as a consequence, the vetting process has continued to-date unimpeded.

10. This Appeal was preferred by the Appellant on 29th August, 2011, from a decision in a Petition he had filed in the High Court, seeking several declarations and orders regarding the constitutionality of the *Vetting Act*. The Honourable Judges of the High Court (Ngugi, Majanja & Odunga, JJ) consolidated the prayers sought in the Petition as follows:-

> A declaration that the rights of Judges and magistrates under articles 19, 20, 22, 23, 24, 25, 27, 28, 29, 47 and 50 of the *Constitution* have been denied, infringed, violated and/or threatened.A declaration that sections 2 to 4 and 17 to 23 of the *Vetting Act* are inconsistent with articles 19(1), (2) & (3), 20(1), 21(1), 22(1) & (2), 23(3), 24(2)(a), (b) & (c), 25(a) & (c), 27(1), (2), (4) & (5), 28, 47 (1) & (2)and 50(1) and (2) of the *Constitution* and are to that extent illegal, null and void.An order for compensation of all Judges and magistrates who have been or will be or are likely to be affected by The *Vetting Act* taking into account their contract with the former Constitution and the period the Judge or magistrate will have served according to the *Constitution*.An injunction to restrain the Respondents from d-oing anything prejudicial to the judges and magistrates pending the hearing of the Petition.

11. The issue of whether or not the vetting process is constitutional or not, has to be considered in the light of the various arguments that have been placed before us, which include, that, the vetting process and the *Vetting Act* are inconsistent with the constitutional requirement of the independence of the Judiciary, the removal of judges and infringeupon, and or violate the rights of the judges and magistrates. Further it is argued that the vetting process and the *Vetting Act* violate international law and treaties, including the Bangalore and Latimer House Principles that, the specific provisions of the Vetting Act are inconsistent with the *Constitution* to the extent of their inconsistency, are null and void and should be declared unconstitutional.

12. After hearing all parties, the High Court (Ngugi, Majanja & Odunga, JJ) on 18th November, 2011, rejected and dismissed the Petition, and found as follows:-

> " 104. We appreciate that the vetting process will cause some anxiety to the judicial officers serving before the effective date who will be subjected to the process. However, we believe that the outcome of the process will not only be beneficial to the country and the Judiciary, but also to individual judges and magistrates. As a country, we have chosen to be guided by certain values and principles, among them accountability and integrity.

105. This process will help to underpin these values with respect to the Judiciary and restore the Judiciary to its respected place as the arbiter of justice in Kenya. We believe that rather than undermining judicial independence, the process which is limited in time will enable the Judiciary operate with confidence in its central role of upholding the rule of law in Kenya, free from the shackles that have reduced it to a timid player in government due to the widespread perceptions of incompetence and corruption.

13. Aggrieved by the dismissal of the Petition, the Appellant lodged this Appeal enumerating 34 grounds in his Memorandum of Appeal. The grounds of appeal can be condensed to raise the following issues:

a. Is section 23 of the Sixth Schedule unconstitutional, and ultra vires the *Constitution*"

b. What is the effect of the Vetting Act on the independence of the Judiciary"

c. Whether the process of vetting and the Vetting Act violates the fundamental rights and freedoms as guaranteed by the *Constitution*"

d. Is section 23 as read together with the *Vetting Act* capable of removing the judges having regard to article 172(1) (c)"

e. Did the vetting process breach international treaties and conventions in violation of article 2(5), including the Bangalore and Latimer House Principles"

14. In canvassing the Appellant's case, Dr Khaminwa, learned counsel for the applicant holding brief for Mr Ondieki with the concurrence of learned counsel Mr Mwenesi, who appeared for the Kenya Magistrates and Judges Association (KMJA) submitted that, section 23 of the Sixth Schedule being part of the transitional and consequential provisions of the *Constitution*, was not capable of effecting the removal of Judges, which could only be undertaken by invoking the substantive provisions for removal within the *Constitution*, through a process involving the Judicial Service Commission, and the establishment of tribunals; that the performance of judges could not be assessed, on the basis of the National Values and Principles specified in article 10, as these are vague and undefined concepts.

15. Dr Khaminwa contended That the Application of section 23 of the Sixth Schedule would violate the fundamental rights and freedoms of judges and magistrates, and subject them to torture, or inhuman and degrading treatment. Counsel argued that the High Court judgment was overly Kenyan centric, and placed undue emphasis on reforms of the Judiciary, and further that the vetting process would prejudice the independence of the judiciary, due to alleged interference by the executive and parliament, disruption of security of tenure, and the legitimate expectation of the Judges, that instead the precautionary principle should have been applied; and submitted that section 23 of the Sixth Schedule was in conflict with the entire *Constitution*, on which basis it should be declared unconstitutional, and the affected judges reinstated.

16. Dr Khaminwa and Mr Mwenesi both submitted that the *Latimer* and *Bangalore Principles* had been ratified, and formed part of the laws of Kenya, and therefore would be breached by the implementation of the vetting process contemplated under section 23 of the Sixth Schedule.

17. Mr Mwenesi submitted that the KMJA was not opposed to vetting, but was concerned that section 23 of the Sixth Schedule would deny the judges and magistrates, the right to a fair hearing and appeal, and disregarded the dignity and stature of judges and magistrates. Counsel contended that the issue of the time frame for the vetting process was a fundamental one, as Parliament had limited the time frame to one year, and it did not have power to extend the period for vetting; that the judgment should be

set aside, and section 23 of the Sixth Schedule be declared unconstitutional, and to the extent that the *Vetting Act* was found wanting, the process was therefore impugned.

18. Mr Njoroge, learned state counsel for the 1stand 2nd Respondent supported the judgment of the High Court, and emphasized that the vetting process under section 23 of the Sixth Schedule should be considered within the historical context; that Chapter 18 comprised all transitional and consequential provisions of the *Constitution*, including section 23 of the Sixth Schedule and therefore was an integral part of the *Constitution*. Counsel in his submissions equated the vetting process to employer- employee assessments, and therefore could not be irregular; that article 256 engenders a holistic and constructive approach to interpretation of the *Constitution*; that the *Bangalore Principles* and *the Latimer House Principles* could not be equated to, or considered superior to the *Constitution*. Counsel urged a dismissal of the Appeal.

19. Mr Issa, learned counsel for the 4th Respondents posited that the vetting process differed from the responsibilities of the Judicial Service Commission as provided under article 172; that, a complaint against a judicial officer could be made at any time to the Judicial Service Commission, and that this process was not usurped by the vetting board; that the vetting process was brought about by the transitional provisions of the *Constitution*; that the then judges in Kenya, as stake holders, had during prior consultations, recommended the establishment of an interim Judicial Service Commission to conduct the vetting process, but finally the vetting process under section 23 of the Sixth Schedule was agreed upon, and established to ascertain the suitability of judges and magistrates; that the *Vetting Act* did not exceed the authority specified by the *Constitution*. Counsel further contended that the vetting process was a one off process, limited to a one year period, with a provision empowering Parliament to enlarge time; that with respect to the fundamental rights and freedoms, the Vetting Board was expected to adhere to its mandate, and uphold the fundamental rights of the judges and magistrates, including the right to claim for compensation in the event of any breach of their rights.

20. Mr Kitonga, learned counsel for the 3rd Respondent supported the decision of the High court, and submitted that the learned judges rightly underscored the historical context behind section 23 of the Sixth Schedule, which facilitated the enactment of the Vetting Board as a special purpose vehicle, to transit the Judiciary from the ambits of the old constitution, and into the new dispensation, and was aimed at the reorganization of the Judiciary by inter alia, the vetting of judges and magistrates, to ensure compliance with the stringent requirements of article 10. Counsel argued that, the concept of legitimate expectation, that the judges would remain in office until they retired was unfounded and unrealistic, and that the contention that the rights of the judges and magistrates would be violated by subjecting them to torture, and cruel and inhuman treatment, was far-fetched; that under the *Vetting Act*, provision was made for fair hearing, requiring strict adherence to the rules of natural justice; that the independence of the judiciary was not threatened by the transitional provisions; and that sections 18, 19 and 20, did not exceed the ambits of section 23 of the Sixth Schedule; that Parliament was empowered to extend the time frame for vetting as necessary, and finally, that the *Bangalore* and *Latimer House principles* did not form part of the laws of Kenya.

21. I have considered the arguments of the Appellant's, as well those of the Respondents' as set out in the pleadings in the Record of Appeal, and the respective submissions from learned counsel, which I summerise as follows:

Background

22. In order to appreciate the genesis of section 23 of the Sixth Schedule of the *Constitution* and the Vetting Act, it is important from the outset, to consider and determine the purpose and intent of the said provision.

23. It was the culmination of two decades of agitation by the people of Kenya to attain a new *Constitution*, that saw Kenya on the 27th of August 2010 promulgate the current *Constitution*, founded on the sovereignty of the people of Kenya. In the clamour for a new constitutional dispensation, of particular concern to the Kenyan people, was the absolute necessity to reform the Judiciary, which had suffered criticism and lack of confidence by the public in the judicial process, due to the actual or perceived failure to uphold the rule of law, chronic delays in the dispensation of justice, rampant corruption, judicial incompetence, and lack of independence. From the Report of the Committee of Experts on Constitutional Review dated 11th October 2010, it was clear that, the Committee was unanimous that the Judiciary required to be reformed to restore public confidence, integrity and accountability. Two remedial options were proposed with respect to judicial officers, either that all the judges and magistrates resign and reapply for their positions, or that judicial officers to remain in office, undergo a "vetting process" and subsequently take a new oath of office which was aimed at ensuring that the serving judicial officers were suitable to serve within the stricter ethical principles and requirements set out in the *Constitution*. The latter option was preferred, presumably after adequate consultation with all stake holders, including the judicial officers who were to be affected by the proposed vetting process. Following the work of the Final Report of the Task force on Judicial Reforms presented to the Government of Kenya on 1st July 2010, it was concluded that vetting of judges and magistrates would require to be conducted, in order to ensure that the stringent conditionalities of the *Constitution* were met in the appointment of all judges and magistrates. This was to become the vetting process contemplated under section 23 of the Sixth Schedule of the *Constitution* which provided as follows:

> " 23
>
> (1) Within one year after the effective date Parliament shall enact legislation which shall operate despite articles 160, 167, 168, establishing a mechanism and procedure for vetting within a timeline to be determined by the legislature, the suitability of 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 article 10 and 159.
>
> 23
>
> (2) A removal or 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. "

24. To give effect to section 23, and in accordance with the requirements of article 262 of the *Constitution*, Parliament passed into law the *Vetting Act*, and therein established a framework for the vetting of judges and magistrates. section 3, of the *Vetting Act* provides that:-

> " The purpose of the Act is to establish mechanisms and procedures for the vetting of judges and magistrates pursuant to the requirements of section 23 of the Sixth Schedule".

25. Section 4 specifies that the *Act* will only apply to persons serving as judges and magistrates who were in office on or before the effective date. Section 6 of the Act established an independent Board to be

known as the Vetting of Judges and Magistrates Board ("the Vetting Board"). Section 13 provided for the functions of the Vetting Board which were, *inter alia*:-

> " To vet judges and magistrates in accordance with the provisions of the *Constitution* and this Act".

26. Being a constitutional provision, before proceeding to determine the constitutionality and validity of section 23 of the Sixth Schedule, I consider it necessary to begin with an interpretation of the impugned provision, so as to ascertain its meaning and effect.

27. the *Constitution* being the supreme law of the country, provides the basis against which the legality of all statute law is tested. In interpreting a Constitution, the principles to be applied were set out in *Republic v Mann* (1969) EA 357, as follows:

> " We do not deny that in certain contexts a liberal interpretation of the *Constitution* may be called for, but in one cardinal respect we are satisfied that a constitution is to be construed in the same way as any other legislative enactment, and that is where the words used are precise and un-ambiguous they are construed in their ordinary and natural sense. It is only where there is some in-precision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words. "

28. In construing a provision of the *Constitution*, it is also essential that the intention, or the meaning behind the words is examined. In the case of *Direct United States Cable Co v The Anglo-American Telegraph Co* (1877) 2 AC 394 Lord Blackburn stated that;

> " The tribunal that has to construe an Act or legislation or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in review. "

29. Therefore in order to construe the meaning and effect of section 23 of the Sixth Schedule, due regard must be given to the requirement spelt out in article 259, that such interpretation shall insure that it:

a) promotes its purpose, values and principles;

b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c) Permits the development of the law and d) Contributes to good governance.

30. In doing so, the Courts are directed to approach the interpretation of the *Constitution* by applying the principal of harmonization, unless there is some plausible justification for the consideration of the subject provisions in isolation, see *Olum & another v Attorney General* [2002] 2 EA 508.

31. The clear and plain meaning of section 23 of the Sixth Schedule clearly demonstrates that the intention of the people of Kenya was to establish a process to determine the suitability or otherwise of judges and magistrates in office before the promulgation of the *Constitution*, to remain in office. It was intended that vetting process would be insulated from judicial and other processes and procedures, and would be a one off procedure to be undertaken within a limited time frame during the transitional period.

32. Dr Khaminwa submits that, the enactment of section 23 of the Sixth Schedule within the transitional and consequential provisions, renders it insignificant, and incapable of overriding the substantive provisions of the *Constitution*. The "Transitional and Consequential provisions", are to be found in Chapter 18 of the *Constitution*, and are deemed to be an integral part of the *Constitution* by virtue of

article 262 of the *Constitution*. The transitional provisions were enacted in this way, for reasons that their operation and purpose was specific, and confined to a particular period in time. It was the framers intention, that the *Constitution* should not be encumbered with provisions that would cease to be of any consequence, once the *Constitution* was fully implemented, but, it was definitely not intended to relegate the transitional provisions to a status inferior to the substantive provisions of the *Constitution*.

33. In *Centre for Rights Education & Awareness (CREAW) & 2 others v John Harun Mwau & 2 others*, this Court stated thus,

> "...The functional construction rule referred to requires that the enactments must be construed in a manner which gives each component part of the Act containing it, according to its legislative function as such a component. In my view, the same construction applies to a schedule to the *Constitution*.
>
> Furthermore, the schedules including the Sixth Schedule to the current Constitution were contained in the Proposed Constitution of Kenya which was approved in a national referendum."

34. Section 262, does not specify in a situation of conflict between separate constitutional provisions, which would prevail. However in the case of *South Dakota v North Carolina* (192 US 268 (1940) LED, the Court stated,

> "It is an elementary rule of constitutional construction is that no one provision of the *Constitution* is to be segregated from all the others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be interpreted as to effectuate the general purpose of the instrument".

35. The vetting process of judicial officers as provided by section 23 within the Sixth schedule, was one of the transitional requirements included as an integral and fundamental part of the *Constitution*, through which the then existing judiciary would have to traverse to enable the birth of a new judiciary, restored and reformed capable of operating in consonance with, and within the framework and spirit of the new Constitution. From the plain and ordinary meaning of section 23 of the Sixth Schedule, the intention was for the establishment by Parliament through legislation, of a body to vet and determine the suitability of judges and magistrates, who were in office on the effective date, and it mattered not that the provisions were contained in the Schedules of the *Constitution*. It was the intention of the people of Kenya that the provisions of the Schedules were to be given the same force and effect as substantive provisions of the *Constitution*.

36. This the leads us to the first issue for determination.

a. Is section 23 of the Sixth Schedule unconstitutional, and ultra vires the *Constitution*"

37. It is the Appellant's contention that the section 23 of the Sixth Schedule is unconstitutional as, to the extent that it establishes an impugned process for the vetting of judges and magistrates, it should be declared unconstitutional.

38. The principles to be applied to determine whether or not a statute is constitutional, are now well settled. In the case of *Hamrardda Wakhama v Union of India* AIR 1960 at 554, it was stated as follows;

> "When an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard

must be had to the enactment as a whole to its objects and purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at".

39. The same proposition was expounded on in *Republic v Big M Drug Mart Ltd* [1985] I SCR 295 where the Court stated thus;

> "Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate a legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislations object and its ultimate impact, are clearly, linked, if not indivisible. Intended and achieve effects have been looked to for guidance in assessing the legislation's object and thus the validity"

40. In *Olum & another v Attorney-General* (supra) the Court held that in order to determine the constitutionality of a statute, it had to consider the purpose and effect of the impugned statute or section thereof. If the purpose was not to infringe a right guaranteed by the *Constitution*, the Court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the *Constitution*, the statute or section in question would be declared unconstitutional. The court went on to refer to the principle of harmonization, which requires that all provisions of the *Constitution* concerning an issue, should be considered together.

41. It is undisputed that, the purpose and intent of section 23 of the Sixth Schedule was to give effect to the sovereign will of the people of Kenya for the reform of the Judiciary so as to embrace the new socio-economic and political order, with its new values and norms. The scope and effect of the provision, was aimed at actualizing such ideals and standards that would initiate a journey towards an ideal and credible judicial system, one which would be independent, free from interference, transparent and accountable as envisioned by the people of Kenya. Bearing this in mind, the question for consideration of this Court is whether the impugned provisions which seek to promote such eminent principles can be deemed unconstitutional and therefore invalid" I am not persuaded by that argument.

42. Article 1 (1) of the *Constitution* provides that,

> " All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the *Constitution*. "

43. Indeed, guided by this mandate, I find that section 23 of the Sixth Schedule as promulgated by the Kenyan people is constitutional, and not ultra vires the *Constitution*, as its purpose and true intention are specific and sufficiently defined, which was the establishment of a process by which to vet judges and magistrates in office at the promulgation of the *Constitution*, to ascertain their suitability or otherwise.

b. What is the effect of the Vetting Act on the independence of the Judiciary"

44. Article 159 provides that judicial authority is derived from the people of Kenya, and shall be exercised by the Courts and tribunals established by this Constitution. The independence of the judiciary is specified at article 160 of the *Constitution*. The United Nations Convention on the Basic Principles on the Independence of the Judiciary as endorsed by the United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 sets out the minimum requirements for an ideal judicial system.

45. Both Dr Khaminwa and Mr Mwenesi have argued that section 23 of the Sixth Schedule as read together with the Vetting Act threaten the independence of the Judiciary in contravention of article 160, as first, interference was permitted through the enactment of legislation by Parliament to vet judges and magistrates, secondly, the vetting process denied the judicial officers their security of tenure, and finally judicial officers were denied the legitimate expectation to serve until retirement age.

46. When considering these arguments, it will be recognized that the vetting process is an express requirement of the *Constitution*, and unless it can be demonstrated otherwise, the Legislature was obligated to enact a law with mechanisms and processes to ascertain the suitability of existing judicial officers to serve under the newly promulgated Constitution. Pursuant to section 23 of the Sixth Schedule, the *Vetting Act* was passed into law, following which, Parliament had no further role to play. What followed thereafter was the establishment of the Vetting Board, an independent judicial body, sui generis, and of unusual hierarchical status, with its origins rooted in section 23 of the Sixth Schedule of the *Constitution*, endowed with special functions and exclusive jurisdiction, to vet judges and magistrates, in accordance with the provisions of the *Constitution* and the Vetting Act. In the circumstances, it is difficult to comprehend the argument put forward by the Appellant that Parliament and the Executive could interfere with the vetting process, or indeed with the independence of the Judiciary.

47. With reference to the security of tenure of judges, it must be appreciated that this entitlement is a constitutional prerogative, granted by the *Constitution*. As to whether such privileges continue in perpetuity would be dependent on the existence of a constitutional provision providing for them. However, when the provision ceased to exist by virtue of the promulgation of a new constitution, it followed that the privilege or entitlement referred to would stand extinguished, or altered. In the present circumstances, and with the promulgation of the current Constitution, the privilege would be bestowed following confirmation of suitability to serve in office. For this to occur, judicial officers would be required to fulfill certain conditions precedent. In the case of serving judicial officers, the conditions precedent were the declaration of suitability by the Vetting Board. In the case of judges appointed under the new constitutional order, after due appointment and administration of an oath to serve the Republic of Kenya under the *Constitution*. Without the fulfillment of the aforementioned conditions precedent, the entitlement to security of Tenure would cease, or never come into being as the case may be. With regard to the argument that serving judicial officer had a legitimate expectation to serve until retirement age, I consider that, the promulgation of a new constitution as constituting exceptional circumstances that can validly oust the legitimate expectations of any serving public officer including judges and magistrates.

48. It is my considered view that, the process of vetting was intended to strengthen the independence of the judiciary by allowing only those judges and magistrates who were found suitable to serve to remain in office. At the same time, under the new constitutional order, a transparent and well defined process of recruitment of judges would be institutionalized with the aim of upholding the constitutional principles for an independent and credible judiciary. I therefore find, that the vetting process does not contravene the provisions on the independence of the judiciary, to the contrary, I find that the vetting process serves to strengthen the independence of the judiciary.

49. As to whether the vetting process interfered with the independence of the judiciary, I find that the vetting process once instituted, could not become the subject of interference by the Parliament or the Executive. It was a process that was designed to be insulated from all external influence, with the independence of the judiciary being upheld.

c. The process of vetting and the Vetting Act violate the fundamental rights and freedoms as guaranteed under the *Constitution*"

50. The Appellant temphatically argued that sections 2 to 4 and sections 17 to 23 of the *Vetting Act* are inconsistent with articles 19(1), (2) & (3), 20(1), 21(1), 22(1) & (2), 23(3), 24(2)(a), (b) & (c), 25(a) & (c), 27(1), (2), (4) & (5), 28, 47(1) & (2), 50(1) and (2), as well as articles 165, 168 and 172, as they violate the rights of judges and magistrates, by providing for a process for their removal from office the *Constitution* and to that extent are illegal, null and void.

51. I remain conscious of the legal position that where fundamental rights and freedoms are alleged to have been violated, it is a special jurisdiction, and therefore a party who seeks to invoke the Court's jurisdiction under article 22, so as to enforce the Bill of Rights, must identify the sections or provisions, and demonstrate how the sections are violated in relation to him. This principle has long been established in the case of *Anarita Karimi Njeru v Republic (No 1)* 1979 KLR 261 and *Matiba v the Attorney General* HC Misc Appln 666 of 1990. In the context of the appeal before us, the particular rights in question are, first, that the right to appeal is denied, second, that vetting is discriminatory, third, that the judges and magistrates would be subjected to torture and inhuman and degrading treatment, and finally, that the right to fair trial and access to justice is denied, and that therefore section 23 of the Sixth Schedule is impugned.

52. I will examine individually each fundamental right or freedom alleged by the Appellant to have been violated in relation to the vetting process, and the *Vetting Act*.

53. First, the Appellant has argued that, the vetting process violates the judges and magistrates right of appeal contrary to article 22 of the *Constitution*, in that section 23(2) of the Sixth Schedule provides that:-

> " a removal or a process leading to a removal of a judge shall not be subject question in, or review by any court".

54. As established earlier, a literal and plain meaning of the constitutional provision ousts the jurisdiction of the Court to hear questions, or to review the decisions of the Vetting Board on suitability. It is apparent from the provisions of the *Vetting Act* that, the drafters having taken cognizance of the ouster provision in section 23 of the Sixth Schedule, included at section 22 of the *Vetting Act* a provision permitting the review of the first decision by the Vetting Board, after which review, that decision will be final. Having said that, it is also clear that no provision was made for a process of appeal to the High Court. It is my considered view that, without such provision, it is difficult to envisage how a right of appeal can now exist. As such I find that there can be no right of appeal to the High Court.

55. Second, the Appellant has argued that, the judges and magistrates serving at the time of the promulgation of the *Constitution*, were the subject of unconstitutional discrimination, by virtue of section 23 of the Sixth Schedule.

56. Article 27 of the *Constitution* provides that every person is equal before the law, and has the right to equal protection and benefit of the law. The provision prohibits discrimination by the state against sex, race, pregnancy status, marital status, health status, ethnic or social origin, colour, age disability, religion, conscience, belief, culture, dress, language or birth.

57. It is a requirement of section 23 of the Sixth Schedule, that all judges and magistrates serving before the promulgation of the *Constitution*, would be subjected to the vetting process. Equally, it is a requirement that in the case of judges and magistrates appointed to the Judiciary after the promulgation of the

Constitution would be subjected to a stringent interview process in accordance with the article 172 as read with article 10 of the *Constitution* and the, provisions of the *Judicial Service Act*. In all cases, the spirit of the *Constitution* was that going forward, all persons appointed to the serve as judges and magistrates must meet the requirements of integrity and standards of ethics stipulated in the *Constitution*.

58. Given the specific criteria that was applicable to all appointments to the positions of judges and magistrates, I find and hold that no discrimination would be occasioned to the judges and magistrates, holding office prior to promulgation of the *Constitution*.

