Judicial Service Commission v Oduor & 5 others (Petition 18 (E025) of 2021) [2023] KESC 32 (KLR) (21 April 2023) (Judgment)

Neutral citation: [2023] KESC 32 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 18 (E025) OF 2021

PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

APRIL 21, 2023

BETWEEN

JUDICIAL SERVICE COMMISSION ..... APPELLANT

AND

MICHAEL KIZITO ODUOR ..... 1ST RESPONDENT

WILSON KABERIA NKUNJA ..... 2ND RESPONDENT

OKELLO TIMOTHY ODIWUOR ..... 3RD RESPONDENT

BERNARD JAMES NDEDA ..... 4TH RESPONDENT

JUDGES AND MAGISTRATES VETTING BOARD ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal of Kenya sitting at Nairobi (Okwengu, Kiage & Kantai, JJ.A) delivered on 22nd October 2021 in Consolidated Civil Appeals Nos. 457, 458, 466 and 475 of 2018)

Section 23(2) of the Sixth Schedule to the Constitution ousting the jurisdiction of courts with respect to decisions of the Judges and Magistrates Vetting Board applies to magistrates

Reported by Kakai Toili

Constitutional Law *- interpretation of constitutional provisions - interpretation of section 23(2) of the Sixth Schedule to the Constitution - where section 23(2) provided that a removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under section 23(1) shall not be subject to question in, or review by, any court - whether the ouster in section 23(2) of the Sixth Schedule to the Constitution applied to magistrates - whether a contest to the decision of the Judges and Magistrates Vetting Board affecting judges involved in the vetting process was inconsistent with the terms of the Constitution - Constitution, articles 160,167, 168, Sixth Schedule, section 23(2).*

Constitutional Law *- Judges and Magistrates Vetting Board (the Board) - functions of the Board - vetting of judges and magistrates - scope of the Board in considering the conduct of serving judges and magistrates - Constitution, article 262, Sixth Schedule, section 23(2).*

Jurisdiction *- jurisdiction of the High Court - review jurisdiction of the High Court - review jurisdiction against the Judges and Magistrates Vetting Board's function of vetting of judges and magistrates - whether the Judges and Magistrates Vetting Board's function of vetting of judges and magistrates was subject to the review jurisdiction of the High Court - Constitution, articles 160,167, 168 Sixth Schedule, section 23.*

Civil Practice and Procedure *- orders - orders as to costs - orders as to costs against public bodies and organizations - when could public bodies and organizations which ordinarily existed to serve a country's government and who were acting within their mandate be condemned to pay costs in a suit.*

Brief facts

The 1st to 4th respondents, who were serving magistrates, were vetted by the 5th respondent, the Judges and Magistrates Vetting Board (the Board) and found unsuitable to continue serving as such. Their attempt to have the Board review its decision was dismissed and as a result, the Judicial Service Commission, (appellant) removed them from office. Aggrieved, various petitions were filed by individual magistrates before the High Court challenging their removal as magistrates by the Board. The 1st to 4th respondents sought to quash the determination of the Board regarding their suitability to continue serving as magistrates, alleging violation of fundamental rights and freedoms and breach of process.

The High Court held that the intention of the drafters of the Constitution of Kenya, 2010 (Constitution) was that both the serving judges and magistrates were to be vetted under a process insulated from court proceedings. Accordingly, the provisions of section 23(2) of the Sixth Schedule to the Constitution as to the decisions by the Board on the removal of a magistrate were not subject to question in any court.

The High Court also found that the Supreme Court's decision in *Judges and Magistrates Vetting Board and 2 Others v Centre for Human Rights and Democracy and 11 others*, Petition No 13A of 2013 as consolidated with Petition No 14 of 2013 and 15 of 2013 [2014] eKLR (*JMVB 1*) held that courts lacked jurisdiction to review the process or outcome of the vetting process by the Board. Further, in *Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association & another*, SC Petition No 29 of 2014; [2014] eKLR (*JMVB 2*) the Supreme Court determined that courts could intervene in decisions of the Board only where the Board exceeded its constitutional and statutory mandate and more specifically, where there was proof that the Board considered matters outside the period provided under the law.