59. Third, Dr Khaminwa contended that the vetting process was in violation of article 28, as judges and magistrates would be subjected to torture or inhuman and degrading treatment, by virtue of having to undergo the vetting process. In order to determine whether the process was in violation of article 28, it is imperative that the definition of torture be considered. In the case of *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, the Court stated,

> " Torture is defined article 1 on the United Nations Convention against torture as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials. "

60. In the case of *Harun Thungu Wakaba v The Hon Attorney General* 2010 eKLR the Court stated, Therefore the question is whether the various acts to which each of the plaintiffs was subjected to, as deponed to in the respective affidavits qualify to be torture or inhuman or degrading treatment within the meaning and definition provided in article1 of the Convention against Torture or inhuman or degrading treatment or punishment The incessant interrogation and the denial of sleep were all mental or psychological infliction of pain Further, the infliction of pain was done during the course of interrogation with a view to obtaining information or a confession from the plaintiffs. Thus all the ingredients of the definition of torture as contained in article 1 of the Convention against Torture or inhuman or degrading treatment or punishment were present. The actions described in the affidavits would constitute infringement of the right to protection against inhuman treatment as provided under section 74(1) of the *Constitution*". (now repealed) In determining whether the vetting procedures are within the definition of torture, an interrogation the procedures as set out in section 18 to 23 of the Vetting Act which were enumerated in detail earlier shows that, the procedures comprise of notifications of interviews, compiling of personal and professional information, personal interviews, consideration of information gathered in the course of the personal interviews of judge or magistrate, hearings, either public or private as the case may be.

61. It is my considered view that, these are standard requirements for the conduct of many an interview in other disciplines, and as such I cannot see how the vetting process, can by any stretch of the imagination, be considered a process that was designed to willfully and deliberately inflict pain and suffering on the judges and magistrates, so as to be classified as torturous. I am unable to comprehend how a professional interactive interview process, provided for both by the *Constitution* and statute can be equated to torture or inhuman or degrading treatment. Looked at objectively, the nature of the vetting process could be considered an enquiry or assessment of the judicial career of the judges and magistrates, a performance milestone, similar to the routine employee performance assessments carried out by other private and public institutions.

62. Fourth, the Appellant contends that judges and magistrates would be deprived of the right to a fair trial under article 50(1) and (2). It is clear that the vetting process is by its very nature, judicious, and conducted by the professional peers including eminent international judges, senior advocates and

others. The Vetting Board being a quasijudicial body was established to carry out the process of vetting judges and magistrates, in accordance with the *Vetting Act*. For this specific reason, the *Vetting Act* comprises such provisions as would be necessary for the conduct of this process. Specifically, sections 17 to 23 are concerned with the "Vetting Procedures". Section 18 sets out those matters for consideration during vetting of a judicial officer, including, diligence and competence in past work record, existence of a criminal record, or any pending complaints from the public. Section 19 the Vetting Act specifies the matters to be considered by the Vetting Board, including, a compilation of the Complaints, issuance of vetting notices comprising a summary of complaints, the hearing process. Section 21 provides for communication of the determination on the suitability or not of all judges and magistrates by the Vetting Board, in accordance with the values and principles set out in articles 10 and 159 of the *Constitution*. The *Vetting Act* makes it a statutory mandate that the vetting process, accord all judges and magistrates a fair hearing, and makes it a requirement that the Vetting Board adhere to the rules of natural justice. With the stipulation of this stringent process, it cannot be convincingly stated that the *Vetting Act*, falls short of article 50, thereby depriving the judges and magistrates of the right to a fair hearing. The Act is clear on this requirement, and as a consequence, I find and hold that the *Vetting Act* has made adequate provision for a fair hearing process in the vetting of judges and magistrates.

63. Fifth, that the judges and magistrates are denied access to justice contrary to article 22. I consider that this has been adequately address with respect to article 50(1) and (2) and I find and hold that the Vetting Act has made adequate provision for access to justice in respect of the vetting of judges and magistrates.

64. In considering the limitation of the identified rights it is necessary to make reference to article 24 of the *Constitution*, which provided that a right or a fundamental freedom can be limited by law in consideration of various factors including,

> " a) the nature of the right or fundamental freedoms;
>
> b) the importance of the purpose of the limitation;
>
> c) the nature and extent of the limitation
>
> d) ..."

65. To my mind, the limitations provided in the vetting process, were to ensure that in the shortest time possible, the required reform in the judiciary would be attained.

66. Having carefully considered the rights specifically identified by the applicant as against the impugned provisions, I find that section 23 of the Sixth Schedule and the *Vetting Act* are not inconsistent with the fundamental rights, and principles, in particular the right to appeal, equality and freedom from discrimination, freedom from torture and inhuman and degrading treatment, the right to fair trial and access to justice, as enshrined in the *Constitution*, with the limitations specifically provided, having regard to article 24, on account of the transitional requirements. To this extent, I find section 23 of the Sixth Schedule to be constitutional.

d. Are section 23 and the Vetting Act capable of removing the Judges and Magistrates"

67. Both Dr Khaminwa and Mr Mwenesi argued that the section 23 of the Sixth Schedule as read together with section 18, 19, 20 of the *Vetting Act* purported to make provision for the removal of judges from office, who were not found to be suitable. Counsel argued that judges could only be removed from office in accordance with the substantive provisions of article 172(1)(c) of the *Constitution*, that is, through complaints against judicial officers and the establishment of tribunals, and not through the impugned provision to be found in the Schedules of the *Constitution*.

68. Mr Mwenesi expounded further that, section 23 of the Sixth Schedule does not deem it possible for the vetting process to remove a judge or magistrate from office, as section 23 of the Sixth Schedule did not specify how the judge's removal would be effected.

69. In my considered view, given the historical context which I have already highlighted, the framers of the *Constitution* were alive to the unique and special circumstances that prevailed at the time, and therefore incorporated articles 168 and 172 to provide for the applicable process, for all judicial offices who survived the vetting or were appointed subsequent to the promulgation of the new constitution. The vetting process under section 23 of the Sixth Schedule therefore constituted an exception to the process of removal contemplated under articles 168 and 172.

70. Section 23 of the Sixth Schedule makes provision for the establishment of mechanisms and procedures for vetting. As outlined earlier, sections 18, 19 and 20 set out the details of the procedure for vetting. From a critical evaluation of these procedures, it is apparent that they provide for a process that would holistically assess the judge or magistrate to ensure that any judicial officer appointed to office has the necessary qualifications experience and capabilities, and was of high moral integrity and capable of impartiality, such as is demanded by article 166 of the *Constitution*.

71. When these procedures, are compared with section 23 of the Sixth Schedule, it is clear and I find that they accurately reflect, and are harmonious with the requirements of section 23, and therefore cannot be considered to be in excess of such provision.

72. As to whether a finding of unsuitability of a judge or magistrate by the Vetting Board, automatically removes such judicial officer from office, it is unequivocal from the plain meaning section 23 of the Sixth Schedule that, the process of vetting was to determine the suitability of all judges and magistrates in office following the promulgation of the *Constitution*. The question therefore is that in the event, that a judge or magistrate is declared unsuitable, are they by virtue of section 23 of the Sixth Schedule as read together with section 21 of the *Vetting Act* deemed to have been removed from office"

73. Section 23(2) of the Sixth Schedule provides,

> " A removal or 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. "

74. Section 21 of the *Vetting Act* provides:

(1) The Vetting Board shall upon determining the unsuitability of a judge or magistrate to continue serving in the judiciary, within thirty days of the determination, inform the concerned judge or magistrate of the determination, in writing, specifying the reasons for the determination.

(2) Once informed of the decision, under sub section (1), the judge or magistrate shall be deemed to have been removed from service.

75. The terms of section 23(2) of the Sixth Schedule and section 21 of the *Vetting Act* are clear and unambiguous. From the plain and ordinary meaning, it is evident that a finding of unsuitability automatically results in a removal, without recourse to any other process. In the circumstances it cannot be argued that there is a lacuna in the law relating to removal under the Vetting Act, for which there must be reference to the removal provisions provided in articles 168 and 172.

76. To consider further the spirit of the *Constitution* that governed the process of removal, it is necessary to examine a comparable provision. In this regard, I refer section 24 of Sixth Schedule which provided for the vacation of the Chief Justice in office immediately before effective date, notwithstanding the provisions of articles 168, and 172. As a corollary, it is self -evident that, that articles 168 and 172 were specifically ousted under the new Constitution for the purposes of redeeming and reforming the then discredited Judiciary.

77. As such, I find that section 23 of the Sixth Schedule as read together with section 21 of the *Vetting Act* is constitutional, and would render a judge or magistrate automatically removed from office, subject to review under section 22, where a determination is reached that the individual judge or magistrate has been found unsuitable to serve.

e. Was there a breach of the international treaties and conventions contrary to article 2(5) including the Bangalore and Latimer House Principles"

78. Article 2(5) provides that the general rules of international law shall form part of the laws of Kenya. Article 2(6) goes further to stipulate that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. Dr Khaminwa has argued that The *Bangalore Principles*, and the *Latimer House Principles* form part of the rules of international law within the meaning of article 2(5), and the vetting process was in direct breach these principles. Mr Njoroge argued that, the *Bangalore Principles* and the *Latimer House Principles* were developed by judges as a bench code of conduct to provide guidelines in the conduct of their work, but could not assume the status of law that was superior to the *Constitution*.

79. Indeed, I have reviewed the *Bangalore Principles* and found that they are a bench code establishing ethical conduct for judges.

80. The *Latimer House Principles*, were indeed ratified by Kenya, and as such, there can be no doubt that they form a part of the laws of Kenya, which in any event makes them subordinate to the *Constitution*. I consider them to be guidelines and a bench code for the conduct of judges and magistrates and for the independence of the Judiciary, which I note from the Preamble:-

> " in each case is subject to the domestic law of each Common wealth country. "

81. In our case a new *Constitution.*

82. I therefore find, that the *Latimer House Principles* are specifically ousted by section 23 of the Sixth Schedule.

Summary of Findings

83. I now set out a summary of my findings on the issues framed for determination as hereunder:

a) On the issue of section 23 of the Sixth Schedule is unconstitutional, and *ultra vires* the *Constitution* by virtue of being inconsistent with the spirit and the letter of the *Constitution*, I find the provision to be constitutional and valid.

b) On the issue of whether the vetting process contravenes the constitutional requirement for the independence of the judiciary, I find, that the vetting process does not contravene the constitutional provisions on the independence of the judiciary, I further find that the vetting process to be an integral and necessary part in the process of achieving an independent judiciary.

c) On the issue of the alleged violation of the fundamental rights and freedoms, more particularly the right to appeal, to equality and freedom from discrimination, freedom from torture and inhuman and degrading treatment, the right to fair trial and access to justice, I find that section 23 of the Sixth Schedule and the *Vetting Act* are not inconsistent with the requirements of the Bill of Rights as enshrined in the *Constitution*, with the limitations specifically provided, in article 24, and taking into account of the transitional provisions.

d) On the issue as to whether or not the vetting process and the *Vetting Act* can result in the constitutional removal of judges and magistrates, it is clear, and I find that, section 23 of the Sixth Schedule and section 21 of the *Vetting Act* expressly and adequately provides for a process to vet the judges and magistrates be conducted as part of the process of reforming the Kenyan judiciary.

e) On the issue of whether that the vetting process is in breach of the international treaties and conventions, more particularly that the *Bangalore* and *Latimer House Principles*, I find, that the *Latimer House Principles* are specifically ousted by section 23 of the Sixth Schedule.

84. To the extent of the findings above, I find that section 23 of the Sixth Schedule, the *Vetting Act* and the vetting process to be constitutional and valid and as such, I decline to interfere with the judgment of the Honourable Judges of the High Court delivered on 18th November 2011, as a consequence of which this appeal is dismissed with no order as to costs due to the public interest nature of this Appeal.

85. Accordingly, the final orders of the Court shall be as stated in the judgment of Kiage JA.

Judgment of F Sichale, JA

86. On 29th August, 2011, Dennis Mogambi Mong'are an Advocate of the High Court of Kenya, filed a Petition against the Attorney General, The Minister for Justice & Constitutional Affairs, The Judges & Magistrates Vetting Board and The Judicial Service Commission (the 1st, 2nd and 3rd Respondents respectively). In the Petition, he sought the following orders

a. A declaration that the Judges and Magistrates rights to institute proceedings under article 19(1),(2), (3) have been infringed, violated, denied and/or threatened.

b. A declaration that the Judges and Magistrates rights to enforce their basic rights under article 20(1) of the *Constitution* have been denied, infringed, violated and/ or threatened.

c. A declaration that the Judges and Magistrates right to institute proceedings under article 22(1) of the *Constitution* have been denied, infringed, violated and/ or threatened.

d. A declaration that the rights of Judges and Magistrates to conservatory orders, injunction, judicial review and compensation under article 23(1)(3) of the *Constitution* has been denied, infringed, violated and/or threatened.

e. A declaration that the rights of Judges and Magistrates envisaged by articles 24(2)(4)(b)(c) of the *Constitution* has been violated, infringed and/or threatened.

f. A declaration that the rights of Judges and Magistrates under article 25(a)(c) of the *Constitution* has been denied, infringed, violated and/or threatened.

g. A declaration that the rights of Judges and Magistrates under article 27(1)(2)(4)(5) of the *Constitution* have been denied, infringed, violated and/or threatened.

h. A declaration that the rights of Judges and Magistrates under article 28 of the *Constitution* have been denied, infringed, violated and/or denied.

i. A declaration that the rights of Judges and Magistrates under article 29(f) has been denied, infringed, violated and/or threatened.

j. A declaration that the rights of Judges and Magistrates under article 47(1)(2) of the *Constitution* has been denied, infringed, violated and/or denied.

k. A declaration that the rights of Judges and Magistrates under article 50(1)(2) of the *Constitution* has been denied, infringed, violated and/or threatened.

l. A declaration that sections 2, 3, 4, 17, 18, 19, 20, 21, 22 and 23 of the *Vetting of Judges and Magistrates Act*, 2011 are inconsistent with article 19(1)(2)(3), 20(1), 21(1), 22(1), 23(1)(3), 24(2)(a)(b), 25(a)(c), 26(1), 27(1)(2)(4)(5), 28, 29(f), 40(1)(2), 50(1)(2) of the *Constitution* and to that extent illegal, null, void and invalid.

m. A declaration that the actions done under section 19, 20, 21, 22, 23 of the *Vetting of Judges and Magistrates Act*, 2011 are invalid by tint of article 2(4) of the *Constitution*.

n. An order for compensation of all judges and magistrates who have been or will be or are likely to be affected by the *Vetting of Judges and Magistrates Act*, 2011 taking into account their contract with the former Constitution and the period the judge/magistrate will have served according to the *Constitution*.

o. An injunction restraining the Respondents, their agents, servants or whosoever from doing anything prejudicial to the Judges and Magistrates until this Petition is heard and determined.

87. During the pendency of the Petition, the High Court granted leave to the Party of Independent Candidates of Kenya (PICK), The International Commission of Jurists (KENYA Chapter - ICJ-K), The Law Society of Kenya (LSK), Kenyans for Peace With Truth and Justice (KPTJ) African Centre for Open Governance (AfriCOG) and the Kenya Magistrates & Judges Association (KMJA) to be enjoined in the Petition.

88. The parties through their various counsels presented their rival arguments before Justice Ngugi, Justice Majanja and Justice Odunga who on 18th November, 2011 delivered themselves thus:-

82. We do not however, find any discrimination between judges and magistrates. There is no right of appeal provided under the *Vetting of Judges and Magistrates Act* for magistrates who are removed as a result of vetting.

The import of section 23(2) referred to is to shield the vetting process from the application of article 168(8) which provides for an appeal to the Supreme Court by a judge who has been removed from office. We find and hold that both judges and magistrates are treated equally in terms of appeals in that both categories of judicial officers have no right of appeal.

83. We also do not see how article 27 is infringed. All judges and magistrates appointed prior to the coming into force of the *Constitution* are all treated equally and have the same rights under the *Vetting of Judges and Magistrates Act*.

85. We also hold that in so far as the vetting process is constitutionally ordained, it cannot be subjected to the test of discrimination nor do we find in the provisions of the *Vetting of Judges and Magistrates Act* an infringement of article 27.

87. With the greatest respect to the Petitioner, we do not see how the vetting process as provided for under the *Vetting of Judges and Magistrates Act* and sanctioned by the *Constitution* would even remotely approach the definition of torture, cruel, inhuman and degrading treatment and amount to a violation of the provisions of article 25.

93. We have studied the *Vetting of Judges and Magistrates Act* and are satisfied that it meets the threshold of what constitutes a fair process. The requirements for notice and for the complaints to be communicated to the judge or magistrate, the opportunity to be heard, the requirement that the rules of natural justice which include the right to legal representation be followed in the vetting process are all clearly intended to safeguard the rights of the judicial officers to be vetted. In the circumstances, we are unable to find anything in the *Vetting of Judges and Magistrates Act* that violates the right of judges and magistrates to a fair hearing, and we do not find anything in the *Vetting of Judges and Magistrates Act* that derogates from article 50(1).

97. Section 23 of the *Vetting of Judges and Magistrates Act*, which provides for the time frame within which the vetting is to take place, is attacked as being insufficient for the vetting process. This attack, in our view, has no merit. Section 23(1) provides as follows: "The vetting process once commenced shall not exceed a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year.

98. We hold that the time frame provided by the *Vetting of Judges and Magistrates Act* gives judicial officers the expectation that their matter will be dealt with expeditiously and without undue delay. This is the hallmark of a sound judicial process and cannot be faulted. With respect to the Petitioner, the concern with regard to the period for vetting being too short is speculative and calls on this court to make decisions on apprehensions that are not grounded in reality.

102. For the reasons stated above, we find that this Petition lacks merit and is hereby dismissed.

89. The Court proceeded to make further orders as follows:-

"103. We are of the view that this matter is a matter that was of great public interest, both to the general public who are the consumers of justice, but also to the judicial officers who will be subjected to the vetting process. We therefore make no order as to costs.

104. We appreciate that the vetting process will cause some anxiety to the judicial officers serving before the effective date who will be subjected to the process. However, we believe that the outcome of the process will not only be beneficial to the country and the judiciary, but also to individual judges and magistrates. As a country, we have chosen to be guided by certain values and principles, among them accountability and integrity.

105. This process will help to underpin these values with respect to the judiciary and restore the judiciary to its respected place as the arbiter of justice in Kenya. We believe that rather than undermining judicial independence, the process, which is limited in time, will enable the judiciary operate with confidence in its central role of upholding the rule of law in Kenya, free from the shackles that have reduced it to a timid player in government due to the widespread perceptions of incompetence and corruption. "

90. The Appellant was aggrieved by the decision of the Superior Court and filed this Appeal. He listed 34 grounds in the Memorandum of Appeal dated 8th June 2012 which can be summarized as follows:-

1. The High Court erred in law by failing to appreciate the full import, purport, object and value of the Bangalore Principles, the Latimer House Principles and the United Nations conventions that protect the independence of the judiciary from any person or authority;

2. The High Court erred in law by failing to appreciate that section 23 of the Sixth Schedule did not exclude judges and magistrates from enjoying the inherent rights under the *Constitution*, such articles 19, 20, 21, 22, 23, 24, 25 and 50;

3. The High Court erred in law by failing to appreciate that article 172(1) of the *Constitution* as read with section 23 2) of the Sixth Schedule excludes magistrates from vetting;

4. The High Court erred in law by failing to interpret and answer various constitutional questions that had been proposed by the Petitioner, thus failing in carrying out its mandate under article 165 of the *Constitution* and erred in law by drawing wrong conclusions, that the judiciary is corrupt, incompetent and inept;

5. The High Court erred in law by failing to appreciate that judges are only subject to removal by the mechanism defined in the *Constitution*;

6. The High court erred by failing to appreciate that the vetting of Judges and Magistrates contravenes article 168 of the *Constitution* and section 31 and 31 of the Sixth Schedule to the *Constitution*;

7. The High Court erred in failing to appreciate that the provisions of the *Vetting of Judges and Magistrates Act* violate the principles of legitimate expectation protected by article 10, 159 and 259 of the *Constitution*, and the principle of non-discrimination protected by article 27 of the *Constitution*;

8. The High Court erred in failing to find that the *Vetting of Judges and Magistrates Act* 2011 has a retrospective effect that prejudices judicial officers;

91. The Appellant prayed that:-

a) The judgment of Honourable Ngugi J, Majanja J, and Odunga J. dated 18th November 2011 be set aside and in its place the sections 3, 4, 17, 18, 19, 21, 22, 23 of the *Vetting of Judges and Magistrates Act* No 2 of 2011 be declared invalid and unconstitutional.

b) It be declared that Judges and Magistrates are entitled to the rule of law and due process.

c) It be declared that Judges and Magistrates are entitled to an appeal from the determination and/or finding and/or decision of the Vetting of Judges and Magistrates Board.

d) It be declared that the rights of Judges and Magistrates to a fair trial under article 25(c) are so deep in our jurisprudence that they cannot be violated.

e) Any other order the Court may deem fit and convenient in the circumstances of this case.

92. The Appeal came up for hearing before us on 16th September, 2013. Arguments in support of the appeal were made by learned counsels Dr Khaminwa and Mr Mwenesi whilst the arguments in opposition to the appeal were presented by learned senior counsel Nzamba Kitonga, learned counsels Mwangi Njoroge and Mansur Issa.

93. In his submission, Dr Khaminwa for the Appellant urged us to find that section 23 of the Sixth Schedule to the *Constitution* was in conflict with the substantive provision of the *Constitution*; that the Judges who took oath of office under article 159 of the *Constitution* could only be removed in

accordance with the substantive provisions of the *Constitution*; that section 23 of the Sixth Schedule is contrary to article 50 of the *Constitution* which provides for the right to a fair trial as a human right that cannot be violated; that the ouster clause in section 23 of the Sixth Schedule in removing the vetting process from the review mechanism was unconstitutional; that the vetting as outlined in the *Vetting of Judges and Magistrates Act* is akin to subjecting judges and magistrates to inhuman and degrading treatment contrary to article 29 of the *Constitution*; that the judges had the legitimate expectation to remain in office until the attainment of 74 years of age as provided in the former Constitution; that the section 23 of the Sixth Schedule being not part of the substantive provisions of the *Constitution* cannot override the substantive provisions; that the vetting process undermined the security of tenure provided for in the office of a Judge; that the vetting process undermined the independence of the judiciary contrary to the Latimer and Bangalore principles which are now part of treaty law by dint of article 2(5) and (6) of the *Constitution*; that the vetting process is discriminatory and undermines the collegiality of Judges and finally that the vetting process was geared towards removal of Judges as opposed to vetting them.

94. On his part, Mr Mwenesi on behalf of The Kenya Judges and Magistrates Association supported the appeal and associated himself with Dr Khaminwa's submissions. He faulted the vetting process for its derogation from the Bangalore and Latimer principles which principles require that the vetting of Judges be carried out only by Judges and further provide for a right of appeal; that the vetting process was discriminatory as it afforded the magistrates with the right to appeal and removed that right from the Judges; that the vetting process would undermine the independence of the Judiciary besides the undermining of the dignity, integrity and stature of Judges and Magistrates. He echoed the submissions of Dr Khaminwa that the vetting process was geared towards removal of Judges as opposed to vetting them. He criticised the Vetting Board for taking unnecessarily long to complete the process by going out on a "fishing expedition".

95. Mr Njoroge, on behalf of the Attorney General and the Minister for Justice and Constitutional Affairs, opposed the appeal on the reasoning that the vetting process could not be equated to a trial and hence the inapplicability of articles 50(2) and 25 of the *Constitution*; that there was no discrimination as all judicial officers who were in office on the effective date were to be subjected to vetting; that whereas there was no process of removal of the judicial officers in the *Constitution* as anticipated in section 23 of the Sixth Schedule, this was to be provided for in legislation, and hence the enactment of the *Vetting of Judges and Magistrates Act* and further that there was no contradiction between the provisions of the Sixth Schedule and the substantive provisions of the *Constitution*.

96. Mr Nzamba Kitonga for the 3rd Respondent also opposed the appeal. He submitted that the vetting of judicial officers was the option taken by the Kenyan people in dealing with the ills that had plagued the judiciary; that the vetting process was not a trial and hence articles 25 and 50(2) of the *Constitution* were inapplicable; that the Appellant's assertion that the vetting was cruel, inhuman and degrading was incorrect as the judicial officers were not to be subjected to physical or mental suffering; that the vetting process respected the principles of natural justice as the judicial officers were to be represented by counsel of their own choice and would fully participate during the hearing of complaints; that there was no contradiction between the Sixth Schedule and the *Vetting of Judges and Magistrates Act* on the one hand and the *Constitution* on the other; and further that the Latimer and Bangalore principles were established by Judges of the Commonwealth for housekeeping measures and for that reason they should not be placed on a higher plane than established law. He supported the findings of the superior court.

97. Mr Kitonga however faulted the trial Judges for not penalising the Appellant with an order for costs as costs follow the event and he urged us to find that since the Petitioner's Petition was dismissed, the Petitioner ought to have been condemned to pay the costs.

98. Mr Issa for the 4th Respondent took issue with the Appellants' submissions to the effect that it was only the Judicial Service Commission that could effect the "vetting. " He further submitted that the vetting process under section 23 of the Sixth Schedule was sui generis, different and separate from a removal that would be initiated by the Judicial Service Commission under article 168 of the *Constitution*.

99. The above summarises the positions of the parties in this Petition.

100. The first line of attack raised by the Appellant was that section 23 of the Sixth Schedule was in conflict with the substantive provisions of the *Constitution*. This criticism was at various levels. It was argued that the only way Judges could be removed from office was through a process stipulated by article 168 of the *Constitution* and that section 23 which purports to set up a mechanism for removal of Judges in a process outside article 168 was unconstitutional. Section 23(1) and (2) provide 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 time-frame to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in articles 10 and 159.

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

102. Whilst article 168(2) provides:

168

(2) "The removal of a Judge may be initiated only by Judicial Service Commission acting on its own motion, or on the Petition of any person to the Judicial Service Commission. "

103. Learned counsels in support of the Appeal argued that section 23 was contrary to article 168 of the *Constitution*.

104. In my view and as I held in the case of Law Society of Kenya v The Centre for Human Rights & Democracy CA No 308 of 2012, section 23 of the Sixth Schedule and article 168 of the *Constitution* serve two distinct and different purposes, the former to vet judicial officers who were in office on the effective date and the latter to provide for mechanism of removal of those who would join the judiciary after the effective date either by way of fresh appointment after 'vetting' by the Judicial Service Commission or after the vetting by the Judges and Magistrates Vetting Board. It is therefore incorrect to argue the Judges who took Oath of Office under the provisions of article 159 of the *Constitution* could only be removed through a process to be initiated via the Judicial Service Commission. As submitted by Mr Issa Mansur this was a sui generis process and was set up for purposes of transitting from the former constitutional dispensation to the current one. It was to operate during the transition as after the vetting, all judicial officers who would have been retained after the 'purge' would be subjected to the provisions of article 168(2) of the *Constitution* in the event of removal.

105. It was the Appellant's further contention that section 23 of the Sixth Schedule violates article 25(a) and (c) of the *Constitution*. Article 25 provides:-

> " Despite any other provision in the *Constitution*, the following rights and fundamental freedoms shall be not be limited 25(a) freedom from torture and cruel, inhuman or degrading treatment or punishment.
>
> 25
>
> (c) the right to a fair trial;"

106. The *United Nations Convention Against Torture* defines torture as:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or issuspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. "

107. Torture and inhuman treatment was considered in the case of *Republic v Minister for Home Affairs & others ex parte Sitamze Nairobi* [2008] 2 EA 323, where Justice Nyamu defined 'torture' and 'inhuman' treatment as follows:-

> " torture means infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure. "...[It can also be defined as] infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matter of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. "

108. Justice Nyamu then defined inhuman treatment as follows:

> " In the Case of *Ireland v United Kingdom* (1978) 2 EHRR 25 (Eur Ct of Human Rights), the Court referred to torture as deliberate inhuman treatment causing very serious and cruel suffering. "

109. And went further to state:

> " Inhuman treatment was for the first time in International Humanitarian Law defined by the Trial Chamber in the *Celebici Camp* Case No IT-95-14/2-PT (1999) p 44 as."an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. "

110. The Appellant's complaint was that article 25 of the *Constitution* had been violated as the Judges & Magistrates had been treated in a cruel, inhuman and degrading manner and that this amounted to indignity being visited on them.

111. It is true that freedom from torture, cruel and inhuman treatment is protected in article 29 of the Bill of Rights. Article 29 provides as follows:-

> 29. Every person has the right to freedom and security of the person, which includes the right not to be
>
> (d) subjected to torture in any manner, whether physical or psychological;
>
> (f) treated or punished in a cruel, inhuman or degrading manner.

112. It is also true that under article 25 of the *Constitution* this freedom cannot be limited. Article 25 provides as follows:

> 25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-
>
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

113. I have carefully considered the Appellant's proposition on this matter. Needless to state, the vetting process was bound to cause anxiety and discomfort. But can this anxiety and discomfort be equated to torture, cruel, inhuman and degrading" With profound respect to counsels who urged us to find in favour of the Appellant, I do not think so. Certainly, the "torture", "cruelty", "inhuman treatment" and "degrading" conditions as defined above cannot be equated to the anxiety and discomfort to be experienced by all those who would undergo the vetting process.

114. In my view the vetting process was not torturous, inhuman and degrading as judicial officers were simply being called upon to give an account of how they had discharged their duties. There was nothing degrading about this and neither can it be said that the Judicial officers were subjected to torture, cruel, inhuman or degrading treatment or punishment.

115. It was further argued that section 23 of the Sixth Schedule is unconstitutional as it interferes with the independence of the Judiciary as entrenched in article 160 of the *Constitution*. Article 160 of the *Constitution* provides as follows:

> " 160
>
> (1) In the exercise of judicial authority, the Judiciary, as constituted by article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any persons or authority. "

115. It was the Appellants contention that section 23 of the Sixth Schedule provides for the establishment of a vetting process to determine the suitability (or otherwise) of Judges and Magistrates infringed the independence of the Judiciary. On my part the establishment of the vetting process and the consequential vetting is not infringement of the independence of the Judiciary. The independence envisaged in article 160 of the *Constitution* relates to the performance of its work and it is fallacious to argue that judicial officers are immune to checks and balances because of the independence provided in article 160 of the *Constitution*.

116. The Appellant further urged us to find that section 23 undermines the security of tenure of Judges as stipulated in article 167 which provides:-

167

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

117. Again it cannot be true that the removal of a Judge found unsuitable is contrary to the provisions of the *Constitution* providing for retirement upon the attainment of the age of 70 years. In my view, to argue so would border on absurdity as if this was the case, Judges would serve upto the retirement age irrespective of their suitability or otherwise. To be able to hold office upto the age of 70 years is not a carte blanche provision that Judges and Magistrates are immune to checks and balances and are absolved from the constitutional tenets of good governance. I reject the invitation that the vetting of judges and Magistrates is tantamount to interference of the Judiciary as outlawed in article 165 of the *Constitution*.

118. As regards the contention that section 23 is an infringement of the right to a fair trail, first and foremost, it is important to point out that the vetting process is not a trial. Moreover, even if the vetting process could be equated to a trial, the *vetting of Judges and Magistrates Act* provides sufficient safeguards that guarantee a fair "trial". The vetting procedure provided in the *vetting of Judges and Magistrates Act* is as follows:-

19)

3) every Judge or Magistrate to be vetted shall be given sufficient notice.

(4) The notice referred to under subsection 3 shall include a summary of complaints, if any, against the Judge or Magistrate.

(5) The hearing by the Board shall not be conducted in public, unless the concerned Judge or Magistrate requests a public hearing.

(6) The Rules of natural justice shall apply to the Board's proceedings. "

119. I find that this criticism of section 23 of the Sixth Schedule is without merit.

120. A further attack on section 23 of the Sixth Schedule was that it unconstitutional as it insulates the process of vetting in the ouster clause in section 23(2) of the Sixth Schedule which provides:-

> "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. "

121. It is my position that the rationale for the insulation of the vetting was to make the process short and fast for purposes of restoring credibility in the Judiciary. It cannot be denied that there was dire need to reform the Judiciary. The final report of the Committee of Experts reflects this need and urgency. It stated:

> "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 to undergo a 'vetting process' ".

122. Suffice to state that the whole purpose and gambit for the vetting process was to promote public confidence in the Judiciary and it was not a witch-hunt. Section 23 had a historic perspective. The Judiciary had been accused to being inept and corrupt. The enactment of section 23 of the Sixth Schedule provided a solution to a Judiciary that had lost credibility and was viewed as being incapable of dispensing justice. As indicated above the initial reaction was to remove all Judges and then ask them to re-apply. Eventually the drafters of the *Constitution* settled for a less drastic action of vetting section 23 was further faulted by the Appellant for being discriminatory contrary to article 27 of the *Constitution* which provides for equality and freedom from discrimination. In my view there is nothing discriminatory in section 23 of the Sixth Schedule. The aim of section 23 was to vet the Judicial officers serving as on the effective date. The reasons for this was as explained, to retain suitable officers and weed out unsuitable officers. The 'new' lot would be vetted by the Judicial Service Commission so that the old and the new blend together. There is no discrimination here. In the case of *Malasyan Bar & another v Government of Malaysia* 1987 (SC) in interpreting Clause 8(1) of their Federal *Constitution* which provides that:

> " All persons are equal before the law and entitled to the equal protection of the law. "

123. The Court stated as follows:-

> " The requirement for equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the laws so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. Individuals in any society differ in many respects such as, inter alia, age, ability, education, height, size, colour, wealth, occupation, race and religion. Any law made by a legislature must of necessity involve the making of a choice and differences as regards its application in terms of persons, time and territory. Since the legislature can create differences, the question is whether these differences are constitutional. The answer is this: if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid. If on the other hand there is no such relationship the difference is stigmatized as discriminatory and the impugned legislation is therefore unconstitutional and invalid. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause. "

124. To subject judicial officers who were in office before the effective date to a vetting process and the fact of not subjecting those not serving before the effective date was not discriminatory.

125. The other argument raised by the Appellant's counsels was that the ouster clause in section 23(2) did not oust the jurisdiction of the High Court as article 165(5) of the *Constitution* limits the jurisdiction of the High Court in only two instances, namely in respect of matters:

> "
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> " 5
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> (a) Reserved for the exclusive jurisdiction of the Supreme Court... or
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> (b) Falling within the jurisdiction of the Court's contemplated in article 162(2)
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> and further that article 165(6) which provides:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. "

126. Did not exempt the Board from the supervisory jurisdiction of the High Court. With tremendous respect to the Appellants' counsels', the transitional provisions found in the Sixth Schedule were meant to serve for a season. Once the transitional period was over, there would be no need for these transitional provisions. This explains the reason for non-inclusion of the Board in the exceptions provided in article 165(5) of the *Constitution*. Similarly, there was no need to exempt the Board from the supervisory jurisdiction of the High Court as provided in article 165(6) of the *Constitution* as to do so would have clattered the *Constitution* with transitional provisions which were to fade away in the fullness of time. I am fully in support of the contention by the Respondents' counsels that the design of section 23 of the Sixth Schedule was to serve the transitional period. There was absolutely no reason to include the Board in article 165(5) and to exclude it from the provision of article 165(6) of the *Constitution*.

127. The other contention made by the Appellant was that section 23 has an inferior status vis a vis the other provisions of the *Constitution*. In my view this is not correct. It is immaterial that section 23 is 'outside' the main body of the *Constitution* but suffice to state that they were part and parcel of the *Constitution*. The Committee of Experts justified the transitional schedule in its report of 11th October, 2010 thus:

> " 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 and those institutions that are retained under the new constitution continue to function properly. The 'transitional' provisions that do this are usually not included in the body of the *Constitution* because they have a temporary lifespan. Instead they are included in a schedule which is part of the *Constitution* but, because it is appended at the end of the *Constitution*, its provisions will not interfere with the 'permanent' provisions of the *Constitution* in the future. "

128. In the case of *Centre for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others* [2012] eKLR it was stated as follows:-

> " ... that the transitional provisions in the Sixth Schedule to the *Constitution* are to be read and understood as part and parcel of the *Constitution*. "

129. Similarly, in the case of *South Dakota v North Carolina* [1940] 192 US 268 [1940] LED the United States Supreme Court held as follows:-

> " Elementary rule of constitutional construction is that no one provision of the *Constitution* is to be segregated from all others to be considered alone, but that all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the general purpose of the instrument. "

130. In the Ugandan case of *Tinyefunza v The Attorney General of Uganda* [1977] UGCC 3 Constitutional Appeal No 1 of 1996, the Court of Appeal of Uganda held that:-

> " The entire constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony

rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution".

131. In view of the foregoing reasons, I, too, dismiss the Appeal.

132. On the issue of costs, I am in agreement with Nzamba Gitonga, senior counsel that costs follow the event and would order that the costs in both the superior court and in this Court be borne by the Appellant, but as the majority are of a contrary opinion, each of the parties herein shall bear their own costs. Accordingly, the final orders of the Court shall be as stated in the judgment of Kiage, JA.

Judgement of J. Mohammed JA

133. I have had the opportunity to read the draft judgment of Otieno- Odek, JA. and I do agree with it in its entirety. The judgment and the orders that I propose are as contained in the said draft judgment of Otieno-Odek, J.A. The final orders of the Court on costs shall be as stated in the Judgment of Kiage, JA

Judgement of Otieno-Odek, JA

1. Constitutionality of the vetting process and the legality of the *Vetting of Judges and Magistrates Act*, No 2 of 2011 (hereinafter referred to as the vetting Act) are the essence of this appeal. The vetting of judges and magistrates was never envisaged to be a ritual; it is an embodiment of a constitutional, legal, philosophical and historical spectrum and paradigm shift in the juridical history of Kenya. The vetting process should be devoid of the weight of raw emotions, biases, passion and subjectivity but must be laden with constitutionalism and the weight of reason, obj ectivity and concrete evidence. Ajudge or magistrate of integrity who delivers judgment based on constitutionalism and the rule of law without unreasonable delay has nothing to be apprehensive about when called upon to account through the vetting process. Concomitant to the vetting process is the questioning of judges and magistrates on their fiscal means and probity, past judicial decisions and delayed judgments. Delivery of justice through judgment should be expeditious as justice ought to be swift and timely. Judgment dates should be cast on stone and if not, let it be on steel. Delivery of judgment on the set date should be the norm not the exception. Delay in delivery of judgment always breeds danger. If an individual judge or magistrate persistently delivers judgment after unreasonable delay, this ceases to be an issue of integrity but one of conscientiousness, time and case management, prioritization and competence. Judgment delayed is delayed justice and delayed justice is injustice. A delayed judgment is judgment is inconsiderate of litigants. Delayed judgments seek to puts on hold or slowdown the wheels of justice which must continuously be rolling. To those bent on delaying judgments, let it be known that justice limbs but it gets there all the same and if you do not maintain justice, justice will not maintain you. When a litigant comes to court, he cries for justice. If ajudge or magistrate shut his ears to the cry of a litigant for delayed justice, he too will cry out and not be answered. The vetting of judges and magistrates is a collective determination by the people of Kenya to have an independent, competent and professional judiciary in which they repose their confidence to fairly resolve disputes expeditiously without procrastination; without fear, favour or ill-will, and without discrimination, or regard to technicalities and the social status of the litigants.

2. This Appeal rests on three fundamental issues. First is the vetting process constitutional? Second, is the *Vetting of Judges and Magistrates Act* No 2 of 2011 constitutional" Third, are sections 2 to 4 and 17 to 23 of *Vetting of Judges and Magistrates Act* inconsistent with articles 19(1), (2) & (3), 20(1), 21(1), 22(1) & (2), 23(3), 24(2)(a), (b) & (c), 25(a) & (c), 27(1), (2), (4) & (5), 28, 47(1) & (2), 50(1) and (2), as well as articles 165, 168 and 172 of the *Constitution* and are to that extent illegal, null and void?

3. The present appeal is anchored on the precept that various provisions of the *Vetting Act* are contrary to the *Constitution* and that the identified provisions should be declared null and void to the extent of their inconsistency; and that the *Vetting Act* is contrary to several international conventions that Kenya has ratified. It is also argued that the vetting process and the Vetting Act are against the rule of law and the principle of independence of the Judiciary and to that extent, the vetting process and the *Vetting Act* are unconstitutional. The Appellant beseech this Court to determine the constitutionality of certain provisions of the Vetting Act vis-vis provisions of articles 10 and 159 of the *Constitution*.

4. At the outset, bearing in mind that this appeal is anchored on the precept of constitutionalism and the rule of law, let me state that constitutionalism and the rule of law are embedded in Kenya's legal system. Simply put, constitutionalism requires that all government and legislative action as well as judicial decisions must comply with the *Constitution*. The Rule of law requires that all judicial and administrative action must comply with the law including the *Constitution*. (See Reference *Re Secession of Quebec* (1998) 2 SCR 217).

5. The Petition the subject of this appeal is dated 26th August, 2011, and was filed on 29th August, 2011, by the Appellant who is neither a Judge nor a Magistrate but an advocate of the High Court of Kenya. The Petition was lodged in public interest before the vetting process commenced, in other words, the Petition was actio popularis ab ante (filed in the public interest in advance). In considering the merits of this appeal, let me state ex facie the fact that the Petition was lodged prior to commencement of vetting of Judges and Magistrates is immaterial. I note that subsequent to the filing of the Petition, the *Vetting Act* was amended by Act No 43 of 2012 whose commencement date is 14th December, 2012. Further amendment to the *Vetting Act* was made in December 2013 with an effective date of 10th January 2014 (See Kenya Gazette Supplement No 177 (Acts No 43) dated 27th December 2013). The constitutionality of the *Vetting Act* shall be considered in light of the amendments thereto. Further, this Court will of its own motion consider points of law that were not relied upon before the High Court. This invariably will arise when there is a question as to the supervisory jurisdiction of the High Court (Damodar Jihanbhai & Co Ltd v Eustace Sisal Estates Ltd (1967) EA 153 at 158) or where this Court is asked to give a judgment which would be contrary to the *Constitution* (Jagat Singh Rains v Choglev (1949) 16 EACA 27). It is my considered view that when a question of law arises in a penultimate appellate court upon facts admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, for this Court to consider the issue either suo moto or as argued by counsel. As was stated in Vyas Industries v Diocese of Meru (1982) KLR 114, this Court may consider an issue if the said issue has been left for the decision of the Court. In the instant appeal, the question of constitutionality of the vetting process and various provisions of the *Vetting Act* have been left to this Court to determine and consequently, any issue relevant to the question shall be considered. (See Odd Jobs v Mubia (1970) EA 476).

6. The background to this appeal is that on 29th August, 2011, the Appellant instituted a Petition in the High Court seeking several declarations and orders regarding the constitutionality of the *Vetting Act*. For convenience, the Honourable Judges of the High Court (Ngugi, Majanja & Odunga, JJ) consolidated the orders sought in the Petition as follows:-• A declaration that the rights of Judges and magistrates under articles 19, 20, 22, 23, 24, 25, 27, 28, 29, 47 and 50 of the *Constitution* have been denied, infringed, violated and/or threatened.• A declaration that sections 2 to 4 and 17 to 23 of the *Vetting Act* are inconsistent with articles 19(1), (2) & (3), 20(1), 21(1), 22(1) & (2), 23 (3), 24(2)(a), (b) & (c), 25(a) & (c), 27(1), (2) , (4) & (5), 28, 47(1) & (2) and 50(1) and (2) of the *Constitution* and are to that extent illegal, null and void.• An order for compensation of all Judges and magistrates who have been or will be or are likely to be affected by The *Vetting Act* taking into account their contract with the former Constitution and the period the Judge or magistrate will have served according to

the *Constitution*.• An injunction to restrain the Respondents from doing anything prejudicial to the judges and magistrates pending the hearing of the Petition.

7. After hearing all parties, the High Court (Ngugi, Majanja & Odunga, JJ) on 18th November, 2011, rejected and dismissed the Petition and concluded as follows:-

> " 104. We appreciate that the vetting process will cause some anxiety to the judicial officers serving before the effective date who will be subjected to the process. However, we believe that the outcome of the process will not only be beneficial to the country and the Judiciary, but also to individual judges and magistrates. As a country, we have chosen to be guided by certain values and principles, among them accountability and integrity.
>
> 105. This process will help to underpin these values with respect to the Judiciary and restore the Judiciary to its respected place as the arbiter of justice in Kenya. We believe that rather than undermining judicial independence, the process which is limited in time will enable the Judiciary operate with confidence in its central role of upholding the rule of law in Kenya, free from the shackles that have reduced it to a timid player in government due to the widespread perceptions of incompetence and corruption.

8. Aggrieved by the dismissal of the Petition and the orders made, the Appellant lodged this appeal enumerating 34 grounds in his Memorandum of Appeal. The grounds of appeal can aptly be condensed as:

i. The Honourable Judges erred in law by failing to appreciate the full import and purport of the *Bangalore Principles*, *Latimer Principles* and the UN Conventions that protect the independence of the Judiciary.

ii. The High Court erred in law by failing to appreciate that section 23 of the Sixth Schedule to the *Constitution* does not prevent the Judges and magistrates from enjoying the inherent rights in the Bill of Rights.

iii. The High Court erred in law in failing to appreciate that the *Vetting of Judges and Magistrates Act* violates several provisions of the Constitutions to wit: articles 19, 20, 21, 22, 23, 24 (2)(a), (b) & (c), 25(c), 27, 28, 47, 50, 165 and 172 (1)(c);

iv. The High Court erred by failing to find that section 23 of the Sixth Schedule is unconstitutional to the extent it denies Judges and magistrates the right of appeal.

v. The High Court erred in law by failing to appreciate that the *Vetting Act* has a retrospective effect to the prejudice of the affected judicial officers.

vi. That the High Court erred in failing to answer the serious constitutional question of interpretation and to appreciate that removal of a magistrate is contemplated by article 172(1) (c) of the *Constitution* and not the *Vetting Act*.

vii. The High Court erred by failing to find that section 17(1) of the *Vetting Act* offends the provisions of article 168 of the *Constitution* which prescribes the procedure of removing Judges from office.

viii. The High Court erred by failing to find that the Vetting process offends the right to a fair trial in articles 25 and 50 of the *Constitution*.

ix. The High Court erred by failing to find that the *Constitution* creates equal organs of the Legislature, Executive and Judiciary and section 22 of the *Vetting Act* negates the spirit, purport and objects of the *Constitution* by purporting to make the Judges and magistrates subservient to the whims of the Executive and legislature.

x. The High Court erred by failing to find that the vetting process violates the independence of the Judges and magistrates as enshrined in article 160(1) of the *Constitution*.

xi. That the High Court erred by introducing extraneous concepts of torture and corruption in its judgment which were never canvassed at the hearing.

xii. That the High Court erred in law and fact by holding and finding that vetting is synonymous to removal of a Judge and or magistrate from office.

9. The Appellant through the appeal herein seeks specific orders from this Court to wit:-• That the Judgment delivered by the Honourable Judges of the High Court on 18th November 2011 be set aside and in its place sections 3, 4, 17, 18, 19, 21, 22 and 23 of The *Vetting Act* be declared invalid and unconstitutional.• That it be declared that the Judges and Magistrates are entitled to the rule of law and due process.• It be declared that the Judges and Magistrates are entitled to an appeal from the determination and/or finding and/ or decision of the Vetting of Judges and Magistrates Board.• It be declared that the rights of Judges and Magistrates to a fair trial under article 25 (c) of the *Constitution* is so deep in our jurisprudence that it cannot be violated.• Any other order the Court may deem fit and convenient in the circumstances of this case.

10. During the hearing, Senior Counsel, Dr John Khaminwa appeared for the Appellant, learned counsel Mr Mwangi Njoroge appeared for the 1st and 2nd Respondents; Senior Counsel, Mr Nzamba Kitonga appeared for the 3rd Respondent; learned counsel Mr Mensur Issa appeared for the 4th Respondent while learned counsel Mr Stephen Mwenesi appeared for the Kenya Magistrates and Judges Association (hereinafter abbreviated as KMJA).