The High Court concluded that the Board acted within its powers and dismissed the petitions. Aggrieved, the 1st to 4th respondents filed appeals to the Court of Appeal, which by a majority held that the Supreme Court in *JMVB (1)* never addressed the question as to whether the reference to a judge under section 23(2) of the Sixth Schedule extended to include a magistrate. Consequently, the Court of Appeal held that the Supreme Court had not determined with finality the issue of the High Court's jurisdiction over decisions by the Board in respect of magistrates as it was only judges who were exclusively mentioned. The Court of Appeal allowed the appeals and set aside the High Court's judgment. Aggrieved, the appellant filed the instant appeal.

Issues

i. Whether the ouster clause in section 23(2) of the Sixth Schedule to the Constitution applied to magistrates.
ii. Whether the Judges and Magistrates Vetting Board's function of vetting of judges and magistrates was subject to the review jurisdiction of the High Court.
iii. Whether a contest to the decision of the Judges and Magistrates Vetting Board affecting judges involved in the vetting process was inconsistent with the terms of the Constitution.
iv. What was the scope in which the Judges and Magistrates Vetting Board in considering the conduct of serving judges and magistrates?

v. When could public bodies and organizations which ordinarily existed to serve a country's government and who were acting within their mandate be condemned to pay costs in a suit?

Relevant provisions of the Law

Constitution of Kenya, 2010

Sixth Schedule

Section 23 - Judges

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

Held

1. The instant appeal met the requisite jurisdictional threshold since it involved the interpretation of section 23(2) of the Sixth Schedule to the Constitution *vis-à-vis* its applicability to magistrates which issue had been subject of the litigation and transcended through the superior courts to the court. In any event, section 23(2) had previously been before the court through *JMVB 1* and *JMVB 2* the effect of which was partly in issue in the instant appeal.
2. Following the court's decision in *JMVB 1* and *JMVB 2*, section 23(2) of the Sixth Schedule to the Constitution ousted the jurisdiction of the courts. In the *JMVB* cases, the focus of the court's decision was the mechanism contemplated under section 23 of the Sixth Schedule. That mechanism revolved around the operations and functions of the Board as per the legislation enacted under section 23(1). It did not matter whether the judges, magistrates or any other litigant, considering the expanded scope of access to justice that the Constitution brought with it, were challenging the decisions or mechanisms of the Board in relation to vetting.
3. To avert the potential excesses by the Board in the vetting of magistrates and judges, it was necessary to clarify and delineate the time zone within which the Board was to consider its activities. The Board having been established as a transitional institution was expected to consider the conduct of the serving judges and magistrates as at the effective date of the promulgation of the Constitution. Any consideration beyond that date would turn it into what the court equated to the unruly dog.
4. It was not entirely accurate to proclaim that magistrates were not represented in the *JMVB* cases. Indeed, while the *JMVB* cases pit at least 7 judges, serving at the time, amongst the litigants were the appellant and the Kenya Judges and Magistrates Association (KJMA) – the umbrella body dealing with the welfare of judicial officers to which magistrates comprised a large constituency. The KMJA was at all times capable of articulating the position of magistrates alongside those of judges.
5. The court's findings in the *JMVB* cases on the interpretation of section 23(2) of the Sixth Schedule to the Constitution was adequate. The court's findings in the *JMVB* cases were neither *per incuriam* nor *obiter dictum*. The alleged absence of magistrates among the direct litigants did not overshadow the constitutional imperative which shielded the operations of the Board itself under which both the judges and magistrates fell. The mandate of the Board itself was not at the moment under challenge and the respondents willingly submitted to its jurisdiction both at the first instance and in appellate capacity when they sought a review of the Board's decision.
6. The constitutionality of section 22(4) of the Vetting of Judges and Magistrates Act No 2 of 2011 (the Act) was not framed by either of the superior courts as an issue for determination. At the heart of the instant dispute on appeal was the interpretation of section 23(2) of the Sixth Schedule to the Constitution and whether the ouster contemplated under section 23(1) of the Sixth Schedule extended to magistrates. It therefore served no further purpose to spend judicial time and resources in

answering a peripheral question by way of unconstitutionality of section 22(4), the main constitutional provision of section 23(2) of the Sixth Schedule having already been addressed by the court.