11. The Appellant elaborated on the grounds of appeal urging this Court to set aside the judgment and decree of the High Court dated 18th November, 2011. The Appellant submitted that the provisions of sections 2, 3, 4, 17, 18, 19, 21, 22 and 23 of the *Vetting Act* are null and void for contravening articles 19(2)(3), 20(1), 21(1), 22(1), 24(2)(a), (b) &(c), 77(1), (2), (3) &(4) and 77(5) of the *Constitution*. Senior Counsel Dr Khaminwa supported by learned counsel Stephen Mwenesi submitted that sections 2 & 3 of the *Vetting Act* are unconstitutional as they confer jurisdiction to remove a Judge from office in a manner unknown by the *Constitution*. He argued that section 14 of the *Vetting Act* is unconstitutional as it violates the principles of natural justice and condemns the Judges and magistrates unheard. He submitted that section 15(5) of the *Vetting Act* contravenes the *Constitution* as it seeks to divest from the Tribunal envisaged under article 168 of the *Constitution* the power to remove a judge from office and bestow and delegate the power to the Judges and Magistrates Vetting Board's (Vetting Board) which Board is a strange body not contemplated by article 168 of the *Constitution*. Learned counsels Dr Khaminwa and Mr Mwenesi argued that section 17(1) of the *Vetting Act* offends the provisions of article 168 of the *Constitution* which prescribes the procedure for removal of a Judge from office. The Appellant's counsel strenuously urged this Court to find that section 22(3) of the *Vetting Act* offends the provisions of article 168(8) & (9) of the *Constitution* which allows for an appeal to the Supreme Court from the decisions of a Tribunal appointed to remove a Judge; that section 22(3) of the *Vetting Act* also offends article 25(a) & (c), 27(1) and 50(1) & (2) of the *Constitution* which protects the right to fair trial and protection of the law. Counsel urged this Court to hold that section 23(1) & (2) of the Sixth Schedule did not grant legislative powers to the National Assembly to enact a law that

contravenes articles 19, 21, 22, 23, 24, 25, 26, 27, 47 & 50 of the *Constitution* and that it was the duty of Parliament to make laws in accord with the foregoing provisions of the *Constitution*. Dr Khaminwa submitted that due process ought to be followed and therefore, section 22 of the *Vetting Act* is illegal, null and void to the extent that it creates a parallel mechanism that is unknown and contrary to articles 10, 19, 20, 21, 23, 24, 25 and 27 of the *Constitution*; that section 22 of the *Vetting Act* circumvents the provisions of article 1(3)(c), 159(1)(2), 23(3), 165(3) and 169(1) of the *Constitution* which vests the power to adjudicate cases and interpret the *Constitution* to the High Court. Dr Khaminwa argued that the *Constitution* creates equal organs of the Legislature, Executive and Judiciary and therefore section 22 of the *Vetting Act* negates the spirit, purport and objects of the *Constitution* by purporting to make the Judges and Magistrates subservient to the whims of the Executive and Legislature.

12. The Appellant's counsel submitted that the vetting of Judges and magistrates is inhuman and degrading, violates the right to a fair trial, and prohibits the right of appeal; that section 22(3) of the *Vetting Act* presumes a Judge or magistrate guilty until proven otherwise; that the provisions allowing only review to the Vetting Board is unconstitutional. Dr Khaminwa emphasized that the vetting process is selective and discriminatory and contrary to article 27(1) & (2) of the *Constitution* in that the Executive arm of government which has generated several scandals has not been subjected to vetting and likewise the National Assembly has not been subjected to the vetting process yet the *Constitution* requires that justice must be administered to all without regard to status.

13. It was further submitted on behalf of the Appellant that the vetting process and the *Vetting Act* is contrary to the general principles of international law, conventions and treaties ratified by Kenya. It was argued that the *Vetting Act* violates the following international instruments on the independence of the Judiciary: The *Bangalore Principles*, *The Latimer Principles*, article 19 of the *Universal Declaration of Human Rights*, article 14 of the *International Covenant on Civil and Political Rights*, article 7 of the *African Charter on Human and People's Rights* and Resolution 40/32 and 40/46 of 1985 *UN Basic Principles on the Independence of the Judiciary*.

14. The Respondents opposed the appeal citing various points of law. Learned counsel Mr Mwangi Njoroge, for the 1st Respondent, submitted that the appeal had no merit and reminded this Court the history leading to the enactment of section 23 of the Sixth Schedule to the *Constitution* (hereinafter referred to as the Sixth Schedule). He stated that the people of Kenya had approved the *Constitution* in a referendum as it is; that the provision in section 23(2) of the Sixth Schedule prohibiting a right of appeal was part and parcel of the Constitutional document that was approved by Kenyans; and that Kenyans in their wisdom opted for a right of review to individual Judges or magistrates. Counsel submitted that a right to compensation is provided in section 24(3) of the *Vetting Act* to any Judge or magistrate who is not vetted or who is found unsuitable to continue in office. The Respondents submitted that the various sections of the *Vetting Act* cited by the Appellant were not unconstitutional; that the Bill of Rights is part and parcel of the Kenya Constitution and the *Vetting Act* is not contradictory to the *Constitution*. It was submitted that the right to a fair trial is provided for in the various provisions of the *Vetting Act* and due process is guaranteed in the Act. The Respondents further submitted that the *Vetting Act* is not in contravention of any international instrument that Kenya has ratified.

15. This being a first appeal, I am reminded of the primary role of a first appellate court namely to re-evaluate, reassess and reanalyze the facts as they were before the learned trial Judges and then determine whether the conclusions reached by the learned trial Judges are to stand or not and give reasons either way. See the case of *Sumaria & another v Allied Industries Ltd* [2007] KLR 1 where this Court held inter alia that being a first appeal the Court is obligated to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that the Court of Appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the

Judge has shown dominantly to have acted on wrong principles reaching the finding he did. See also the case of *Musera v Mwechelesi and another*, [2007] 2 KLR 159 wherein this Court held *inter alia* that:-

> " As an appellate court the Court had to be very slow to interfere with the trial judge's finding unless it was satisfied either that there was absolutely no evidence to support the findings or that the trial judge had misunderstood the weight and bearing of the evidence before him and thus arrived at unsupportable conclusion".

16. The issues raised in this appeal are multifarious and I have considered the record and Memorandum of Appeal, the Judgment by the Honourable Judges of the High Court particularly their reasoning, the written submissions by counsel at the High Court and the submissions made before this Court. I have painstakingly examined the relevant provisions of the *Constitution* and the *Vetting Act* together with the international instruments referred to and the authorities cited by counsel. Most, if not all issues raised in this appeal relate to constitutional interpretation. Of significance is the Appellant's prayer for a declaration that section 23 of the Sixth Schedule is unconstitutional. On this prayer, I am reminded of the presumption of legality as captured in the maxim omnia rite acta praesumuntur. The presumption is to the effect that all formalities required for enactment of law have been complied with and the person who alleges the contrary has the burden of proof. The Appellant is seeking orders to declare section 23 of the Sixth Schedule as well as certain provisions of the *Vetting Act* to be unconstitutional. Whereas the Appellant has the burden to prove unconstitutionality of the impugned provisions, this burden is not to be discharged on a balance of probability. I hold that declaring any article of the *Constitution* or any section of a Schedule to the *Constitution* to be unconstitutional requires a higher standard of proof; the standard is neither on peradventure nor on a balance of probability; neither is the standard somewhere between a balance of probability and beyond reasonable doubt; I hold that the requisite standard is proof beyond reasonable doubt and there is only one way to prove this - that the constitutional provision sought to be declared unconstitutional has been amended by a body competent to amend the *Constitution*. It is illogical and contradictory to speak of a provision in the *Constitution* as being unconstitutional as the Appellant claims.

17. The gravamen of the Appellant's case is that certain sections of the *Vetting Act* which are anchored by the Sixth Schedule to the *Constitution* are unconstitutional and by the same token the Appellant submits that the articles of the *Constitution* are superior to, override and supersede the provisions of the Sixth Schedule to the *Constitution*. In addressing the constitutionality of the issues raised in this appeal, I take cognizance of the dicta in *Uganda v Commissioner of Prisons ex parte Matovu*, (1966) EA 514 at 529 wherein the predecessor to this Court in a judgment delivered by Sir Udo Udoma observed that it is an extra-ordinary proposition to use one section of the *Constitution* to outlaw another section of the same Constitution. I am further reminded of the provisions of article 2(3) of the 2010 *Constitution* which provides that:-

> " . . . The validity or legality of this Constitution is not subject to challenge by or before any court or other state organ. "

(See this Court's decision in *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR.

It is my considered view that a party cannot select, pick and choose certain articles of the *Constitution* and aver that they supersede the rest. In dealing with the submissions by the Appellant on this point, I bear in mind the principle of harmonization enunciated by Musinga, J (as he then was) in the case

of *Centre for Rights Education and Awareness (CREAW) and others v The Attorney General* -Nairobi Petition No 16 of 2011 (Unreported) wherein he observed as follows:-

> "In interpreting the *Constitution*, the letter and the spirit of the supreme law must be respected. Various provisions of the *Constitution* must be read together to get a proper interpretation. "

In the Ugandan case of *Tinyefuza v The Attorney General* Constitutional Appeal No 1 of 1997, the Court held as follows:-

> "The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramouncy of the written constitution. "

A similar principle was enunciated by the United States Supreme Court in *Smith Dakota v North Carolina* (1940) 192 US 268 as follows:-

> "It is an elementary rule of constitutional construction that no one provision of the *Constitution* is to be segregated from the others and to be considered above but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument".

18. Taking into account the judicial decisions cited, I hold that the Sixth Schedule and other Schedules to the *Constitution* as well as the articles of the *Constitution* must a fortiori be read as representing a coherent, indivisible and inseparable package of rights and principles which have to be considered as one constitutional document. All the sections of the Sixth Schedule are anchored in the *Constitution* and are not severable and the Schedule is of law, from law and is the law, juris et de jure (of law and from law).

19. Having stated the foregoing, I identify the following issues as key in the determination of this appeal:Whether section 23 of the Sixth Schedule contradicts other substantive provisions of the *Constitution* and if so whether it should be declared null and void.Whether section 23 of the Sixth Schedule undermines the security of tenure of the serving Judges under articles 167 & 168 of the *Constitution*.Whether the *Vetting Act* contradicts the Bill of Rights with regard to the right to a fair trial, due process, and the independence of the Judiciary.Whether the *Vetting Act* offends several international instruments.Whether the cited provisions of the *Vetting Act* are contrary to the *Constitution* and should be declared null and void to the extent of their inconsistency.What orders should be made in this Appeal.

20. For ease of re-evaluation of the Judgment and record of the High Court and consideration and determination of the grounds raised in the Memorandum of Appeal, the issues identified shall be analyzed as hereunder:-

A. Application of International Law in Kenya:

21. In public international law, there are two theories that underlie the relationship between international law and national domestic law. These are the monist and dualist theories. In the monist theory, international law is automatically part of national domestic law. In the dualist theory, international law is not part of domestic law unless it has been specifically adopted and domesticated. Senior Counsel Dr Khaminwa supported by learned counsel Mr Steve Mwenesi submitted that The Banglore and Latimer

Principles being principles of international law have been domesticated in the Kenyan laws. Article 2(5) of the *Constitution* stipulates that the general rules of international law shall form part of the law of Kenya. In article 2(6) it is stipulated that any treaty or convention ratified by Kenya shall form part of the law of Kenya. The Appellant's argument is that this Court should apply the spirit of the various Conventions cited now that the new Constitution imports international law and conventions into our jurisprudence. The Appellant contends that the principle of independence of the Judiciary is anchored in various international instruments of which Kenya is either a signatory or has ratified and that these instruments must be implemented as part of the laws of Kenya as stated in article 2(5) of the *Constitution*. The Appellant identified the relevant international instruments recognizing judicial independence to include The *Bangalore Principles*, The *Latimer Principles*, article 19 of the *Universal Declaration of Human Rights*, article 14 of the *International Covenant on Civil and Political Rights*, article 7 of the *African Charter on Human and People's Rights* and Resolution 40/32 and 40/46 of 1985 *UN Basic Principles on the Independence of the Judiciary*. The Appellant contends that the vetting process and the *Vetting Act* go against the spirit and tenets of the concept of independence of the Judiciary which is recognized in articles 160 and 255(1)(g) of the *Constitution* and as such the vetting process and the *Vetting Act* are unconstitutional.

22. The circumstance under which international law is applicable in Kenya was considered in *Rono v Rono & another* Civil Appeal No 66 of 2002 (unreported) where this Court stated:-

> "Of the two theories on when international law should apply, Kenya subscribes to the Common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principle 7 of the *Bangalore Principles on the Domestic Application of International Human Rights Norms* states:-
>
> > "It is within the proper nature of the judicial process and well established functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law. '"

23. In the case of *AOG v SAJ & another*, - Civil Appeal No 188 of 2009, this Court stated that section 3 *Judicature Act*, Chapter 8, Laws of Kenya spells out the mode of exercise of jurisdiction of all the Courts in this country. Therefore, courts may apply ratified treaties and international customary law where there is no conflict with existing law or for purposes of removing ambiguity or uncertainty in our laws. In the context of the present appeal, subsequent to the promulgation of the 2010 *Constitution* and under article 2(5) and (6) thereof, the general principles of international law as well as any and all treaties and conventions that Kenya has ratified are now part of the laws of Kenya. Consequently, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *African Charter on Human and People's Rights* and Resolution 40/32 and 40/46 of 1985 *UN Basic Principles on the Independence of the Judiciary* to the extent that they embody general rules of international law, they are applicable in Kenya. It is my considered view that Kenya has opted for a monist approach to international law under article 2(6) and a dualist approach under article 2(5) of the *Constitution* since a distinction is made between international law in the form of treaties and other

rules of international law. Kenya is not a pure monist state, it is partly monist and partly dualist in approach to public international law.

B. Application of the Bangalore and Latimer Principles in Kenya:

24. Section 5 of the *Vetting Act* stipulates that:-

> " In the exercise of its powers or the performance of its functions under this Act, the Board shall at all times, be guided by the principles and standards of judicial independence, natural justice and international best practice".

The *Bangalore* and *Latimer Principles* are not treaties or conventions ratified by Kenya and they do not fall within the ambit of article 2(6) of the *Constitution* and they cannot be applied in Kenya pursuant to the said provision.

25. The next issue is whether the Bangalore and Latimer Principles can be said to be part of the general rules of international law under article 2(5) of the *Constitution*. A general rule of international law is one that binds all states as contrasted with special rules that bind only a few states. Various international conventions recognize the independence of the Judiciary as an integral part of the principles of international law. Article 2 of the *Statute of the International Court of Justice* stipulates that the Court shall be composed of independent Judges; article 10 of the *Universal Declaration of Human Rights* recognizes the principle of independence of the Judiciary. Teachings of the most highly qualified publicists recognize the concept of independence of the Judiciary and the International Commission of Jurists in 2004 confirmed the idea of an independent Judiciary in its Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism. The American Society of International Law and the International Judicial Academy in its May 2006 Volume 1 Issue 2 also recognize and conclude that the concept of independence of the Judiciary is a general principle of international law. Being cognizant that international conventions and writings of the most highly qualified publicists recognize that independence of the Judiciary is a general principle of international law, I am persuaded and hold that the Banglore and Latimer Principles are part of the general rules of international law applicable in Kenya under article 2(5) of the *Constitution*. I also find that the *Bangalore* and *Latimer Principles* on the independence of the Judiciary is an international best practice that the Vetting Board should be guided by under section 5 of the *Vetting Act*. Consequently, I declare that the *Latimer* and *Banglore Principles* should be observed by the Vetting Board in the exercise of its powers and performance of its functions. I further find that the concept of independence of the Judiciary is part of the general principles of international law recognized and practiced by civilized nations and as such, the concept is applicable and enforceable in Kenya.

C. Decisional independence of Judges and magistrates:

26. Having held that the concept of independence of the Judiciary is applicable in Kenya, it is imperative to examine if the vetting process and the *Vetting Act* contravene the principle of independence of the Judiciary and decisional independence of Judges and magistrates and if the *Vetting Act* contravene the appellate process of Kenya's judicial system. Independence of the Judiciary is a relational term whose substantive thrust is negative. It is negative since it prevents the Executive or Legislature from interfering with exercise of the judicial function. Such independence does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interpret the law and the fundamental principles

and assumptions that underlie it. I adopt the dicta in the Namibia Supreme Court case of *Minister of Defence, Nambia v Mwandinghi* (1992) 2 SA 355) where it was stated that:

> " The independence clause" does not accord independent "carte blanche to act or conduct on whim;

independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the *Constitution* and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance".

27. Learned counsel Dr Khaminwa and Steve Mwenesi for the Appellant and KMJA respectively, submitted that the *Vetting Act* is unconstitutional as it seeks to question and vet Judges and magistrates on the basis of their decisions and judgment. Section 18(1)(b) of the *Vetting Act* provides that the Vetting Board shall consider prior judicial pronouncements of a Judge. The Appellant submitted that the concept of independence of the Judiciary vests upon individual Judges and magistrates decisional independence whereby they have independence to make decisions and determinations without fear or favour; that by questioning and vetting Judges and asking them to explain and justify their decisions, this amounted to violation of judicial independence and the decisional independence of the Judges. Counsel submitted that the doctrine of independence of the Judiciary entails that no Judge may be interrogated either in his/her decision or conduct as a Judge and that each Judge is strictly independent in his or her decisions and judicial conduct.

28. The letter and spirit of independence of the Judiciary and its corollary decisional independence is acknowledged through articles 160 and 255(1)(g) of the *Constitution*. This independence is recognized and buttressed in section 68 of the *Evidence Act*, Chapter 80, Laws of Kenya that confer immunity to a Judge for anything done in discharge ofhis/her judicial office and non-compellability to testify as to any matter that relates to the conduct of a case before him. In addition section 6 of the *Judicature Act*, Chapter 8, Laws of Kenya, provides immunity from civil liability to a Judge or a Magistrate acting judicially.

29. A sub-set of the doctrine of independence of the Judiciary is the idea of decisional independence. The general rule is that individual Judges or magistrates have the legal right to pronounce judgment and make decisions independently and free from any direction or influence from any person. The decisional independence enables a Judge to be free in thought and independent in judgment. A Judge or magistrate through decisional independence is to a great extent unfettered in the exercise of his/her judicial function. Decisional independence when applied, must be guided by law and governed by rule, not by humour, it must not be arbitrary, vague and fanciful, but legal and regular. The rationale for decisional independence of a Judge or magistrate is not so much for their own sake as for the sake of the public and for the advancement of justice. The decisions of a Judge or magistrate maybe impugned for error either of law or fact. Any person aggrieved by the decision or judgment of any court has the liberty to appeal the decision in accordance with the appellate structure of Kenya's judicial system.

30. Under decisional independence, the judge has a right to err and any error is to be corrected through the appellate process. However, it is my considered opinion that the right to err and decisional independence on the part of the judge does not mean that the judge is not free from all constraints in his decision making process. A judge is not entitled to dispose of the cases that come before him in any manner that appeals to his own personal whim and preference. (See Comment on Judicial Independence in "*An Introduction to the Legal System in East Afried*" by William Burnett Harvey, East African Literature Bureau, Nairobi 1975 at 726). Factors such as the judge's own personal or political interests, interests of the family or friends or calculations of his personal loss or gain or bias

and outright and flagrant disregard of established legal principles are but examples of constraints to decisional independence. These constraints when violated may amount to incompetence, breach of judicial ethics and code of conduct or lack of integrity on the part of the judge and in sum total it may constitute misconduct. I hold that decisional independence on the part of the judge is not absolute and whenever allegations of impropriety, breach of ethics, misconduct, arbitrariness, corruption or neglect of duty arise, decisional independence is not a shield. In *Houlden v Smith*- 14 Q B 841, it was held that an action would lie against a judicial officer who in execution of his duty made an order without jurisdiction provided he had knowledge or means of knowledge of which he ought to have availed himself of facts which showed his want of jurisdiction. (See also *Polley v Fordham* (1904) 2 KB 345). A Judge can also be liable if he acts maliciously and without reasonable and probable cause (See *Plamer v Crone* (1927) 43 TLR 265); see The *Nova Scotia Court of Appeal Inquiry (Donald Marshall Affair*).

31. In the Kenyan context, I now pose the question, should decisional independence of a Judge be used as a defense or a shield to an allegation of corruption, misconduct, lack of integrity, incompetence or lack of transparency and accountability, or inability to dispense justice in a fair and equitable manner on the part of the Judge" The answer is in the negative and I hold that it is not unconstitutional to interrogate a Judge or magistrate on prior judicial pronouncements if evidential basis is laid to show that the judgment or ruling reveals misconduct or negatively impacts on the integrity and competence of the Judge or magistrate.

D. Security of Tenure of Judges:

32. Mr Steve Mwenesi, learned counsel for KMJA submitted that the vetting process and the *Vetting Act* is unconstitutional to the extent that it violates independence of the Judiciary and the legitimate expectation of individual Judges to continue to serve in office until the retirement age of 74 years. On this submission I observe that security of tenure of Judges is integral to the principle of independence of the Judiciary. However, security of tenure of a Judge is not equal to the independence of the Judiciary. Security of tenure is individual while independence of the Judiciary is a both an individual and corporate concept. Security of tenure is not absolute but is subject to competence, good behaviour, good conduct and ability to perform the functions of the office of a judge as well as solvency on the part of individual Judges as specified in article 168 of the *Constitution*.

33. The Appellant and KMJA contend that the serving Judges had a legitimate expectation to serve until the age of retirement. It was submitted that a Judge has security of tenure till retirement and has some form of property in the position as a Judge which property continues to exist until retirement. As was correctly stated in the case of *Justice Amraphael Mbogholi Msagha v The Hon Chief Justice & others* (2006) eKLR, the office of a Judge is a tenured office; it should not be regarded as an item of property in which any one Judge has a proprietary interest to hold office till retirement. The office of a Judge is a privilege which is held so long as the Judge is of good behaviour or conduct in terms of the *Constitution*, code and ethics of that high office. When a Judge falls short of that standard, he is removed not at will but in accordance with the process as ordained by the *Constitution* under which he serves. It is my considered opinion that Judges are appointed aut culpam, ie until misconduct. It is erroneous to state that it is an absolute and inviolable principle that a judge holds office until retirement. It is a misconception to state that there is a legitimate expectation to hold office till retirement; the correct position is that subject to good conduct, there is expectation to hold office till retirement.

E. Is Removal of a judge from office through the vetting process contrary to section 62 of the old Constitution and article 168 of the 2010 Constitution?

34. In support of the Appeal, Learned Counsel, Mr Steve Mwenesi for KMJA submitted that the vetting process and the *Vetting Act* are unconstitutional to the extent that section 21(2) of the Act purports

to deem as removed a Judge or magistrate who is found unsuitable to serve. Section 21(2) of the Act states:-

> " Once informed of the decision under subsection (1), the Judge or Magistrate shall, subject to section 22, be deemed to have been removed from service."

35. The Appellant and KMJA contend that the only legitimate way to remove a Judge from office is through a Tribunal established under article 168 of the *Constitution* upon a complaint being received by the Judicial Service Commission. Article 168 states that a Judge of a superior court may be suspended from office on recommendation to the President by the Judicial Service Commission and thereafter the President is required to appoint a Tribunal to consider the Petition for removal of the Judge from office. The Appellant and KMJA contention is that the Vetting Board is not a Tribunal established under article 168 of theConstitution and as such, it has no mandate to remove a Judge from office. It was submitted that section 21(2) of the *Vetting Act* which purports to deem a Judge as having been removed from office is unconstitutional to the extent that the said section contravenes the procedure outlined in article 168 of the *Constitution* for removal of a Judge.

36. I have considered the Appellant and KMJA submission on this point. The argument presupposes that there is only one constitutional procedure or mechanism for removal of a Judge from office. This is not necessarily true. The traditional common law approach has been removal of a Judge through a Tribunal. I state that the mechanism for removal of a judge from office is not only critical but the competent body and procedure provided in the *Constitution* must be adhered to and such procedure is sacrosanct. The Appellant contend that the provisions of section 23 of the Sixth Schedule is unconstitutional to the extent that it leads to removal of a Judge from office through a person or body and in manner not contemplated by article 168 of the *Constitution* and by extension the manner is contrary to section 62(3) of the repealed Constitution under which the affected Judges had a contract to serve. The Appellant contend that the affected Judges terms of service were under the old constitution and that they could only be removed in accordance with the constitutional provisions of the old Constitution. There are two issues arising from this submission namely:-

- Is section 62(3) of the repealed *Constitution* applicable to all serving Judges who were in office on the effective date of the current Constitution"
- Is section 62(3) of the repealed *Constitution* still applicable in Kenya and can it be enforced and implemented despite the coming into effect of the 2010 *Constitution*" Does article 168 of the 2010 *Constitution* apply to any and all Judges, who were serving in office during the effective date of 27th August, 2010"

37. The 2010 *Constitution* ushered a new constitutional order in Kenya with new values and principles contained in articles 10 & Chapter Six. On the effective date, the old constitutional order yielded place to the new constitutional order. Section 62(3) of the repealed Constitution provides:-

> " 62
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> (3) A judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehavior and shall not be removed except in accordance with the section.
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> 62

(4) a judge shall be removed from office by the President if the question of his removal has been referred to a Tribunal appointed under sub-section 5 of section 62 of the *Constitution* and the Tribunal has recommended to the President that the judge ought to be removed from office for inability as aforesaid or for misdemeanor. "

Article 168(1) ofthe 2010 Constitution provides that:"

(1) A Judge of a superior court may be removed from office only on the grounds of-

a) Inability to perform the functions of office arising from mental or physical incapacity;

b) Breach of code of conduct prescribed forjudges of the superior courts by an Act of Parliament;

c) Bankruptcy;

d) Incompetence;

e) Gross misconduct or misbehavior.

(2) The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the Petition of any person to the Judicial Service Commission. "

38. It is the Appellant and KMJA's contention that the vetting process is contrary to the provisions of section 62(3) of the repealed *Constitution* and article 168 of the 2010 *Constitution*. In addition, it was contended that the vetting process is not the process envisaged under section 62(3) of the repealed *Constitution* or article 168 ofthe 2010 *Constitution*. The other contention by the Appellant is that the Vetting Board is not the Tribunal envisaged under section 62(3) of the repealed *Constitution* or the Tribunal appointed pursuant to article 168 ofthe 2010 *Constitution*.

39. Analysis of the Appellant's submissions is appreciated if the nature of the 2010 *Constitution* vis-vis the repealed *Constitution* is examined and a determination made as to whether the provisions of section 62(3) of the repealed *constitution* are still in force in relation to Judges who were in office on the effective date and to what extent does article 168 ofthe 2010 *Constitution* apply to Judges who were in office on the effective date.

40. Except as expressly provided in the transitional provisions, on the effective date, the 2010 *Constitution* repealed in entirety the old Constitution. Article 264 ofthe 2010 *Constitution* states:-

"Subject to the Sixth Schedule, for the avoidance of doubt, the *Constitution* in force immediately before the effective date shall stand repealed on the effective date. "

41. As far as removal of Judges is concerned, it is my considered view that the wording of article 264 of the 2010 *Constitution* invites an interpretation that unless section 62(3) of the old *constitution* was saved by the Sixth Schedule to the 2010 *Constitution*, the said section 62(3) was repealed and has no legal effect in Kenya and is unenforceable. I have conducted a tooth comb scrutiny of the provisions of sections 2 and 3 of the Sixth Schedule to the *Constitution* and nowhere in the Sixth Schedule is section 62(3) of the old *Constitution* saved. Section 7 of the Sixth Schedule relates to existing laws and not the repealed constitution. I adopt and concur with the dicta in *Uganda v Commissioner of Prisons exparte Matovu* (1966) EA 514 at 529 wherein it was stated that there cannot be two constitutions in force at the same time. The Sixth Schedule is an integral part of the 2010 *Constitution* and its provisions have

the force and effect on the supremacy of the *Constitution* as ordained in article 2(1) of the *Constitution*. It is my considered view that section 62(3) of the old *Constitution* was repealed by article 264 of the 2010 *Constitution* and the tenure of office of Judges and magistrates who were serving as at the effective date was made subject to the vetting process by section 23(1) of the Sixth Schedule. I hold that the process for removal of a Judge which was provided for under section 62(3) of the old *Constitution* stands repealed and is inapplicable and unenforceable.

42. The severance of the old constitutional order and the tenure for the judges who were in office on the effective date was transited by the provisions of section 13 of the Sixth Schedule relating to the Oath of Allegiance to the 2010 *Constitution*. The serving Judges took oath of allegiance to the 2010 *Constitution* and this effectively transited them from the old *constitution* and their continuity to serve in office was made subject to the new constitutional order which contains section 23(1) of the Sixth Schedule to the *Constitution* - a section that requires vetting for suitability to continue to serve. The individual Judges who were serving on the effective date took an oath of allegiance to the new constitutional order and cannot turn around and impugn the constitutional order to which they swore to uphold. A Judge cannot abjure the allegiance which he owes to the *Constitution* and one cannot approbate and reprobate. The oath of allegiance taken by the serving judges was not a child's play or an empty rhetoric ceremony. It had substantive legal consequences, it severed and cut off the umbilical cord that linked the Judges from the old constitutional order and subject to vetting, the Oath of Allegiance ushered the Judges into the new constitutional order. In exercising their sovereign and inalienable right as stated in the preamble to the 2010 Constitution, the people of Kenya effectively decided that any and all Judges and magistrates who were in office on the effective date must undergo vetting and only those found suitable shall continue to serve in office. In a lay mans language, you cannot take the marriage vows and still claim to be single, your status changes and the past is cast into the annals of history. The Oath of Allegiance is a constitutional estoppel to the Judges and article 2(3) of the *Constitution*, binds them to uphold the new constitutional order and its values.

43. I now turn to the issue whether article 168 of the 2010 *Constitution* applies to the Judges who were serving in office on the effective date. The case as urged by Dr Khaminwa and Mr Steve Mwenesi is that article 168 of the *Constitution* applies to Judges who were in office on the effective date. It cannot be disputed that Judges recruited after the effective date are subject to the provisions of article 168 of the *Constitution*. For Judges who were in office on the effective date there are two scenarios one in which article 168 is applicable and the other where it is inapplicable. First, when the question is suitability to continue to serve, article 168 is inapplicable; second, if the issue is removal from office on the grounds stipulated in article 168 then the said article is applicable. Suitability to continue to serve cannot be determined under article 168 because the article is not the envisaged vetting process. I therefore hold that article 168 of the 2010 *Constitution* is not a vetting process to determine the suitability of Judges who were in office on the effective date to continue to serve. Vetting and a finding of suitability to continue to serve is a constitutional condition precedent for a Judge to continue to serve. Having taken the oath of office under section 13 of the Sixth Schedule, all Judges who were in office on the effective date continue to constitutionally exercise judicial functions of the office and enjoy all powers and privileges of a Judge until their suitability to continue to serve is determined. Similarly, a magistrate who is yet to be vetted continues to constitutionally exercise the functions of the office until his/her suitability to continue to serve has been determined.

44. To the judges and magistrates who were in office on the effective date, I restate in allegory and in lay man's language the spirit and purport of section 23(1) of the Sixth Schedule to the *Constitution*. There is only one process - vetting, and one Constitutional gate or door that a judge or a magistrate who was in office on the effective date must go through and transit and continue to serve as a judge or magistrate under the 2010 *Constitution*. There is no other gate, no other door and no other entrance.

This gate has one sentry known as the Judges and Magistrate's Vetting Board. No other person, body or authority can usurp the role of the sentry and guard the gate. The sentry has legally prescribed criteria upon which to evaluate and vet all persons who seek to pass through the gate. All judges and magistrates who were in office on the effective date must pass through this sole and distinct gate and obtain a certificate of suitability to continue to serve from the sentry at the entrance. The certificate of suitability to continue to serve is the key that opens the gate and enables one to enter and transit to the new Constitution. The sentry which is the Vetting Board is vested with the sole and exclusive jurisdiction to guard the gate and neither the High Court nor the Judicial Service Commission (JSC) has the mandate to issue a certificate of suitability to continue to serve. The mandate given to the JSC under the 2010 *Constitution* does not extend to determining suitability to continue to serve as a judge or magistrate. Likewise, the original jurisdiction of the High Court does not extend to determining suitability of a judge or magistrate to continue to serve in office. Any judge or magistrate who was in office on the effective date and who has not passed through the one and only gate and obtained the requisite certificate of suitability cannot transit and pass through the gate and continue to serve as a judge or magistrate under the 2010 *Constitution*.

F. Is the Vetting Board unknown to the *Constitution* and hence ultra vires"

45. The Appellant and KMJA contends that the jurisdiction to remove a judge from office is vested upon a Tribunal under article 168 of the *Constitution* and the *Vetting Act* is unconstitutional to the extent that it creates the Vetting Board which is a body not known or anticipated by the *Constitution* for purposes of removal of a Judge from office. The Appellant and KMJA contend that Parliament erred by bestowing upon an unknown entity the power to remove a Judge from office; that the 2010 *Constitution* did not delegate the power to remove a Judge from office to the Vetting Board. It is the Appellant's case that section 62(5) of the repealed Constitution and article 168(5) of the 2010 *Constitution* do not allow Parliament to delegate, remove or usurp the powers of a Tribunal and vest them upon the Vetting Board. It was submitted that Parliament by establishing the Vetting Board and vesting upon it power to remove a Judge acted ultra vires article 168 of the *Constitution*. Parliament was exercising delegated powers and delegates non potest delegare. I agree with the Appellant and KMJA's submission that the Vetting Board is neither the Tribunal envisaged under the repealed section 62(3) of the old Constitution nor is it a Tribunal appointed under article 168(5) of the 2010 *Constitution*. However, this does not make the Vetting Board as duly established to be *ultra vires* the *Constitution*.

46. I am reminded of the decision in *Njoya & others v AG* (2004) 1 EA 194 where the Court held that the *Constitution* should be viewed in a broad, liberal and purposeful way so as to give effect to its values and principles. The vetting process is a sui generis system established under section 23(1) of the Sixth Schedule to the 2010 *Constitution* and as such, I find and hold that the vetting process and the Vetting Board are constitutional. Various reasons support this finding. First, section 23(1) of the Sixth Schedule clearly mandated Parliament to establish mechanisms and procedures for vetting to determine the suitability of all Judges and magistrates who were in office on the effective date. The spirit in this provision is that a separate, special and distinct procedure and mechanism was to be created for purposes of vetting Judges and magistrates who were in office on the effective date. The vetting process is anchored in the *Constitution* under section 23(1) of the Sixth Schedule and is not ultra-vires the *Constitution*. Second, section 23(1) expressly excludes the application of article 168 of the *Constitution* to the serving Judges. This is a constitutional ouster clause and I hold that article 168 is inapplicable to judges who were in office on the effective date and the article comes into effect and applies to a judge who has been determined suitable to continue to serve. The 2010 *Constitution* repealed the provisions of section 62(3) of the old *Constitution* and by virtue section 23(1) of the Sixth Schedule it expressly excludes the application of article 168 of the *Constitution* to the serving Judges. Third, the 2010 Constitution makes it mandatory that the tenure of serving Judges and magistrates and their

continuity to serve in office is dependent upon the outcome of the vetting process. Fourth, the people of Kenya deliberately and consciously opted for a distinct process and mechanism which is not through the Tribunal as established under article 168. The Vetting Board and the vetting process are *sui generis* and are constitutionally anchored under section 23(1) of the Sixth Schedule. If there were any conflict between the vetting process as envisaged under section 23(1) of the Sixth Schedule to the *Constitution* and article 168 of the *Constitution*, the same was resolved by the *Constitution* itself wherein section 23(1) of the Sixth Schedule expressly excluded the application of article 168 to the Judges who were serving on the effective date. I hold that there is no conflict between section 23(1) of the Sixth Schedule and article 168 of the *Constitution*. Through section 23(1) of the Sixth Schedule, the people of Kenya mandated Parliament to enact legislation creating a distinct mechanism and procedure for vetting. The word mechanism whether narrowly or broadly interpreted envisages the establishment of a body or a legal person to undertake the vetting process. I, therefore, find and hold that the Vetting Board is the mechanism that was envisaged in section 23(1) of the Sixth Schedule of the *Constitution* to conduct the vetting process. I hold that the Vetting Board is not a body unknown to the *Constitution* and the said Vetting Board is a constitutional body.

47. Having found that the Vetting Board is a body known to the *Constitution*, I hasten to add that the jurisdiction of the Vetting Board is set out by section 23 of the Sixth Schedule as operationalized by the *Vetting Act*. It is my considered opinion that the Vetting Board has no jurisdiction to determine or set its jurisdiction because this is a matter that has been fixed and determined by the *Constitution*. However, the Vetting Board has power to interpret its jurisdiction as fixed and determined by the *Constitution* and the enabling legislation. In this regard, I do find and hold that the Vetting Board has *comptence de la comptence* - an initial capacity to determine whether or not it has the jurisdiction to hear and determine an issue up before it.

G. Discrimination and Equality of Treatment:

48. The Appellant contends that *Vetting Act* is discriminatory and does not treat the Judges and magistrates in equal measure with the Executive and the legislature; that section 23 of the *Vetting Act* is discriminatory and contrary to article 27 of the *Constitution* which guarantees equal protection and equal benefit before the law. The Appellant argues that section 23 of the Sixth Schedule is punitive and discriminatory in its very nature as it accords an unfair advantage to the Executive and the Legislature which organs are not subject to the vetting process yet the Judiciary is subjected to vetting and this is in breach of the tenets of fairness, equality and proportionality and is therefore unconstitutional. The issue for consideration is whether section 23 of the Sixth Schedule is discriminatory and makes the Judiciary subservient to the Executive and the Legislature. In *Charles Omanga & another v The Independent Electoral & Boundaries Commission & 2 others* Nairobi Petition No 2 of 2012 it was stated that:-

> " The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category. "

49. It is my considered opinion that under the 2010 *Constitution*, all the three arms of government are and were subjected to appraisal and evaluation for compliance with Chapter Six of the *Constitution* although the terminology used for each arm of government is different. It is the mechanism, process

and body that conduct the scrutiny, appraisal and evaluation for each arm of government that is different. One should not compare oranges to mangoes, although both are fruits, they are different. The rule of differentiation is inherent in the doctrine of equality and the modus of appraising and evaluating the Executive and Legislature must of necessity be different from the modus of vetting the Judiciary. Different treatment of different people is equality of treatment. The 2010 *Constitution* chose the vetting process and Vetting Board for the Judiciary; for the Executive and the Legislature the mechanism chosen was through the presidential and general election by the people of Kenya in an election conducted by the Independent Electoral and Boundaries Commission (IEBC). The vetting of the Executive particularly Secretaries to the Cabinet and Principal Secretaries are further done through Parliamentary Committees. (See article 153-155 of the *Constitution*). The Kenya Police Service is also subject to vetting and thus discriminatory allegation has no basis in law. One of the criteria for qualification to the Executive or Legislature is the moral and ethical requirements prescribed by the *Constitution* i. e. Chapter Six and article 10 (See also article 99(1)(b) & (h) and 137(1)(b) of the *Constitution*). Both the Executive and the Legislature are appraised and evaluated by the people of Kenya through the Presidential and General Elections which are conducted every five years. Through the electoral process, the individual office bearers in the Executive and Legislature undergo a determination of suitability to continue to serve. I do find that section 23 of the Sixth Schedule of the *Constitution* is not discriminatory as all the three arms of government were and are treated equally and are subjected to evaluation and appraisal albeit through different process and mechanism under the 2010 Constitution. Further, it is my considered view that individual Judges and magistrates form the class of persons known as judicial officers. There is no material before this court to support the notion that any individual judge or magistrate has been singled out and discriminated in the vetting process. Section 23 of the Sixth Schedule to the *Constitution* requires all judges and magistrates who were in office on the effective date to be vetted. All judges and magistrates are treated equally under the *Vetting Act*.

50. The above analysis shows that the Appellant and KMJA's contention that the vetting process and the *Vetting Act* are unconstitutional as they are discriminatory against the Judges and magistrates is not sound and tenable. The submission fails to appreciate the nature and impact of constitution making. The 2010 Constitution involved socio-political re-engineering, shake up and reorganization of the governance structure in Kenya. Various offices and institutions were restructured to conform to the new constitutional order and dispensation. Numerous examples of restructuring abound within the new constitutional framework. For instance, a devolved government was introduced; the system of administration previously known as Provincial Administration was restructured (See section 17 of the Sixth Schedule); Parliament was restructured to establish a bicameral house (article 93(1); the office of the Attorney General was restructured (See articles 156 and 159) and the holder of the office of the Attorney General and Chief Justice under the repealed *Constitution* were required to vacate office (See section 24 of the Sixth Schedule); the Presidency was remodeled with restricted powers and the Judicial Service Commission was restructured and revamped. This restructuring and re-engineering process did not only affect or target the Judiciary and hence it is a fallacy to argue that the vetting and restructuring process under the 2010 *Constitution* was discriminatory to Judges and magistrates. Even if the vetting process were to be considered discriminatory, (which it is not) it is discrimination sanctioned and ordained by the supreme law of the land to wit section 23 of the Sixth Schedule to the *Constitution*. I hold that even if the vetting process were discriminatory, I would find that differential treatment is sanctioned by the *Constitution* and cannot be unconstitutional and such discrimination would be legal under article 24(1)(b) of the *Constitution*.

H. Prospective and retroactive application of the Vetting Process:

51. The Appellant contend that the *Vetting Act* is unconstitutional to the extent that it applies retroactively with regards to the Judges and magistrates. It was submitted that sections 18(1), (b), (c), (d) & (e) and (2)(c)(i) of the *Vetting Act* seek to examine and vet the Judges and magistrates based on their conduct and decisions prior to the effective date of the *Constitution*. The Appellant's submission is in accord with the dicta in Duncan Otieno Waga v The Attorney General Nairobi, Petition No 94 of 2011, where it was stated that:-

> " It is trite law that the *Constitution* of Kenya is only prospective and the acts occurring prior to the *Constitution* are, unless otherwise stated by the *Constitution* itself, to be judged by the existing legal regime that is, the former Constitution".

52. It is a general principle of law that statutes or legislation are prospective and have a future application and unless the contrary is expressed, there is no retroactive application of law. (See Buckley LJ decision in West v Gwynne, (1911) 2 Ch 1, 12). The principle against retroactivity is captured in the maxim lex retro non agit (the law does not operate retroactively). The principle of nonretroactivity is a general principle and like all general principles, there are exceptions. If the intention of the legislature or for this purpose the *Constitution* is sufficiently expressed that retroactivity is required, then the intention of the *Constitution* or legislature shall prevail (See Moon v Durden 2 Exch 22).

53. The question of the alleged retroactivity ofthe vetting process and the *Vetting Act* is a matter of constitutional interpretation. On this issue, I am guided by the dicta of Ringera, J (as he then was) in the case of Rev Dr Timothy Njoya and 6 others v Attorney General & 4 others (2004) 1 KLR 232, where he aptly stated that:-

> " the *Constitution* is not an Act of Parliament and is not to be interpreted as one".

54. Guided by this dictum, I am of the considered view that in order to determine the constitutionality of the retrospective nature of section 23 of the Sixth Schedule, the guiding principles of interpreting the *Constitution* as provided in article 159 of the *Constitution* must be applied. I am comforted by the provisions of section 2 of The *Interpretation and General Provisions Act*, Chapter 2 (Laws of Kenya) which expressly states that the Act shall not apply to the construction or interpretation of the *Constitution*.

55. In determining whether the retrospective application of the vetting process and the *Vetting Act* is unconstitutional, I adopt the sentiments of the Supreme Court as expressed in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others Application No 2 of 2011 (2012) eKLR where it was stated:-

> " The general rule for non-criminal legislation was that all statutes other than those which were merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature A Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions or provisions with retrospective ingredients. However, in interpreting the *Constitution* fair trial to determine whether it permits retrospective application of any of its provisions, a Court

of law must pay due regard to the language of the *Constitution*. If the words used in a particular provision are forward looking and do not contain even a whif of retrospectively, the Court ought not to import it into the language of the *Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights which legitimately occurred before the commencement of the *Constitution*".

56. Section 23 of the Sixth Schedule requires that the Judges and magistrates who were in office on the effective date be vetted for suitability to continue in office in accordance with the values and principles of articles 10 and 159 of the *Constitution*. The issue for consideration is whether this provision permits retroactive application of the vetting process. A determination of whether an individual Judge or magistrate is suitable to continue in office entails evaluation of the antecedent conduct and decisions made prior to the effective date. I find that the practical application and implementation of the vetting process is that section 23 of the Sixth Schedule to the *Constitution* is retrospective in its application. I am of the considered view that this retroactivity is mandated by the Sixth Schedule which is an integral part of the *Constitution*.

57. Section 23(1) of the Sixth Schedule to the *Constitution* requires that Judges and magistrates should be vetted on integrity and other values in article 10 and 159(2)(a) & (b) of the *Constitution* especially that justice shall be administered without regard to status and justice should not be delayed. Integrity looks backwards, there is no tonight without yester night, no tomorrow without today and no future without the past and present. Integrity is an inquiry into honesty and uprightness of an individual and this has to do with character. Character stems from disposition and reputation; disposition and reputation have all to do with individuals past and yester conduct, demeanor and pre-dispositions. The Constitutional requirement that a Judge or magistrate be vetted on integrity ipso factoand ipso jurerequires that a Judge's or magistrate's past conduct must be examined and evaluated. Whether a Judge or magistrate has the ability to dispense justice to all without delay and without regard to status or technicality involve an inquiry into prior judicial pronouncements. I find that the retrospective evaluation of Judges and magistrates for conduct prior to the effective date is not unconstitutional since evaluation of past conduct and prior judicial pronouncement is indispensable to determine if a judge is suitable to continue to serve in accordance with the values enunciated in articles 10(2)(c) and 159(2)(a) (b) & (d) as read with section 23(1) of the Sixth Schedule to the *Constitution*. It is my considered view that the 2010 *Constitution* intended that the vetting process should be retroactive in its application when determining the suitability of a Judge or magistrate to continue to serve in office. I hold that the retroactive nature of the vetting process and the *Vetting Act* are ordained by the *Constitution* and are not unconstitutional.

58. The Appellant and the KMJA contention that the vetting process is unconstitutional and retroactive is a misconception of a point of law. It is misconception to state that vetting on integrity criteria is retroactive. This is not so. The Appellant and KMJA's submission presupposes that prior to the 2010 *Constitution*, a Judge or Magistrate could conduct him/herself in a manner below the integrity threshold. It is my considered view that prior to the promulgation of 2010 *Constitution*; there were laws in Kenya that prohibited conduct on the part of public officers that fell below the threshold of integrity. For instance, the *Public Officers' Ethics Act* No 4 of 2003, as well as the *Judicial Service Code of Conduct and Ethics* vide Legal Notice No 50 of 2003, dealt with integrity issues. I do find that integrity issues were part and parcel of the Laws of Kenya prior to the 2010 *Constitution*. I find that there is no retroactivity in so far as the vetting process looks into past Judicial Conduct and pronouncement to establish the integrity of an individual Judge or Magistrate. Section 7 of the Sixth Schedule to the *Constitution* saved all existing laws. It is my finding that section 23 of the Sixth Schedule to the *Constitution* gives a constitutional underpinning to an integrity regime that has always been

applicable to judicial officers. The section gives a Constitutional underpinning to judicial conduct that was all along prohibited ie conduct that falls below ethical and integrity threshold expected of a Judicial Officer. It is fallacious to state that before the 2010 *Constitution*, conduct below the integrity threshold was permissible.

I. Does the *Vetting Act* contravene the rules of natural justice and the constitutional requirement for fair administrative action?

59. The Appellant and KMJA contend that the vetting process and the *Vetting Act* contravene the entitlement to fair administrative action as guaranteed under articles 25(c), 47(1) and 50 of the *Constitution*. Learned counsel, Mr Mwangi Njoroge for the 1st and 2nd Respondents in opposing the appeal submitted that the vetting process is not a trial and hence the provisions of article 25(c) and 50(c) are inapplicable.

60. It is my considered view that the requirement for fair administrative action is not only relevant and applicable to criminal trials; it applies to all civil proceedings, quasi-judicial proceedings, and judicial proceedings and to any administrative body or person vested with power to make decisions. The jurisdiction of a court or any tribunal is nothing if it is not fair and equitable - ie nobile Officium. Article 47(1) of the *Constitution* stipulates that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Under article 50(1) of the *Constitution* every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In article 50(2) (a) every person has the right to be presumed innocent until the contrary is proved and to be informed of the charge, with sufficient detail to answer it. The Appellant has invoked both articles 47(1) and 50 of the *Constitution* and it is my considered view that these articles protect separate and distinct rights which should not be conflated. Although the two rights relate to the general rules of natural justice they apply to different circumstances. Article 50(1) applies to a court, tribunal or a body established to resolve a dispute while article 47 applies to administrative action generally. Article 50(1) deals with matters of a civil nature while the rest of the article deal with criminal trials. Article 47 was intended to subject administrative processes to constitutional discipline hence relief for administrative grievances was no longer left to the realm of common law or judicial review (See *Dry Associates Limited v Capital Markets Authority and another* Nairobi Petition 328 of 2011 (Unreported)). I concur with the Appellant's submission and hold that Judges and magistrates are entitled to fair administrative action. I hasten to add that what fairness does not require is perfection. The fairness of the vetting process need not require perfection in every detail. The absence of perfection does not mean that the vetting will not be a fair one. The essential question is whether the Judge or magistrate has had a fair chance of dealing with the allegations against him. (See Judge *Shahabuddeen in Prosecutor - v Slobodan Milosevic*, Case No IT-02-54-AR 73. 4). As was stated by Nyarangi, JA, in *David Oloo Onyango v The Attorney General* in Civil Appeal No 152 of 1986, there is a presumption in the interpretation of statutes that rules natural justice will apply.