7. In construing the Constitution, article 259 of the Constitution posited that interpretation ought to be in a manner that promoted its purpose, values and principles; advanced the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permitted the development of the law; and contributed to good governance.

8. The main aim of the vetting process was to ensure that any serious complaints against sitting judicial officers were properly considered. Even though the committee of experts' (CoE) recommendation on vetting was limited to judges, it was alive to the fact that most of the public's experiences of the justice system were at the magistracy level. However, the challenge faced was that the magistracy was large and would pose implications in the operations of subordinate courts; and by reason of judges having stronger protection, their removal being a rare occurrence. Nevertheless, before the draft Constitution was submitted to the people of Kenya in the ensuing referendum, the vetting process was extended to cover both judges and magistrates who were in office on the effective date of August 27, 2010. Resultantly, it led to the transition clause contained in section 23 of the Sixth Schedule to the Constitution as promulgated.

9. The suitability of a judicial officer to continue in service under the 2010 constitutional dispensation was a matter reserved by law to the Board. Hardly any cogent argument had been advanced before the court, that the Act, which implemented the ouster clause, was not indeed the legislation contemplated under section 23(1) of the Sixth Schedule to the Constitution; and as there was no other legislation that would claim that status, there was nothing out of harmony in the common purpose of the Constitution, section 23 of its Sixth Schedule, and the relevant statute – the Act.

10. A contest to the decision of the Board, insofar as such a decision affected particular judges involved in the vetting process, was in effect, a collateral challenge to the Board's authority: and that would be inconsistent with the terms of the Constitution.

11. Shielding the vetting process by the Board from the review jurisdiction of the courts represented the unique situation that Kenya found itself in as a country that was transitioning from the old order. In any event, the transition only operated in a specific time frame and historical context of Kenya. Moreover, that transition between the repealed Constitution and the 2010 Constitution was more people centric having accrued from a referendum. It was within that prism that the court went for the broader consideration of the vetting exercise in the transition context.

12. The only logical conclusion out of the vetting exercise by the Board was to either recommend suitability of judges and magistrates to continue serving or unsuitability with the latter resulting to removal. There was no expectation that the judges and magistrates would expect different treatment before the Board undertaking a similar vetting exercise. That by no means amounted to a reading in of the specific provisional Constitution in section 23(2) of the Sixth Schedule, or equating magistrates to judges. The vetting of judges and magistrates was a constitutional requirement that was time bound under article 262 of the Constitution. Any legislative enactments made to effect the Sixth Schedule, including section 23 thereof had to be sustained.

13. On the contention that the drafters of the Constitution knew the difference between magistrates and judges and used the words in the Constitution deliberately, nothing could be further from the truth. In the transition context, articles 160, 167 and 168 were inapplicable, and were thus unavailable for comparative purposes. The issue appeared to be more of grievances regarding the outcomes for the specific respondents who did not agree with the decisions of the Board. Section 23(2) of the Sixth Schedule to the Constitution, in so far as it implicated the function of the Board in the vetting of judges and magistrates, was not subject to the review jurisdiction of the High Court.

14. The appellant sought declarations with regard to a process that was time bound as it was to conclude not later than December 31, 2015 and the Board was to be subsequently dissolved within thirty (30)

days as per the Act. The Board was non-existent. Moreover, the declarations the appellant sought were not matters that were before the superior courts for their determination.

15. The issues raised in the appeal did no more than seek clarity on a legal position that the court had previously provided. There was no purpose to be served by making declarations touching on the defunct Board. Nevertheless, it did not matter that the term of the Board may have lapsed. That was to say, lapse of time was not a factor that contributed towards the interpretation and/or application of the Constitution when the jurisdiction was properly invoked and more so, found to have merit.