61. The Appellant further contend that the vetting process is unconstitutional to the extent that it presumes the Judges and magistrates guilty and reverses the burden of proof contrary to article 50(2)(a) of the *Constitution*. It was contended that the Judges and magistrates have been condemned without a hearing contrary to articles 47 and 50 of the *Constitution*. I concur with the submissions by the Appellant that every person has a right to be heard and a right to fair administrative procedure. Lord Denning in *R v Race Relations Board ex parte Setrarajan* (1976) 1 All ER 12 stated fairness requires that

a person affected by a decision should be told of the case against him and afforded a fair opportunity of answering to it. In *Ridge v Baldwin* (1963) 2 All ER 66 it was observed that,

> " Adecision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. "

62. Lord Wright in *General Medical Council v Sparkman* (1943) 2 All ER 337 at 345 stated as follows:-

> " If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared no decision".

63. In case of *Justice Amraphael Mbogholi Msagha v The Hon Chief Justice & others* (*supra*), it was stated:-

> " We observe firstly that the rules of natural justice "audi alterem partem" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonization of the globe during the hey-days of the British Empire. Secondly, we recognize and observe those principles apply wherever there is no statutory or constitutional law to the contrary. Under the *Judicature Act*, the High Court, Court of Appeal and all subordinate courts are enjoined to exercise their jurisdiction in conformity with the substance of common law and doctrines of equity".

64. It follows therefore that the principles of natural justice and audi alterem partemare part and parcel of the laws of Kenya and Judges and magistrates are entitled to be heard before any decision or determination affecting them is made. Section 19(6) of the *Vetting Act* and the Regulations thereof expressly give each and every individual Judge or magistrate the right to be heard. Section 19(3) and (4) of the *Vetting Act* and the Regulations thereof give each and every judge or magistrate adequate notice of the allegations or complaint made and an opportunity to respond to the complaint.

65. I find that the *Vetting Act* does not violate the rules of natural justice and the maxim audi alterem partem is encompassed in the vetting process. Section 19(6) of the *Vetting Act* and regulation 9 and 10 thereof ensures that no Judge or magistrate shall be condemned unheard. I hold that the Vetting Board has the constitutional responsibility of ensuring expeditious and fair proceedings in a manner consistent with article 47 and the values set out in article 10 of the *Constitution* and ensuring that the rights of individual Judges and magistrates are protected. Section 19(3) and (5) of the *Vetting Act* buttress this point wherein it is provided that the rules of natural justice shall apply to the Board's proceedings. Where the individual Judges and magistrates rights are threatened the Court will not hesitate to intervene through the process of judicial review. (See *Grace A Omolo v Attorney General and 3 others*- Nairobi Petition 252 of 2011). I hold that the vetting process and the *Vetting Act* are not unconstitutional since they provide for the application of the rules of natural justice and observe the requirement of fair administrative action as enshrined in article 47 of the *Constitution*.

66. Counsel for the Appellant urged this court to find that the *Vetting Act* is unconstitutional as it is a trial process. It was submitted that Judges were supposed to be vetted and not tried. *Black's Law Dictionary* (8th Edition) defines a trial as a formal judicial examination of evidence and a determination of legal claims in adversary proceedings. It is my considered view that taking into account the definition of a trial, the vetting process involves a quasijudicial examination of evidence and a determination of the legal claim as to whether a Judge or magistrate is suitable to continue serving. In this context, vetting has semblance of a trial and the primary question for determination in the vetting process is the suitability of a Judge or magistrate to continue to serve. Despite the foregoing, vetting is not a trial;

it is a sui generis mechanism and is neither a criminal trial nor adversarial civil proceedings. The sui generis nature of vetting is underscored by the fact that the vetting process has its own distinct rules of procedure enacted by Parliament. The ordinary rules of criminal and civil proceedings and rigorous rules on admissibility of evidence do not apply to the vetting process. Consequently, I find that the vetting process should not be equated to a criminal trial or civil proceedings. In the final analysis, the pertinent issue is not whether there is a difference between vetting and a trial, this is non sequitor, the fundamental point is whether the rule of law, natural justice, fair hearing and adherence to the criteria for vetting is followed. I now consider the submission that transitional provisions override the substantive articles of the *Constitution*.

J. Do Transitional Provisions override the articles in the *Constitution*?

67. A novel submission was to the effect that the Sixth Schedule to the *Constitution* is a transitional and consequential schedule and the Vetting Board is a transitional mechanism and transitional provisions override and supersede the substantive articles in the body of the *Constitution*. It is my considered view that the *Constitution* is one document which contains substantive articles and the Schedules thereto. the *Constitution* cannot be severed and dissected into main articles and Schedules. the *Constitution* must be interpreted as one document that has logical flow and consistency in-built within itself and between One article and another and between all articles and the Schedules thereof. No single article or Schedule of the *Constitution* should be interpreted to override other articles or Schedules unless expressly stated in the *Constitution*. For example, article 20 expressly states that the Bill of Rights applies to all laws; article 25(c) expressly identifies the fundamental rights that cannot be limited. There is no express constitutional provision that stipulates that transitional provisions and Schedules in entirety override the substantive articles in the body of the *Constitution*.

68. I hold that each specific Schedule and article in the *Constitution* has an equal footing and equal force of law and all articles in the *Constitution* as well as all Schedules thereto must be interpreted as one document with logical consistency within the *Constitution* as a single indivisible document. An apparent conflict, if any, must be given a purposive interpretation to attain and maintain logic, coherence and consistency within the *Constitution* as a one indivisible document. I am not persuaded in legal reasoning that in general, transitional provisions override substantive articles in the body of the *Constitution*. The logical reasoning is that unless expressly stated in the *Constitution*, all provisions in the *Constitution* whether transitional or main articles have an equal footing. To arrive at any other conclusion will be stating that there are two constitutions valid at the same time; one in the articles and the other in the transitional provisions and Schedules. In law, there can be no two constitutions at the same time.

69. I find that transitional provisions and Schedules are only sequential provisions; they must be applied and implemented before the provisions in the main articles of the *Constitution* can be effective. In other words, transitional provisions are a constitutional conditions precedent to the operation of specified articles in the *Constitution*. In the context of this appeal, the transitional provision in section 23 of the Sixth Schedule is not an overriding section but a section which requires an individual judge or magistrate to be vetted before he/she can continue to serve under the new *Constitution*. Section 23 of the Sixth Schedule constitutionalises the vetting process and vetting is thus made a constitutional condition precedent for a judge or magistrate to continue to serve under the 2010 *Constitution*.

K. Compatibility of the *Vetting Act* to articles 10 and 159 of the *Constitution*:

70. The Appellant and KMJA contend that the *Vetting Act* is unconstitutional to the extent that certain provisions in the Act go beyond the provisions of articles 10 and 159 of the *Constitution* as is required by section 23(1) of the Sixth Schedule to the *Constitution*. The thrust of the Appellant's submission is

that the provisions of sections 3, 4, 17, 18, 19, 20, 21, 22 and 23 of the *Vetting Act* should be declared unconstitutional for being contrary to various articles of the 2010 Constitution. Learned counsel Mwangi Njoroge for the 1st and 2nd Respondents in opposing the submission opined that the *Vetting Act* is in conformity with article 10 of the *Constitution* which article is not vague and is enforceable.

71. I am guided by the principle that in order to determine the constitutionality of the *Vetting Act* as a statute, the Court has to consider the purpose and effect of the impugned statute or section thereof. If either the purpose or the effect of its implementation infringes a right guaranteed by the *Constitution*, the statute or section in question would be declared unconstitutional. (See *Gideon Mwangangi Wambua & another v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR). I now turn to analyze and consider separately and disjunctively the constitutionality of the impugned sections of the *Vetting Act*.

L. Constitutionality of section 3 of the *Vetting Act*:

72. The Appellant and KMJA contend that section 3 of the *Vetting Act* is unconstitutional as it introduces a concept of vetting of Judges and magistrates which is unknown to the *Constitution*. With respect, I beg to differ. Vetting as a concept is provided for in the *Constitution*. Section 3 of the *Vetting Act* states that the object and purpose of the Act is to establish mechanisms and procedures for the vetting of Judges and magistrates pursuant to the requirements of section 23 of the Sixth Schedule to the *Constitution*. Article 262 of the *Constitution* incorporates the Sixth Schedule as an integral part of the *Constitution*. Section 23(1) of the Sixth schedule provides that Parliament shall establish mechanisms and procedures to determine suitability of all Judges and magistrates to continue to serve in accordance with the values and principles set out in articles 10 and 159 of the *Constitution*. I find that section 3 of the *Vetting Act* draws its objects and purposes from section 23(1) of the Sixth Schedule which is anchored in the *Constitution*. I therefore find and hold that section 3 of the *Vetting Act* is not unconstitutional. This finding is reinforced by section 13 of the *Vetting Act* which stipulates that the functions of the Vetting Board shall be to vet judges and magistrates in accordance with the provisions of the *Constitution* and the Act.

M. Constitutionality of section 4 of the *Vetting Act*

73. The Appellant contends that section 4 of the *Vetting Act* is unconstitutional and contrary to article 27 of the *Constitution* as it is discriminatory and singles out Judges and magistrates for vetting. Section 4 of the *Vetting Act* provides that,

> " For the avoidance of doubt, the provisions of this Act shall apply only to persons who were serving as judges or magistrates and who were in office on or before the effective date. "

74. A comparison of the provisions of section 4 of the *Vetting Act* to section 23(1) of the Sixth Schedule reveals substantial similarity. The enabling provision of section 4 of the *Vetting Act* is section 23(1) of the Sixth Schedule to the *Constitution*. Section 23(1) of the Sixth Schedule expressly stipulates that the mechanisms and procedures for vetting shall apply to all Judges and magistrates who were in office on the effective date. Section 4 of the *Vetting Act* simply emphasizes what is contained in section 23(1) of the Sixth Schedule. If the contention by the Appellant carries any weight, then the attack must be directed to section 23(1) of the Sixth Schedule which is the enabling provisions that require all Judges and magistrates who were in office on the effective date to be vetted. I shall revert to the constitutionality of section 23(1) of the Sixth schedule later in this judgment. I find and hold that section 4 of the *Vetting Act* is not unconstitutional as it is in tandem and in consonance with the provisions of section 23(1) of the Sixth Schedule to the *Constitution*. In addition, article 27(4) of the *Constitution* prohibits

discrimination directly or indirectly on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. This list is not exhaustive; however, the Appellant has not demonstrated on what criteria it is alleged that the Judges and magistrates have been discriminated. It is not sufficient to merely allege discrimination, one must demonstrate the discrimination. As regard the vetting process, I hasten to add that all Judges and magistrates who were serving on the effective date are subject to the vetting process. section 4 of the *Vetting Act* and section 23(1) of the Sixth Schedule does not discriminate against any Judge or magistrate. All of them are treated equally and are required to undergo vetting. On this score, I find that section 4 of the *Vetting Act* is not unconstitutional on the ground of discrimination since it treats all Judges and magistrates equally; the principle of equality of treatment is observed. I do add and emphasize that if it is the Appellant's contention that judges and magistrate's have been discriminated vis-a-vis the executive and the legislature, this aspect has been addressed in the judgment and it is my finding that there is no discriminatory treatment between the legislature, executive and Judiciary in so far as vetting process is concerned.

N. Constitutionality of sections 18 and 19 of the *Vetting Act*

75. The Appellant contends that the criteria for vetting of Judges and magistrates as laid out in sections 18 and 19 of the *Vetting Act* are unconstitutional as they do not conform to articles 10 and 159 of the *Constitution*. The constitutionality of section 18 and 19 of the *Vetting Act* depends on whether the criteria in these two sections encompass and embody the national values in article 10 and the principles in article 159 of the *Constitution*. It is essential to compare and contrast the provisions of sections 18 and 19 of the *Vetting Act* to articles 10 and 159 of the *Constitution* to determine constitutionality thereof and to identify any similarities or differences therein. Article 10(2) of the *Constitution* stipulates that the national values and principles of governance include:-

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non- discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

On the other hand, article 159 provides that:-

> " 159
>
> (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and tribunals established by or under this Constitution.
>
> (2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles:-
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and

traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted. ”

76. section 18 of the *Vetting Act* as amended by Act No 43 of 2012 provi

“ 18

(1) The Board shall, in determining the suitability of a judge or magistrate, consider—

(a) whether the judge or magistrate meets the constitutional criteria for appointment as a judge of the superior courts or as a magistrate;

(b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and diligence;

(c) any pending or concluded criminal cases before a court of law against the judge or magistrate;

(d) any recommendations for prosecution of the judge or magistrate by the Attorney-General or the Ethics and Anti-Corruption Commission; and

(e) pending complaints or other relevant information received from any person or body, including the:

i. Law Society of Kenya;

(ii) Ethics and Anti-Corruption Commission;

(iii) Advocates Disciplinary Tribunal;

(iv) Advocates Complaints Commission;

(v) Attorney-General;

(vi) Commission on Administration of Justice;

(vii) Kenya National Human Rights and Equality Commission;

(viii) National Intelligence Service;

(ix) National Police Service Commission; or

(x) Judicial Service Commission.

(2) In considering the matters set out in subsection (1)(a) and (b), the Board shall take into account the following:-

(a) professional competence, the elements of which shall include:-

(i) intellectual capacity;

(ii) legal judgment;

(iv) diligence;

(v) substantive and procedural knowledge of the law;

(vi) organizational and administrative skills; and

(vii) the ability to work well with a variety of people;

(b) written and oral communication skills, the elements of which shall include:-

(i) the ability to communicate orally and in writing;

(ii) the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and

(iii) effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life;

(c) integrity, the elements of which shall include:-

(i) A demonstrable consistent history of honesty and high moral character in professional and personal life;

(ii) Respect for professional duties, arising under the codes of professional and judicial conduct; and

(iii) Ability to understand the need to maintain propriety and the appearance of propriety;

(d) Fairness, the elements of which shall include:-

(i) A demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and

(ii) Open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views;

(e) Temperament, the elements of which shall include:-

(i) demonstrable possession of compassion and humility;

(ii) history of courtesy and civility in dealing with others;

(iii) ability to maintain composure under stress; and

(iv) ability to control anger and maintain calmness and order;

(f) good judgment, including common sense, elements of which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles;

(g) legal and life experience, the elements of which shall include:-

(i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and

(ii) broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of different ethnic and cultural backgrounds, and demonstrable interests in areas outside the legal field; and

(h) demonstrable commitment to public and community service, the elements of which shall include the extent to which a Judge or magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular. ”

O. Analysis of Constitutionality of sections 18 of the *Vetting Act*

77. Having outlined the submission by counsel for the Appellant on constitutionality of articles 18 and 19 of the *Vetting Act*, I now undertake the following analysis on the sections. The object and purpose of the vetting process is to determine suitability of a Judge or magistrate to continue to serve under the 2010 Constitution in accordance the values in articles 10 and 159 of the *Constitution*. The first and initial inquiry must be whether the individual Judge or magistrate qualifies to be appointed as a Judge or magistrate under the 2010 *Constitution*. One cannot be suitable to hold or continue to serve in the office of a judge under the new Constitution unless he/she meets the qualifications to be appointed as such ajudge. For this reason, I find and hold that the provision of section 18(1)(a) of the *Vetting Act* is constitutional as it is a condition precedent and sine qua non for an individual Judge to be able to discharge the duties of the office of a Judge in accordance with the values and principles in articles 10 and 159 of the *Constitution*.

78. A comparison between section 18(c), (d) and (e) of the *Vetting Act* and article 10(2)(c) of the *Constitution* reveals that section 18(c)(d) and (e) of the *Vetting Act* is geared towards enforcing and implementing the values contained in article 10(2)(c) of the *Constitution* particularly the issues of integrity and accountability.

the *Constitution* demands that a serving Judge or magistrate should espouse, possess and practice the values of integrity and accountability. These values are essential to transparency, good governance, democracy and upholding of the rule of law (See article 10(2)(a) & (c) of the *Constitution*). Examining the integrity of a judge or magistrate inter alia entails conducting a monetary life style audit of the individual judge or magistrate. The goal is to find out if the judge or magistrate is living in financial integrity and whether his/her daily action is congruent with the principles that leads to wealth creation. This involves deciphering the relationship between the honesty of the judge or magistrate as gauged from his/ her known sources of income and if there is evidence of unaccounted for income, wealth or unfairly earned money. I, therefore, find and hold that section 18(c)(d) & (e) of the *Vetting Act* are constitutional in that they seek to determine if a Judge possesses the constitutional values of integrity, accountability, good governance, democracy and respect for the rule of law.

79. I now evaluate the consonance of the criteria in section 18(b) of the *Vetting Act* and compare and contrast it with the Constitutional values in article 10 of the *Constitution*. Section 18(b) of the *Vetting Act* requires the Vetting Board to look into the past work record of the Judge or magistrate, including prior judicial pronouncements, competence and diligence. It is my considered opinion that section 18(b) of the *Vetting Act* is in consonance with the values expressed in article 10(b) & (c) of the *Constitution*. Article 10(b) requires that the judicial authority must be exercised bearing in mind issues of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Article 10(c) requires that values of good governance, integrity, transparency and accountability must be upheld. It is my considered opinion that it is only possible to evaluate and vet individual Judges on the values in article 10(b) & (c) by looking into past work record and prior judicial pronouncement which will demonstrate the competence and diligence of the individual Judge and his/her ability to espouse, enforce and implement the values in article 10(b) & (c). It is noteworthy that an individual's ideals, ethics, morals, values, aptitude and attitude are discernible from past work record and pronouncements. These individual traits and values determine whether the individual is capable of administering justice to all without regard to social status, without discrimination of whatever kind, whether he/she respects equity and equality and whether he/ she delivers timely judgments. I find that the criteria in section 18(b) of the *Vetting Act* also aims to implement the provisions of article 159(2)(a), (b) & (c) of the 2010 Constitution. By examining the past work record of individual Judges or magistrate, it would become apparent if the said individual

Judge administers justice without delay, justice to all irrespective of social status and whether the Judge or magistrate administers technical or substantive justice. I hold that section 18(b) of the *Vetting Act* is intra vires the *Constitution* as it resonates and is in tandem with the provisions of articles 10 and 159(2) of the 2010 Constitution.

80. I now consider and evaluate the compatibility of section 18(2) of the *Vetting Act* with articles 10 and 159 of the *Constitution*.

I do find and hold that section 18(2) of the *Vetting Act* is constitutional. The criteria in section 18(2)(a) on professional competence is a condition sine qua non for an individual to hold the office of a Judge or magistrate. An individual is not qualified to continue to serve in the office of a Judge or magistrate if she/he has no professional competence. I find that the vetting criterion of professional competence is part and parcel of the requisite qualifications to continue to serve as a Judge or magistrate under the 2010 Constitution. A person ipso facto cannot be suitable to continue to serve if he/she does not have professional competence and qualifications to be appointed a Judge under the *Constitution*. I therefore find section 18(2)(a) of the *Vetting Act* to be constitutional. As regards section 18(2)(b) of the *Vetting Act* relating to written and oral communication skills of a Judge or magistrate, I do find that this criteria is constitutional. The final product of a judicial officer in an adjudication system is a written judgment or ruling. The judgment must be succinct, easy to read and comprehend and must consider and make a determination on the issues in dispute. One tool of trade for the bench is written and oral communication skills. I find that the vetting of Judges or magistrates Board using the criteria in section 18(2)(b) of the *Vetting Act* on written and oral communication skills is constitutional and it promotes the values of transparency, accountability, good governance and the rule of law under article 10 of the *Constitution*. It also furthers the value that justice shall not be delayed (See article 159(1)(b)) through an inordinate and unreasonably longer time line to write and deliver succinct and erudite judgments.

81. Section 18(2)(c) of the *Vetting Act* deals with integrity issues and I find and hold that it is in tandem with the value of integrity as espoused in article 10(c) of the *Constitution*. In relation to section 18(2)(d) and (e) of the *Vetting Act*, I find that these paragraphs are constitutional as they promote the constitutional value in article 10(b) relating to human dignity, equity, social justice, human rights and they also promote good governance, rule of law as well as the objects and purposes of the *Constitution*. Section 18(2)(d) of the *Vetting Act* deals with fairness, it cannot be gainsaid that the need for fairness is an important aspect of the rule of law, democracy and good governance. The adage justice must not only be done but must be seen to be done is premised on the concept of fairness. This reasoning is fortified by the dicta of Judge Learned Hand who eloquently identified the centrality of Judges to the administration of justice in his decision in *Brown v Walter*, (1933), (62 F. 2d. 798, at 799-800) 2d. Cir; where he stated that:-

> "Justice does not depend upon legal dialectics so much as upon the atmosphere of the Courtroom and that in the end depends primarily upon the judge".

82. I find that the temperament of a Judge is a critical component in the administration of justice. This was echoed by Madame Justice MacFarland in the *Inquiry Re: WP Hryciuk a Judge cf the Ontario Court* where she stated that,

> "While a judge has no official authority over other persons working in the Court system ... it is apparent that by his very office he plays a significant and unique role in their working lives. Judges must take particular care never to misuse or to abuse that power. " (See Ontario Commission cf *Inquiry Re: His Honor Judge WP Hryciuk a Judge cfthe Ontario*

Court (Provincial Division), Report by The Honorable Madame Justice J. MacFarland, Commissioner, 1993)".

83 . It is my considered view that section 18(2)(d) of the *Vetting Act* promotes the value of fairness and taken together with section 18(2) (e) of the *Vetting Act* it focuses on temperament and civility; these sub-sections are in tandem with the constitutional value of human dignity, human rights and non-discrimination in article 10(2)(a) and(b) of the *Constitution* and also enforces article 159(2)(a) ofthe Constitution. I hold that section 18(2)(e) of the *Vetting Act* is not unconstitutional. I am fortified by the fact that precedent exists for questioning a Judge on his/her temperament. For instance, in the complaints laid against Judge Andre Ruffo ofthe Court of Quebec, the issue related to her unorthodox decisions and the manner in which she ran her court. In the case of Family Court Judge Raymond Bartlett in Nova Scotia, the issue concerned his conduct in court where during formal sessions he gave lectures and berated women for not obeying their husbands.

P. Analysis of Constitutionality of sections 19 of the *Vetting Act*

84. The Appellant contends that section 19 of the *Vetting Act* is unconstitutional to the extent that it violates the dignity of judges and magistrates and the right to privacy and does not conform to articles 10 and 159 ofthe Constitution. I beg to differ. Article 10(2) (b) of the *Constitution* inter alia promotes the value of human rights and human dignity. Article 28 ofthe *Constitution* stipulates that every person has inherent dignity and the right to have that dignity respected and protected. Section 19(2) of the *Vetting Act* requires that all information obtained by the Board during personal interviews and records of the Judge or magistrate being vetted shall be confidential. It is my considered view that section 19(2) of the *Vetting Act* promotes the dignity and human rights of the individual Judge and magistrate and is in tandem with article 1(2)(b) and 28 of the *Constitution*.

85. On the constitutionality of section 19(3) of the *Vetting Act*, I note that the sub-section requires that every Judge or magistrate to be vetted should be given sufficient notice. This is a rule of natural justice. In line with article 159(2)(c) of the *Constitution*, one of the facets of the rule of law, is that an individual is entitled to adequate notice and the particulars of any complaint against him/ her. This principle is recognized in article 50(2)(b), (c) and (j). It is my considered view that section 19(3) and (4) of the *Vetting Act* is in conformity with the provisions of article 50 of the *Constitution* and is intra vires the *Constitution*. I do find that section 1(5) of the *Vetting Act* is constitutional as it complies with article 10(2)(a)(b) and (c) of the *Constitution* relating to the value and respect of rule of law, human rights, good governance, transparency as well as article 28 which respects the dignity and human rights of the individual Judges. Section 19(5) of the *Vetting Act* is also in conformity with article 50(2)(d) of the *Constitution* to the extent that the hearing by the Vetting Board shall not be conducted in public, unless the concerned Judge or magistrate requests a public hearing. I find that section 1(6) of the *Vetting Act* is constitutional as it encompasses the objects and purposes of the *Constitution* wherein the rules of natural justice apply to the Vetting Board's proceedings. In sum total, my analysis of section 19 of *Vetting Act* as compared to articles 10 and 159 of the *Constitution* reveals that the section is intra vires the *Constitution* and is not unconstitutional.

Q. Analysis of Constitutionality of section 21(2) of the *Vetting Act*

86. The Appellant and the 3rd Respondent contend that section 21(2) of the *Vetting Act* is unconstitutional. Section 21(1) provides that the Vetting Board shall, upon determining the suitability of a judge or magistrate to continue serving in the Judiciary, within thirty days of the determination, inform the concerned Judge or magistrate of the determination, in writing, specifying the reasons for

the determination. Section 21(2) of the *Vetting Act* provides that once informed of the decision to be unsuitable to serve, the Judge or magistrate shall be deemed to have been removed from service.

87. The thrust of the Appellant and KMJA's contention is that article 21(2) ofthe *Vetting Act* is unconstitutional since it "deems as removed" a Judge or magistrate who is found unsuitable to continue to serve. The Appellant and KMJA contend that this "deeming" provision is unconstitutional as the vetting process is not a removal process. It was argued that article 168 of the *Constitution* is the provision that deals with removal of Judges from office and section 21(2) of the *Vetting Act* usurps and undermines the provisions of article 168 by introducing the phrase "deemed to have been removed" from service. That by introducing the "deeming" provision, the *Vetting Act* is contrary to article 168 of the *Constitution* as it equates vetting to a removal process. It was submitted that the only competent organ that can remove a Judge from office is a Tribunal duly appointed and constituted under article 168 of the *Constitution* upon recommendation of the Judicial Service Commission.

88. It was further submitted by learned counsel Steve Mwenesi for KMJA that section 23 of the Sixth Schedule to the *Constitution* which is the enabling legislation to the *Vetting Act* does not contain the "deeming provision" and as such, Parliament acted ultra vires by introducing the "deeming" provision in section 21(2) of the *Vetting Act*. It was submitted that section 23 of the Sixth Schedule envisages a vetting process that aims to determine the suitability of an individual judge or magistrate to continue to serve; it does not envisage a vetting process to determine the removal of a judge from office. That section 21(2) of the *Vetting Act* focuses and lay emphasis on removal rather than suitability and to that extent the section is unconstitutional.

89. I have considered the Appellant's and KMJA's submissions which challenges the constitutionality of section 21(1) & (2) of the *Vetting Act*. Whereas section 21(1) relates to fair administrative action, section 21 (2) relates to the deeming provision. One of the elements of fair administrative action is that a tribunal or a person charged with the responsibility or discretion to make a decision is under duty not only to make the decision but to give reasons for the decision. This tenet is captured in article 47(1) ofthe Constitution whereby every person has the right to administrative action that is reasonably and procedurally fair. In article 47(2) ofthe Constitution, a person is entitled to be given written reasons for decision or any administrative action taken. I do find that section 21(1) ofthe *Vetting Act* is not unconstitutional as it complies with article 47(2) whereby in a fair administrative action written reasons for the decision or action taken must be given.

90. On the submission that section 21(2) of the *Vetting Act* is unconstitutional as it equates vetting to removal, I have considered the submission which is prima facie logical and consistent with a literal interpretation of the words "removal" and vetting". From a plain reading of the words in section 23 of the Sixth Schedule, the submissions by the Appellant is persuasive and in accord with the dicta in *Republic v El Mann* [1969] EA 357, where the Court held that if there is no ambiguity in the wording of a section of the *Constitution*, the section should be construed according to the ordinary and natural sense of the words used. However, to determine the constitutionality of section 21(2) of the *Vetting Act* as read with section 23 of the Sixth Schedule, the letter and spirit of the 2010 *Constitution* is paramount. Article 259(1) of the *Constitution* requires courts to interpret the *Constitution* to promote its purposes, values and principles. Every provision in the *Constitution* must be construed in a manner that it is always speaking. What then is the spirit of section 23(1) of the Sixth Schedule to the *Constitution*"

Section 23(1) of the Sixth Schedule states that despite article 168 of t *Constitution*, Parliament shall enact legislation to determine suitability all Judges and magistrates who were in office on the effective date to continue to serve. The spirit of this provision is that article 168 of the *Constitution* is not a vetting provision for determination of suitability. What is the practical implication of a determination that an individual Judge or magistrate is unsuitable to serve" It is my considered view that the practical

implication is that such a judge or magistrate cannot continue to serve and if one cannot continue to serve it means that by dictate of the *Constitution*, the services of such a Judge or magistrate must come to an end. When one's services come to end, one is deemed to have been removed from office. I find that the "deeming" provision in section 21(2) of the *Vetting Act* is a provision implementing the determination that an individual Judge or magistrate is unsuitable to continue to serve under the values enshrined in articles 10 and 159 of the *Constitution*. Each and every provision in the 2010 Constitution must be enforced and I do find and hold that section 21(2) of the *Vetting Act* is a provision that implements the determination of unsuitability of an individual Judge or magistrate to continue to serve. I hold that the enforcement provision in section 21(2) of the *Vetting Act* is intra vires the *Constitution* and it enforces both the letter and spirit of the *Constitution*. This interpretation is in accord with article 259(1) of the *Constitution* whereby the purpose of the *Constitution* should be implemented.

91. I now turn to interpretation of the phrase "unsuitable to serve" and whether the said phrase has the same meaning and effect as "removal" from office. The Appellant contended that the word "removal" of a Judge as used in the *Constitution* does not have the same meaning as "unsuitable to serve" as used in the *Vetting Act*. I opine that words and phrases must be interpreted by reference to the context of the letter and spirit of the *Constitution* or statute in which they have been enacted. The context and spirit in which the phrase "suitability to serve" was promulgated in section 23(1) of the Sixth Schedule to the *Constitution* and enacted in section 21(2) of the *Vetting Act* is that a Judge who is determined to be unsuitable should not continue to serve as a Judge under the new Constitution. It is true that section 23 of the Sixth Schedule does not use the word "removal". However, I find that within the vetting context, the phrase "unsuitable to serve" should be interpreted to have the same meaning and effect as "removal" from office. I am fortified in this conclusion when it is remembered that the sense and meaning of the law must be collected by comparing one part with another and by viewing all the parts together as one whole and not one part only by itself. The word "removal" cannot by itself be used to interpret the context and spirit of the *Constitution* and to provide the meaning and effect of a determination of unsuitability of a Judge to continue to serve. I find that the context in which the phrase "deemed to be removed" has been used in section 21(2) of the *Vetting Act*, is a phrase that has a cognate expression and a corresponding meaning to the phrase "unsuitable to continue to serve".

92. I now deal with the constitutionality of section 21(3) of the *Vetting Act* which stipulates that the decision to remove a Judge or magistrate from service shall be made public. The Appellant and KMJA contend that this provision is unconstitutional as it violates the Bill of Rights. I note that article 10(c) as read with article 50(d) and 35(1) of the *Constitution* on access to information promotes the values of transparency, public participation, good governance and the rule of law. The people of Kenya are entitled to know the outcome of the vetting process. They are entitled to know who their Judges and magistrates are and whether they are men and women of integrity. Transparency and accountability dictate that the decision of the Vetting Board must be made public. I hold that section 21(3) of the *Vetting Act* is intra vires the *Constitution* as it promotes and enhances the values of transparency and accountability enshrined in article 10 of the *Constitution*.

R. Right of Appeal and Analysis of Constitutionality of section 22 of the *Vetting Act*

93. The Appellant challenges that section 22(3) of the *Vetting Act* is unconstitutional as it denies Judges and magistrates the right of appeal. Counsel for the Appellant did not demonstrate if Judges and magistrates have a constitutional right of appeal from the decisions and determinations of the Vetting Board. The 2010 Constitution does not define what an "appeal" is. The fundamental feature of an appeal is the re-evaluation of the merits of the legal and factual basis of the decision of the lower court. Article 165(3) (e) of the *Constitution* grants the High Court original and appellate jurisdiction

conferred on it by legislation. This is not to suggest that, by dint of article 165(3) all and sundry decisions are appealable to the High Court. A reading of article 165(3)(e) indicates that the parameters of the appellate jurisdiction of the High Court is defined by legislation. For instance, both the *Civil Procedure Act*, Chapter 21, Laws of Kenya and the *Criminal Procedure Act*, Chapter 75, Laws of Kenya contain provisions restricting the right of appeal and these provisions have not been held unconstitutional. (See sections 65, 66, 71A, 72-79 of the *Civil Procedure Act* and sections 348 and 379 of the *Criminal Procedure Act*).

94. In the context of this appeal, whether the High Court has appellate jurisdiction on the vetting of Judges and magistrates is to be ascertained from section 23(2) of the Sixth Schedule to the *Constitution* and section 22(5) of the *Vetting Act*. Section 23(2) of the Sixth Schedule is a constitutional ouster clause whereby the removal or process leading to the removal of a Judge from office shall not be subject to question in or review by any court. Section 22(5) of the *Vetting Act* borrows from section 23(2) of the Sixth Schedule to the *Constitution* and ousts the jurisdiction of any court to question and review the decisions of the Vetting Board. The spirit of section 23(2) of the Sixth Schedule is to the effect that the merits of a determination on suitability to continue to serve are an exclusive preserve for the jurisdiction of the Vetting Board. Nowhere in the *Vetting Act* is the right of appeal to the High Court or any other court granted. On this point, I rely on the dicta of this Court in the case of *Humphrey Olwisi Muranda v Yakobet Nechesa Wabuko*, (2008) eKLR where in the context of appeals from the Land Disputes Tribunal, it was stated that since the Land Disputes Act did not provide for appeals to the Court of Appeal, the Court had no jurisdiction to entertain appeals arising from the Act. Applying the *dicta* in Humphrey Olwisi Muranda case mutatis mutandis, I am of the considered view that since the Vetting of Judges and Magistrate's Act does not provide for an appellate jurisdiction to the High Court, it follows that there is no right of appeal to the High Court.

95. In relation to the jurisdiction of both the Supreme Court and Court of Appeal, it is my considered view that neither the *Constitution*, the *Supreme Court Act*, *Appellate Jurisdiction Act* nor the Judges and Magistrate's *Vetting Act* confer appellate jurisdiction to the Supreme Court or the Court of Appeal to hear appeals or review questions relating to the determinations by the Vetting Board on suitability of a judge to continue to serve under the 2010 Constitution.

96. Article 168(8) provides for a right of appeal to the Supreme Court for a judge aggrieved by the decision of a Tribunal appointed under article 168(5)(b). I have stated heretofore that article 168 is inapplicable to a judge who was serving on the effective date until such a judge has been vetted and found suitable to continue to serve. I have also stated that the Vetting Board is sui generis and is not the Tribunal appointed under article 168 of the *Constitution*. The express words of article 168 of the *Constitution* provides for a right of appeal to the Supreme Court and not to the High Court or Court of Appeal. For avoidance of doubt, I re-iterate that for those judges who were in office on the effective date, there is no right of appeal from the decisions and determinations of the Vetting Board; the only right available is the right to seek judicial review under article 165(6) of the *Constitution*.

97. Learned counsel, Mr Steve Mwenesi for KMJA submitted that article 22(1) of the *Constitution* provides for an independent right to move to the High Court where a fundamental right is breached. Counsel submitted that Judges and magistrates have been denied fair administrative action and right of appeal and this constitute a breach of their fundamental rights. The gist of the submissions is that it is a fundamental principle of law as enshrined in article 22(1) of the *Constitution* that a party aggrieved by any decision or determination has a right of appeal to the High Court. It is my considered view that article 22(1) of the *Constitution* is not in conflict with the *Vetting Act* to the extent that the supervisory jurisdiction of the High Court has been preserved and is not ousted in the vetting process under section 23 of the Sixth Schedule to the *Constitution*. The supervisory jurisdiction of the High Court is part

of the basic structure of the *Constitution* that cannot be excluded. When the High Court exercises its supervisory jurisdiction, one of the factors to be borne in mind is article 20(1) wherein it is provided that the Bill of Rights applies to all laws in Kenya. The High Court must also take into account the provisions of article 25(c) of the *Constitution* wherein the right to a fair trial cannot be abridged and article 22(1) where every person has the right to institute court proceedings in case of alleged violation of fundamental rights.

98. The other contention by the Appellant is that section 22(1) of the *Vetting Act* is unconstitutional to the extent that it allows Judges and magistrates to apply for review before the same panel and this amount to the same person being a judge in his own cause. Counsel submitted that equity maxim nemo judex in causa sua should apply to wit no man should be a judge in his own cause. The issue for consideration is whether it is unconstitutional for the same panel to hear a review of a matter. On the issue of review, the *Vetting Act* is a statute enacted in tandem with the practice of the Courts and the provisions of the *Civil Procedure Act* and the *Criminal Procedure Act* wherein review of cases is before the same court or tribunal that made the decision. It is a practice of common law jurisdictions that an application for review is made before the same Judge, tribunal or court that made the decision and consequently, I hold that it is not a violation of natural justice for section 22(1) of the *Vetting Act* to require review of the Vetting Board's decision should be before the same panel. Further, the words of the *Vetting Act* is succinct and unambiguous and if review should not be before the same panel, this is an issue calling for amendment and not interpretation of section 22(1) of the *Vetting Act*. Pending such amendment, the law as presently enacted is that review is before the same panel and this Court must give fidelity to the letter of the law and implement it as is. Notwithstanding the foregoing, the National Assembly in its wisdom by a Bill passed on 5th December 2013 and assented to be the President on 24th December 2013 amended the provisions of section 22(1) of the *Vetting Act*. The words "same panel" have been deleted and in its place substituted with the words "a new panel to be constituted by the Chairperson of the Board. " (See Kenya Gazette Supplement No 177 (Acts No 43) dated 27th December 2013). Pursuant to the amendments of December 2013 as stated heretofore, the contention by the Appellant on this issue is now an academic exercise having been overtaken by the legislative amendment. It is noted that the amendments made in December 2013 are not stated to be retroactive to affect the legality and constitutionality of any review undertaken prior to the foresaid amendments.

99. A further analysis as to whether or not section 22(1) of the *Vetting Act* has violated the principle that no one shall be a Judge in his own cause, must start with a consideration of the constitutional provisions with regard to the powers, functions and mandate of the Vetting Board. I take the view that in enacting the provision of section 23 of the Sixth Schedule, the clear intention of the people of Kenya was that all Judges and magistrates were to be vetted through an exclusive sui generis mechanism established outside the ordinary court system. Section 23 of the Sixth Schedule makes provision for a different jurisdictional scheme for the vetting process. The mandate to vet the Judges and magistrates is an extra-ordinary process. I find that the Vetting Board exercises extra-ordinary jurisdiction in extra-ordinary circumstance, and extra ordinary circumstances require extra ordinary remedies. It is my considered view that the exclusive jurisdiction of the Vetting Board to determine suitability of a Judge or magistrate to continue to serve is a mandate ordained by the *Constitution* and is vested outside the original or appellate jurisdiction of any court in Kenya. The people of Kenya saw it necessary to establish the vetting process outside the ordinary court system and what is necessary is lawful. This is captured in the maxim quod est necessariumest licitum (what is necessary is lawful). I hold that so long as the Vetting Board exercises its mandate in accordance with the *Constitution* and section 23 of the Sixth Schedule, section 21(2) of the *Vetting Act* cannot be said to be a violation of any constitutional right under articles 47 and 50 or to be a violation of the principle that no one shall be a Judge in his own cause.

100. The Appellant contends that section 23(2) of the Sixth Schedule and section 22(1) of the *Vetting Act* are unconstitutional to the extent that they oust the supervisory jurisdiction of the High Court. It is a fundamental rule of interpretation that a statute is to be expounded according to the spirit and intent of them that made it. (See Pg 1 of *Maxwell on The Interpretation of Statutes* 10th Ed with reference to the *Sussex Peerage Case* (3) (1884) (11. Cl. & Fin at p143). The provisions of section 22(1) of the *Vetting Act* is in tandem with the spirit of article 47(3)(a) of the *Constitution* in relation to review of administrative actions. The argument that section 23(2) of the Sixth Schedule and section 22 *Vetting Act* ousts the High Court's supervisory jurisdiction under judicial review has no foundation in law. It is a basic principle of statutory interpretation that except through legislative amendment, no person can add to or subtract any word from a statutory provision. (See Lord Simmons in *Magor and St Mellons rural District Council v Newport Corporation*, (1951) 2 All ER 839). It is also a basic principle of interpreting statutory provisions that except for drafting and typographical errors, courts should not add to or subtract any word or punctuation mark from the provisions of statute. (See *Viscont Dilhorne in Stock v Frank Jones (Tipton) Ltd*, (1978) 1 All ER 948). Section 23(2) of the Sixth Schedule literally reads

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

101. I have painstakingly read section 23(2) of the Sixth Schedule and section 22(1) of the *Vetting Act* with a toothcomb looking and searching for the word "judicial" in the sub-sections and I have dismally and unapologetically failed to find it. I hereby pose the question: the word used in the section 23(2) of the Sixth Schedule and also in section 22(1) of the *Vetting Act* is "review"; who has added the word "judicial" before the word "review" to introduce and read into the sub-sections the phrase "judicial review". The phrase judicial review does not exist in the words and language of section 23(2) of the Sixth Schedule. Neither does the phrase "judicial review" exist in section 22(1) of the *Vetting Act*. Such a phrase cannot be imported into and introduced into the section by dint of legal arguments or judicial craft of constitutional interpretation.

102. I am aware of the dicta by Lord Nicholls, in *Inco Europe Ltd v First Choice*, [2000] 1 WLR 586 (also reported in The Times, 10th March 2000) where he stated:

> "It has long been established that the role of the Courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the Court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation*, 3rd ed. (1995) pp 93-105. He comments, at p 103:
>
> > "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role. '"

Lord Nicholls went on to describe what he considered to be the proper limits of the Court to add or subtract words in a statute.

103. In the context of this appeal, neither the Appellant nor the Respondents submitted that section 23(2) of the Sixth Schedule or section 22(1) of the *Vetting Act* had a drafting error. Neither did the High

Court make a finding that section 23(2) of the Sixth Schedule or section 22(1) of the *Vetting Act* had a drafting error. It is my considered view that both section 23(2) of the Sixth Schedule and section 22(1) of the *Vetting Act* have no drafting error to warrant the Court to add to or subtract any word therein.

104. It is my considered view that a word which has not been crafted, drafted and promulgated into the *Constitution* cannot be imported and added to the *Constitution*. Likewise, a word which has not been enacted into the Judges and Magistrates *Vetting Act* cannot be introduced into the Act. In interpreting legislation, a word should not be interpreted to change its meaning particularly when the word is unambiguous, not obscure and does not lead to absurdity. A word whose meaning has been generally and universally accepted should not be interpreted to give it the same meaning as another word. The meaning of the word "review" in common law jurisdictions is unambiguous, definite, clear-cut and unmistakable. The word "review" is distinct from "judicial review". The word "review" should not and cannot be interpreted to give it the same meaning as "judicial review". If the word "review" is interpreted to include "judicial review" this would be doing violence to a word whose meaning in the sands of legal history is well settled and has stood the test of time. The word "review" is not generic and is neither a neutral word nor is it of "functional equivalence" to the phrase "judicial review", both have dissimilar roles and remedies. It would be irrational to equate "review" to "judicial review". Further, the word "review" is neither a cognate expression to nor does it possess a corresponding meaning to "judicial review".

105. It is arguable whether the framers and drafters of the *Constitution* intended to use the phrase "judicial review" instead of "review" in section 23(2) of the Sixth Schedule. It is also arguable whether Parliament intended to use the words "judicial review" instead of "review" in section 22(1) of the *Vetting Act*. This would be speculative and no court can deliver a judgment based on speculation. The framers, crafters and drafters of the *Constitution* and the *Vetting Act* made a choice to use the word "review" instead of "judicial review". Choices have consequences and the consequence is that review is distinct from judicial review. It may also be argued that the intention of the people of Kenya was to oust "judicial review". This is also speculative - the Constitutional document that was submitted to the people of Kenya in the referendum contained the word "review" and not "judicial review" in section 23(2) of the Sixth Schedule. It is this document that was promulgated and became the 2010 *Constitution*. The people of Kenya made a choice and the choice was to oust review. I have not seen and my attention has not been drawn to any constitutional amendment inserting or adding the word "judicial" in section 23(2) of the Sixth Schedule. I find and hold that in the absence of a constitutional amendment, it is unconstitutional to add and introduce the word "judicial" before the word "review" in section 23(2) of the Sixth Scheduleand thereby read, import and introduce into the section the phrase "judicial review". It is the duty of the Courts of law to interpret the *Constitution* and the *Vetting Act* as is and not to add and import words and phrases which the framers of the *Constitution* and the legislature did not deem fit to introduce and enact into the *Constitution* or in the *Vetting Act*. I refuse and decline to add the word "judicial" immediately before the word "review" and import the phrase "judicial review" into section 23(2) of the Sixth Schedule. I also refuse and decline to equate the word "review" to "judicial review". the *Constitution* is a sacrosanct instrument of governance and courts of law (except for obvious drafting errors) in exercise of their right to interpret the *Constitution* and other laws have no jurisdiction to add to and import words and phrases into the *Constitution* or any of its Schedules. The converse is also true; courts have no jurisdiction to subtract words or phrases from the

Constitution or any of its Schedules. I echo the *dicta* by Porter JA in *Ngobit Estate Limited v Carnegie*, Civil Appeal No 57 of 1981 where he stated:-

> " The function of the Judiciary is to interpret the statute law, not to make it. Where the meaning of a statute is plain and unambiguous, no question of interpretation or construction arises. It is the duty of the judge to apply such law as it stands".

In *Intalframe Ltd v Mediterrenean Shipping Company*, (1986) KLR 54, the Justices of Appeal Hancox, Platt & Gachuhi quoted from *Halsbury's Laws of England* 3rd Edition, Vol 36 at paragraph 584 where it is stated:

> " It is not competent to any court to proceed upon an assumption that Parliament made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by the legislature, and it is not the function of the Court to repair them. Thus while terms can be introduced into a statute to give effect to its clear intention by remedying mere defects of language and to rectify obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission. "

In *Bristol Gaurdians v Bristol Waterworks Co* (1914) AC 379, Lord Loreburn LC said at 388

> " Now it is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission... It would be most dangerous for any court to presume to insert in legislation a substantive word ."

106. This Court has been urged to find that the High Court has no supervisory jurisdiction unless there are compelling reasons such as the Vetting Board making an outrageous decision or the Board vetting a medical doctor instead of a judge or magistrate. On the surface, this argument appears attractive and persuasive; however, within it is found its Achilles heel and the guillotine to the argument- it is an admission that the High Court has supervisory jurisdiction. The argument proffered is like putting the cart before the horse yet it is the horse that must be before the cart. When the argument is reversed, the statement reads that the High Court has supervisory jurisdiction whenever there are compelling reasons or the Vetting Board makes an outrageous decision.

107. I pose the question which forum shall make the determination that there are compelling reasons? Which forum shall make the determination that the Vetting Board has made an outrageous decision? The forum that makes such determinations must have jurisdiction. Whether compelling reasons exist or whether a determination is outrageous are questions of fact. Jurisdiction is a question of law. The law must first exist before the facts can be determined; without the law, there is no legal basis to evaluate the facts and make a determination whether a compelling reason exists or if a determination is outrageous. The law precedes the determination of issues of fact. On this premise, it is erroneous to argue that the High Court has no jurisdiction unless there are compelling reasons; the High Court must first have jurisdiction and then proceed to determine whether there are compelling reasons or whether a determination or decision by the Vetting Board is outrageous. On this reasoning, I am inclined to find and hold, as I hereby do, that the High Court has supervisory jurisdiction over the Vetting Board and if there are no compelling or outrageous decisions or determinations, the High Court in exercise of its supervisory jurisdiction cannot interfere with the decisions and determinations of the Vetting Board.

108. In the case of *Tononoka Steels Limited v Eastern and Southern Africa Trade Development Bank*, Civil Appeal No 255 of 1998, Justices of Appeal Tunoi and Lakha JJA stated as follows:

> " The right of access to courts can only be taken away by clear and unambiguous words of the Parliament of Kenya. "

109. I pose the question, has Parliament of Kenya in clear and unambiguous words stated that judicial review of the decisions and determinations of the Vetting Board is ousted? The instant case arises from the contention that the wording in section 23 of the Sixth Schedule to the *Constitution* is subject to two different interpretations: one where judicial review is ousted and the other, that judicial review is not ousted. This contention by itself is evidence that there is no clear and unambiguous enactment that the right to judicial review has been ousted in respect to decisions and determinations of the Vetting Board. I endorse and adopt the dicta in *Davies & another v Mistry*, 1973 EA 463 where Spry VP quoting the case of *Pyx Granite & Co v Ministry of Housing* 1960 AC 260 stated that:

> " It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Court for the determination of his rights is not to be excluded except by clear words"

110. The holding that supervisory jurisdiction of the High Court is not ousted is fortified by the answer to the following question. Does the word "review" in Sub-sections 22(1), (2) and (3) of the *Vetting Act* have a different meaning from the word "review" in Sub-section 22(4) of the *Vetting Act*? In Sub-section 22(1), the Vetting Board is vested with the jurisdiction to conduct review and the grounds for review are stated in sub-section 22(2). In Sub-section 22(4), the decisions of the Vetting Board are not subject to review by any court. All the sub-sections 22(1), (2), (3) and (4) have the word "review". The question is whether the word "review" in all sub-sections has the same meaning. The proponents of the view that judicial review has been ousted are interpreting the word "review" in sub-section 22(4) to mean judicial review. The same proponents do interpret the word "review in sub-sections 22(1), (2) and (3) to mean review within the meaning of order 45 of the *Civil Procedure Act*, cap 21 of the Laws of Kenya. Can the same word in the same section have two different meanings? It is absurd for the word "review" in Subsections 22(1), (2) and (3) of the *Vetting Act* to mean "review" as used in order 45 of the *Civil Procedure Act* and the same word in Sub-section 22(4) of the *Vetting Act* to mean judicial review. One cannot interpret the word "review" in the same section to have two different meanings. The same word in the same Constitution and in all statutes (unless qualified by a verb, adjective or a noun) must be construed to have the same meaning. The word "review" as used in all the sub-sections of section 22 is not qualified by any noun, verb or adjective. Consequently, I hold that the word "review" as used in section 22(1), (2) and (3) of the *Vetting Act* must have the same meaning as the word "review" in section 22(4) of the same Act. It is my considered view that the meaning that should be given to the word review in all the sub-sections of section 22 of the *Vetting Act* is review in tandem with order 45 of the *Civil Procedure Act*.