16. Public bodies and organizations which ordinarily existed to serve a country's government and who were acting within their mandate needed not be condemned to pay costs where such an entity had brought or defended proceedings while acting purely in that regulatory capacity. Therefore, award of costs against such entities should only be made where such an entity had acted unreasonably or in bad faith. The appellant being an independent commission and having filed the petition in that capacity did so with no ill intent but rather to clarify the position in relation to the litigants. The court could not punish the respondents, particularly the 1st to 4th respondents for pursuing their legitimate right to access justice under the Constitution.

Appeal allowed.

Orders

i. *The judgment and order of the Court of Appeal dated and delivered on October 22, 2021 was set aside.*
ii. *The judgment and decree of the High Court dated and delivered on June 22, 2018 was upheld.*
iii. *Each party to bear its costs.*

Citations

Cases

Kenya

1. *In re Kenya National Commission on Human Rights & 2 others* Reference 1 of 2012; [2014] eKLR; [2014] 2 KLR 356 - (Explained)
2. *In re the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] eKLR; [2011] 2 KLR 223 - (Explained)
3. *In the Matter of the Speaker of the Senate & another* Advisory Opinions Application 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
4. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] eKLR; [2014] 1 KLR 111 - (Explained)
5. *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* Petition 13 A, 14 &15; of 2014; [2014] KESC 9 (KLR) - (Explained)
6. *Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association & another* Petition 29 of 2014; [2014] KESC 4 (KLR) - (Explained)
7. *Kenya Revenue Authority v Export Trading Company Limited* Petition 20 of 2020; [2022] KESC 31 (KLR) - (Explained)
8. *Mong'are v Attorney General & 3 others* Petition 146 of 2011; [2011] KEHC 1139 (KLR); [2011] 2 KLR 168 - (Explained)
9. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804- (Explained)
10. *Outa, Fredrick Otieno v Jared Odoyo Okello & 3 others* Petition 6 of 2017; [2017] KESC 25 (KLR) - (Explained)
11. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Explained)

Texts

1. Constitution of Kenya Review Commission (CKRC) (2010), *The Final Report of the Constitution of Kenya Review Commission* Nairobi: Constitution of Kenya Review Commission (CKRC)

2. Neo, JL., (Ed) (2017), *Constitutional Interpretation in Singapore; Theory and Practice* London; Routledge 1st Edn p 1

Statutes

Kenya

1. Constitution of Kenya articles 1, 2, 10, 159(2)(e); 160; 161; 163(4)(a)(7); 165; 167; 168; 172; 259; 260; 262; Chapter 10; Sixth Schedule section 23(1)(2) - (Interpreted)
2. Supreme Court Act (cap 9B) sections 15(2); 21(A) - (Interpreted)
3. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 39(1) - (Interpreted)
4. Vetting of Judges and Magistrates Act, 2011 (Act No 2 of 2011) sections 14, 18, 22(4) - (Interpreted)

Advocates

1. *Mr Kanjama Senior Counsel, and Ms Owano* (Muma & Kanjama Advocates) for the appellant
2. *Mr Ongoya* (Ongoya & Wambola Advocates*)* for the 1st to 3rd respondents
3. *Mr Bernard James Ndeda* (C/O Billy Amendi & Co Advocates) for the 4th respondent
4. *Mr Marwa* for the 5th and 6th respondents

JUDGMENT

A. Introduction and Background

1. The promulgation of the *Constitution of Kenya, 2010* on August 27, 2010 signaled the beginning of a transformative path in Kenya. The new constitutional dispensation brought with it a new wave of reforms across governance structures and public institutions. To enhance confidence in the Judiciary, chapter 10 of the *Constitution* contained provisions on judicial authority, independence of the Judiciary, judicial offices and officers, system of courts, appointment of Chief Justice, Deputy Chief Justice and other judges including their tenure, establishment of the Judicial Service Commission as well as the establishment of the Judiciary Fund. To facilitate the transition of the institution from the previous constitutional design of the Judiciary, there had to be mechanism to ensure that judges and judicial officers inspired confidence and were fit to continue serving under the new regime.

2. This paved way for the enactment of the *Vetting of Judges and Magistrates Act* No 2 of 2011 (hereinafter the Act) pursuant to section 23 (1) of the sixth schedule to the *Constitution*. The object of the Act was to provide for the vetting of judges and magistrates pursuant to section 23 of the sixth schedule to the *Constitution*; to provide for the establishment, powers and functions of the Judges and Magistrates Vetting Board, and for connected purposes. The Act established the 5th respondent, the Judges and Magistrates Vetting Board (hereinafter the Board) whose function was to vet judges and magistrates in accordance with the provisions of the *Constitution* and the Act. The Board was tasked with the responsibility of establishing the suitability of judges and magistrates serving at that the time to continue serving.

3. The 1st to 4th respondents, who were all serving magistrates at the time, were vetted by the Board and found unsuitable to continue serving as such. Their attempt to have the Board review its decision was dismissed. As a result, the Judicial Service Commission, the appellant herein, removed the 1st to 4th respondents from office, in line with the Board's decision.

4. This appeal, pursuant to section 15(2) of the *Supreme Court Act* and rule 39 (1) of the *Supreme Court Rules 2020* stems from the ensuing litigation initiated by several magistrates challenging their removal by the Board. The appeal invokes this court's jurisdiction under article 163(4)(a) of the *Constitution* and primarily seeks the interpretation of section 23(2) of the sixth schedule to the *Constitution* and its applicability to magistrates.

B. Litigation History

i. Proceedings at the High Court

5. Various petitions were filed by individual magistrates before the High Court challenging their removal as magistrates by the Board. The 1st and 2nd respondents filed Petition No 251 of 2016 and Petition No 154 of 2016 respectively, which were heard and determined separately. The 3rd and 4th respondents filed Petitions Nos 270 and 230 of 2016 which were consolidated with those filed by five other magistrates not party to the present appeal, heard and determined as High Court Constitutional Petition No 230 of 2016 as consolidated with Petitions Nos 236, 259, 262, 270, 272 and 323 of 2016.

6. From their respective petitions, the 1st to 4th respondents sought to quash the determination of the Board regarding their suitability to continue serving as magistrates, alleging violation of fundamental rights and freedoms and breach of process. The petition was based on, *inter alia*, grounds that: the vetting process was conducted in a manner that violated their constitutional rights to a fair trial; to be presumed innocent; to legal representation; and that the 5th respondent exceeded its mandate and acted *ultra vires* and, in some instances, considered matters outside the set constitutional frames. In response, the Board argued that the 1st to 4th respondents having voluntarily submitted to its jurisdiction, it dealt with the specific complaints raised, weighed them against the evidence and circumstances, and acted within the law to reach their determination and/ or finding.

7. A five judge bench of the High Court (Lesiit, Wakiaga, Ng'enye, Mativo & Onyiego, JJ) determined the petitions and delivered three distinct judgments on June 22, 2018. Across the petitions, the court identified three common issues for determination: (i) whether section 23(2) of the sixth schedule to the *Constitution* ousts the High Court's jurisdiction to review the Board's decisions declaring the magistrates unsuitable to continue serving; (ii) whether the court's jurisdiction to review decisions rendered by the Board has conclusively been determined by the Supreme Court of Kenya; and (iii) whether the High Court can examine the merits of the filed petitions.

8. In addressing the first issue, the learned judges acknowledged that the word 'magistrate' does not appear in section 23(2) of the sixth schedule to the *Constitution*. The High Court interpreted that provision as raising two possibilities - removal and a process leading to the removal of a judge. To the learned judges, the unsuitability of a magistrate to continue serving fell under the first possibility of removal. The court found that section 23(2) cannot be read in isolation, to the exclusion of section 23(1) since it is a settled principle of constitutional construction that constitutional provisions touching on the same subject are to be construed together to sustain rather than destroy the other provisions. The High Court was of the opinion that the intention of the drafters of the *Constitution* was that both the serving judges and magistrates were to be vetted under a process insulated from court proceedings. Accordingly, the provisions of section 23(2) of the sixth schedule as to the decisions by the Board on the removal of a magistrate are not subject to question in any court.

9. On the second issue, the court found that this court's decision in *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy and 11 others*, Petition No 13A of 2013 as consolidated