111. Taking into account the Appellant's submission that the High Court's supervisory jurisdiction has been ousted, I pose the question: do the following sentences have the same meaning?

i. A removal or process leading to the removal, of a judge, from office by virtue of the operation of the vetting process, shall not be subject to question in, or judicial review by any court. (See section 23 of the Sixth Schedule to the *Constitution*).

ii. A removal or process leading to the removal, of a judge, from office by virtue of the operation of the vetting process, shall not be subject to question in, or judicial review by any court.

iii. A removal or process leading to the removal, of a judge, from office by virtue of the operation of the vetting process, shall not be subject to question in, or review or judicial review, by any court.

112. The underlined words are not contained in section 23 of the Sixth Schedule to the *Constitution* but they capture the submission by the Appellant. It is the Appellant's contention that section 23 of the Sixth Schedule should be interpreted to include the words and meaning captured in (iii) above. Is this tenable in law? It is my considered view that the underlined words cannot be added to a constitutional instrument through the craft of judicial interpretation. There is no power to limit or enhance a court's jurisdiction through creeping in words and phrases that do not exist in the text of the *Constitution*. Further, a contextual reading of section 22 of the *Vetting Act* as a whole suggests that a decision made at first instance by the Board is not final. Section 22(1) must be interpreted in the context of section 22(4) of the *Vetting Act* which provides for the power of review. The clear implication is that a decision by the Vetting Board made in the first instance is not final as it may be subject to review by a new panel on application by an aggrieved judge or magistrate.

T. Time Lines and constitutionality of section 23 of the *Vetting Act*

113. The KMJA contend that vetting process conducted by the Vetting Board is illegal, null and void to the extent that it does not conform to the time lines stipulated in section 23(1), (2) and (3) of the *Vetting Act*. Section 23(1) of *Vetting Act* stipulates that the vetting process once commenced shall not exceed a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year. Section 23(2) as amended by Act No 43 of 2012 now provides that:

> " 23
>
> (2) The vetting process, once commenced, shall be concluded not later than the 31st December, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.
>
> (3) Despite subsection (2), the Board shall conclude the process of vetting all the judges, chief magistrates and principal magistrates not later than the 28th March, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period".

114. The KMJA's contention is that at the time of filing the instant Petition, the vetting process was to be concluded within one year from the effective date of the *Constitution* and this period had lapsed yet the Vetting Board continued to vet judges and magistrates. It is argued that any vetting of Judges and magistrates conducted after one year from the effective date is null and void. KMJA's further contention is that although the National Assembly had been given power to extend the vetting period for not more than one year; the extension granted by the Assembly vide the amendment in Act No 43 of 2012 to 31st December, 2013 did not fulfill the prerequisite conditions for extensions and any such extension as granted by the Assembly is null and void.

115. During the submissions on this aspect, learned counsel, Mr Steve Mwenesi for KMJA underscored that the Vetting Board is not operating within the time lines set for the vetting process. Whereas the submission was clear and logical, counsel did not identify the alleged prerequisite conditions for extension of time lines by the Assembly; neither did counsel demonstrate the illegality of the extension granted by the Assembly. There is a presumption of legality and formality as captured in the maxim

omnia rite acta praesumuntur and the burden lies on he who alleges illegality to prove the same. I find that it has not been demonstrated how the timelines in section 23 of the *Vetting Act* is contrary to the *Constitution* in the face of presumption of legality. The KMJA did not lead evidence to rebut the presumption. On the issue of illegality of the vetting of individual judges or magistrates after expiry of the stipulated time lines, it is my considered view that such an issue is to be canvassed by way of judicial review in individual cases. I take judicial notice that the National Assembly by a Bill passed on 5th December, 2013 and assented to by the President on 24th December 2013, extended the vetting period to the year 2015. The effective date of the amendment is 10th January 2014. I further take judicial notice that the amendment of December, 2013 introduced a new sub-section 23(3) which states that where the time prescribed lapses while a matter is part-heard before the Board, that time shall be deemed extended to enable a fair and just and timely conclusion of the part-heard matter. I also take judicial notice that the December, 2013 amendment deleted section 23(1) of the Act and substituted in its place a new subsection 23(1) by deleting the one year time line for vetting.

U. Philosophical justification and overall constitutionality of the vetting process and the *Vetting Act*

116. Dr Khaminwa for the Appellant submitted that the vetting legislation has no constitutional underpinning in Chapter 10 of the Fifth Schedule to the *Constitution*. It was submitted that since the vetting process and the need for a vetting legislation are not referred to in Chapter 10 of the Fifth Schedule, the entire vetting process and the *Vetting Act* are unconstitutional. Counsel argued that if one looks at each of the intended legislations mentioned in the Fifth Schedule to the *Constitution*, the relevant Constitutional Chapter and the specific Constitutional article that envisages the legislation is cited. However, when it comes to Chapter 10 on the Judiciary, there is no article that underpins the vetting process. Counsel submitted that in the absence of a Constitutional article that underpins the vetting process in the Fifth Schedule, this Court should have the courage, boldness and firmness to declare the vetting process and the *Vetting Act* unconstitutional. He submitted that the independence of the Judiciary is not negotiable and it is wrong for Parliament to pass legislation under the guise of vetting of Judges and magistrates yet there is no constitutional article underpinning the process and the motive is removal of Judges. Counsel urged this Court to take heed to the precautionary principle and exercise foresight when it is considered in hindsight that in 2002, a radical surgery of the Judiciary was implemented with a view to remove some Judges. He submitted that the quest to remove Judges was again being repeated under the guise of the vetting process and in future the same could be done. Counsel urged this Court to be intrepid and piercingly pronounce that the independence of the Judiciary is the cornerstone of the Rule of Law and this independence does not permit whimsical and nonchalant removal of Judges whenever the Executive or Legislature deems so.

117. Learned counsel, Mwangi Njoroge for the 1st and 2nd Respondents in reply to the call that this Court should be bold and declare the vetting process illegal submitted that the 2010 Constitution was created by the people of Kenya exercising their sovereign rights. He opined that the 2010 Constitution is the grundnorm and its validity is beyond question. Counsel pointed out that the 2010 Constitution being the supreme law, the provisions of section 23 of the Sixth Schedule should be given the constitutional force of law. In response, Dr Khaminwa submitted that the Kelsenian concept of grundnorm only applies in cases of revolution; that the 2010 Constitution of Kenya is not a product of revolution but evolution and must be interpreted within the context of evolutionary principles.

118. Senior Counsel Nzamba Kitonga for the 3rd Respondent submitted that section 23 of the Sixth Schedule upon which the vetting process and the *Vetting Act* is anchored is an integral part of the *Constitution* and was passed by the people of Kenya in exercise of their sovereignty; that the vetting process and the *Vetting Act* are constitutional as they are anchored on the supreme law of the land; the vetting process should be looked at from the historical context in which the process was initiated.

Counsel submitted that the Fifth Schedule is a time table for Parliament and in Chapter Ten thereof it clearly shows that the vetting legislation has its constitutional underpinning in the Sixth Schedule. Counsel submitted that no schedule is superior to the other. Counsel for the 1st Respondent Mr Mwangi Njoroge emphasized the supremacy of the *Constitution* and noted that the vetting process was a sui generis mechanism agreed upon by Kenyans when the *Constitution* was promulgated. Learned Counsel, Steve Mwenesi for KMJA significantly opined that the constitutionality of the vetting process is not in doubt but it is the criteria used for vetting as stated in sections 18 and 19 of the *Vetting Act* that are contrary to articles 10 and 159 of the *Constitution*.

119. I have considered the submissions by counsel on the concept of grundnorm as propounded by the jurist Hans Kelsen. Elements of the Kelsenian concept are applicable to the 2010 Constitution; for instance, whenever a new constitutional order is established whether by revolution or evolution, there is a fresh beginning, the old order changes yielding place to a new order. (See *Uganda v Commissioner of Prisons ex parte Matovu* (1966) EA 514 at 538). The success and efficacy of a new Constitution results in a new grundnorm. The referendum conducted by the people of Kenya that led to the promulgation of the 2010 Constitution established a new constitutional order and provides the grundnorm for the 2010 Constitution. In this scenario, the old constitutional order prior to the effective date ceased and it was replaced by a new constitutional order with new values and principles which include vetting as a condition precedent for a judge to continue to serve in office. This reasoning was stated clearly and eloquently in the South African case by Mahomed, J in *S v Makwanyane* and another as follows:-

> "In some countries the *Constitution* only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the *Constitution*. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. "

120. Guided by the foregoing judicial dicta, in the Kenyan context, the constitutionality of the vetting process and legitimacy of the *Vetting Act* must be determined by the new constitutional order and the values embodied therein.

121. In addition to the Kelsenian concept of grundnorm, the natural law and utilitarian theories if applied to the vetting process would find the process legitimate and constitutional. John Locke and Jean Jacques Rosseau observed that law is a social contract. (See John Locke, 1632 -1704 *the Second Treatise of Government*; see also of the *Social Contract, or Principles of Political Right (Du contrat social ou Principes du droit politique)* (1762) by Jean -Jacques Rousseau). The 2010 Constitution being the supreme law is the "social contract" bet the three arms of government and the citizens and it embodies the wishes and aspirations of the people of Kenya. It is my considered view t in this social contract, the serving Judges and magistrates are required to be vetted to determine their individual suitability to continue to serve in office. The people of Kenya freely concluded the new social contract in the 2010 Constitution and section 23 of the Sixth Schedule is part of that contract and must be obeyed and enforced.

122. The vetting process and the *Vetting Act* is also philosophically justifiable as the "general will" as per the views propounded by Jean-Jacques Rousseau (See of the *Social Contract, or Principles of Political Right (Du contrat social ou Principes du droit politique*) (1762) by Jean-Jacques Rousseau). According

to Rosseau the 'general will' (la volont gnrale) is, by natural law, the sole and unfettered legal authority in the State. The "general will" is the "will" of the people taken together as a whole, constituting an entity. The 2010 Constitution reflects the general will of the people of Kenya and any individual Judge or magistrate can only continue to hold office and serve subject to the terms and conditions as laid out in the general will. the *Constitution* is an amalgam of the interests of the people of Kenya; their aggregated will constitutes the only legitimate basis of the sovereignty and the goals or value content in Kenya. A Judge is a Judge only by delegation of the 'general will' and could be removed whenever rejected by the 'general will'. Rousseau's doctrine implies that the people are the real adjudicators of disputes and they can remove at their discretion any judge presiding over them. This doctrine is in line with the article 159(1) of the *Constitution* which stipulates that the judicial power is derived from the people of Kenya, the supremacy of the General Will. As John Austin stated, law is the command of the sovereign and the people of Kenya are the sovereign. (See John Austin: *The Province of Jurisprudence Determined* (1832) John Austin (1790-1859). I find that the vetting process and the *Vetting Act* represent the supreme general will of the people of Kenya and it is constitutional.

123. The utilitarian theory of the greatest happiness to the greatest number also provides a philosophical justification for the vetting process. A majority of Kenyans through the referendum expressed their happiness with the vetting process. In this context, what is right is good - ex aequo et boro. Jeremy Bentham captured this in the fundamental axiom:

> "It is the greatest happiness of the greatest number that is the measure of right and wrong" (See Bentham, Jeremy (1789) *An Introduction to the Principles of Morals and Legislation*. London: T. Payne. Retrieved 2012-12-12).

124. In totality, I have considered submissions by counsel for the Appellant and KMJA in light of legal philosophy, the provisions of article 2(3) and 159(1) of the *Constitution* and the political question doctrine. Article 2(3) of the *Constitution* stipulates that the validity or legality of the *Constitution* is not subject to challenge by or before any court or other State organ. As was stated in *Uganda v Commissioner of Prisons Ex parte Matovu* (1966) EA 514 at 529; every constitution has an extra legal origin and I state that the validity or legitimacy of section 23 of the Sixth Schedule lies in the extra-legal realm and is insulated by the political question doctrine. In Marbury v Madison - 5 US 137 it was stated that:

> " The province of the Court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion. "

125. I find that the legitimacy or otherwise of the vetting process is a political and not a legal question. Questions which are in their nature exclusively political can never be adjudicated upon by this Court. It is well for this Court to practice self-restraint and discipline in adjudicating political constitutional issues. The precautionary principle should be exercised before delving and wading into the political arena which is not the province of the Courts. This Court as well as Parliament and all laws alike have their legitimacy derived from the 2010 *Constitution* and the 2010 *Constitution* or any of its articles and Schedules cannot derive their legitimacy from a declaration by this Court or any court for that matter. I find that the validity or legitimacy of the vetting process is a political question and this Court cannot be drawn into political issues and engage in a debate that would question the sovereign will of the people of Kenya. This is not to say that this Court is not bold, firm and fearless, far from it; the legal position is that judicial pronouncements can neither override the sovereign will of the people of Kenya nor change the grundnorm. Questioning the sovereign will of the people of Kenya as embodied in the various articles and Schedules of the *Constitution* is prohibited by article 2(3) of the *Constitution*.

V: Relevance of Historical Background to Constitutional Interpretation

126. During submission, Senior Counsel Nzamba Kitonga for the 3rd Respondent urged this court interpret the *Constitution* in the context of the historical background in which the *Constitution* was drafted and promulgated. The submission brings to fore the role of extrinsic aids and *travaux prepatoires* in constitutional interpretation. Extrinsic aids refers to any material which sheds light on the background to the *Constitution* and enactment of a particular statute and this would include aids such as debates and reports and material explaining the meaning of legislation. In the context of this appeal, extrinsic aids which provide evidence of the background to the vetting process may be useful because legislation does not come into existence in a vacuum. In the context of section 23 of the Sixth Schedule to the *Constitution*, certain political, social and legal considerations form the background to the vetting process and the potential utility of this type of material becomes obvious when one considers the traditional mischief rule or purposive interpretation. By consulting such extrinsic materials, a court is enabled to glean, admittedly indirectly and not always precisely, the effect that the legislation was intended to have.

127. Ensuing from Senior Counsel Nzamba Kitonga's submission, should the spirit of the *Constitution* in relation to the vetting process be discerned from its historical background and context or from the letters and words of the *Constitution*" In a country where there is no written constitution, the historical background and context in which constitutional principles arise is a significant factor in interpretation. Kenya has a written constitution and the letters and words of Kenya's written Constitution have a historical background and context. This background and context influenced the choice of words and phrases and the phraseology of the sentences which were crafted, drafted and became articles of the *Constitution*. I am of the view that the spirit of the *Constitution* is captured by the words and phrases enacted into the *Constitution*. Unless there is ambiguity in the words and phrases used, the historical background and travaux preparatoire to the *Constitution* should have a very limited role to play in the interpretation of the *Constitution*. In Pre-Pepper v Hart, (1992) 3 WLR 1032, it was stated that courts should only resort to extrinsic aids where there is ambiguity or doubt or if a literal construction appeared to conflict with the purpose of the legislation. In the instant appeal, no party submitted that section 23(2) of the Sixth Schedule is ambiguous or doubtful and that its literal interpretation conflicts with the purposes and objectives of the *Constitution*.

128. In choosing the words and phrases, the framers of the *Constitution* took into account the historical background and context of constitution making. Human beings are a people of diverse background and are prone to interpret history and events in different ways and lay emphasis on different facts. Allowing each and every individual judge to interpret the history and context of Kenya's Constitution making may lead to personal idiosyncrasy, divergent and potentially conflicting constitutional interpretation. The single, paramount, standard and objective unifying factors in the interpretation of the *Constitution* are the words, phrases and sentences crafted, drafted and promulgated into the *Constitution*. It is my considered view that all courts in Kenya should find and discern the spirit of the *Constitution* from the words and phrases in the Constitutional document and as far as possible, exercise restraint in delving into the historical background and travaux preparatoire of constitution making. As was stated in the case of Black-Clawson Limited v Papierwerke Waldhof Aschaffenberg AG, 1975 AC 591, 613, we are seeking not what the drafters of the *Constitution* meant, but the true meaning of what they said.

129. I am of the view that how far back one should delve into the history of constitution making has the potential of introducing all manner of history, narrations, and flotsam and jetsam with the consequence that constitutional interpretation is subjected to the res gestae principle whereby

everything is admissible. Restraint must be exercised. This caveat is cognizant of the fact that the historical background to any constitution making is fraught with competing emotive, sectarian, religious, partisan, ethnic, economic and political undertones which are not relevant to constitutional interpretation. The historical background at worst embodies personal, myopic and self calculating political stratagem that are not germane to constitutional interpretation. The legal comprise to all these competing interests and factors is reflected in the words crafted and drafted into articles and sections in the Constitutional document and it is to these words, phrases and sentences that the Courts must turn to and give fidelity. I am satisfied that it would not be permissible to interpret the *Constitution* upon the basis of either speculation, or indeed, even of actual information obtained with regard to the belief of individuals who either drafted the *Constitution* or the *Vetting Act* with regard to the question of the appropriate legal principles applicable to matters being dealt with in the *Constitution* or statute. It is not entirely correct to assume that, whatever purpose or motive the promoters of a provision in the *Constitution* might have, such motive or purpose is the effective interpretation and rationale for the inclusion of the article in the *Constitution*. To know how or why a provision was inserted in the *Constitution* would require a far-reaching examination and analysis of members of the Parliament and the Kenyan citizens who participated in the referendum and who supported or opposed the provision or indeed who absented themselves during its passage. In legal terms, an analysis of the historical motivation for a constitutional provision would be meaningless in practice and in my view wholly unjustified by the doctrine of the separation of powers which vests legislative authority outside the ambit of the Judiciary. The meaning and validity of an article in the *Constitution* must be tested by reference to the Constitutional document ultimately promulgated by the people of Kenya or the *Vetting Act* as enacted by the legislature and not on the basis of the history, motive, intention or purpose of the promoters of the provision by whom the article or legislation was introduced or those of any member who supported or opposed it. Article 259 of the *Constitution* reinforces this position as it does not refer to historical context as a method for construing or interpreting the *Constitution*. Likewise, article 10(1) (a) bind all state and public officers to interpret the *Constitution* in accordance with the national values and principles enshrined therein. Historical context is not recognized as a value or principle that binds in interpreting the *Constitution*.

130. I am fortified in the conviction that historical background should restrictively, if at all, be used in constitutional interpretation by the concept of extra-juridical sources of law. Relying on historical context presupposes that there are certain principles having constitutional force which are found outside the written constitutional document. This implies that there are extra-juridical or extra-constitutional sources of principles or articles of the Kenya Constitution in the form of historical context. A written constitution is a self contained and an all encompassing sacrosanct instrument that cannot have extra-juridical or extra constitutional principles. It is unconstitutional and not permissible to use the extra-legal concept of historical context to introduce words, phrases, principles, values or meanings which are not contained or discernible in the written constitutional instrument. Whereas I appreciate that the past determines the present and the present shapes the future, the Kenya Constitution is a present and futuristic living instrument whose meaning and interpretation should not be tied to and determined by the shackles of history.

131. Considering that a constitution is a social contract, the basic principle as stated in *Penn v Simmonds* (1971) 3 All ER 237 is that pre-contractual negotiations are inadmissible in interpreting the contract. I adopt this exclusionary principle noting that a constitution is a social contract and I endorse the House of Lords dicta in *Chartbrook Limited v Persimmons Homes Limited*, (2009) UKHL 38 wherein their Lordships expressed themselves: Pre- contractual negotiations are not admissible in the interpretation of terms because allowing pre-contractual material could:

(a) create uncertainty and costs as parties would have to spend time and money wading through material,

(b) encourage self-serving statements during negotiations,

(c) allow a situation whereby a third party to the negotiations might find the contract meant something different to what he thought.

132. Whereas I note that historical background and context of constitution making is important; the use of travaux prepatoires must be cautious and to a large extent avoided. I adopt the dicta of Lord Wilberfoce in *Fothergill v Monarch Airlines* [1980] 3 WLR 209, where he stated that the Courts, "in using travauxprepatoires, should exercise a degree of caution and travaux prepatoires should only be referred to when two conditions were fulfilled, ie when "the material is public and accessible and the travaux preparatoires clearly and indisputably point to a definite legislative intention. " For any court to make reference to the historical background and context of Kenya's constitution making, it is my considered view that the following guidelines should be followed:

i. The text must be ambiguous, doubtful or obscure or such as leads to a contradictory or conflicting meaning when literally construed.

ii. The Court must warn itself of the inherent dangers of relying on historical antecedents to the *Constitution* making process.

iii. The Court should not make reference to proposals and counter proposals relating to any provision or article in the *Constitution* but should only refer to the reasoning that led adoption of the final and specific article or section as embodied in the *Constitution*.

iv. The historical material relied upon should be public and accessible and

v. The travaux preparatoires must clearly and indisputably point to a definite legislative intention.

vi. Fidelity to the words, phrases and sentences enacted into the Constitutional document is paramount.

133. In concluding his submissions, Senior Counsel Nzamba Kitonga urged this Court to set aside the orders of the High Court made on 18th November, 2011, to the effect that each party should bear his/its/her costs. Counsel submitted that the instant appeal should be dismissed with costs. He submitted that there is no law that states that parties must bear their own costs if the litigation is in public interest. Counsel urged this Court to find that even if litigation is in public interest, costs should follow the event. The Appellant vehemently opposed this submission on costs arguing there was no cross appeal by the 3rd Respondent on the issue of costs. Senior Counsel Kitonga responded that on the issue of costs, there is no requirement to lodge a cross appeal. I concur with submissions of Senior Counsel that there is no rule of law and no rule of practice that if a litigant files a suit in public interest, then each party must bear his/her own costs. It is a trite principle of law that costs follow the event. Costs are normally at the discretion of the trial court and the Honourable Judges of the High Court duly exercised their discretion and pronounced themselves on costs. I have no good reason to interfere with the exercise of discretion by the Honourable Judges of the High Court and I decline to interfere with the orders made on 18th November, 2011, as regards costs.

W. Conclusion and Final Orders

134. The vetting process is aimed at determining the suitability of judge or magistrate to continue in office. When people see goodness and integrity in a person, they respond by reflecting goodness and honour to that person and he/she gets the certificate of suitability to continue to serve. The Appellant by his memorandum of appeal sought various orders from this Court to wit:

    i. That the Judgment delivered by the Honourable Judges of the High Court on 18th November 2011 be set aside and in its place sections 3, 4, 17, 18, 19, 21, 22, 23, of the *Vetting of Judges and Magistrates Act* No 2 of 2011 be declared invalid and unconstitutional.

    ii. That it be declared that the Judges and Magistrates are entitled to the rule of law and due process.

    iii. It be declared that the Judges and Magistrates are entitled to an appeal from the determination and/or finding and/ or decision of the Vetting of Judges and Magistrates Board.

    iv. It be declared that the rights of Judges and Magistrates to a fair trial under article 25(c) of the *Constitution* is so deep in our jurisprudence that they cannot be violated.

    v. Any other order the Court may deem fit and convenient in the circumstances of this case.

135. I have considered the grounds in the Memorandum of Appeal, the submissions by all counsel, the relevant principles of constitutional and statutory interpretation and the judicial authorities cited by counsel. I find that Judges and Magistrates are entitled to the rule of law, due process and fair trial. The totality of all the foregoing leads me to find that this Appeal should fail in its entirety and I propose it be dismissed with each party bearing its costs. The Orders of the Court shall be as stated in the Judgment of Hon Kiage JA.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2014.

P. O. KIAGE

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JUDGE OF APPEAL

A.K.MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR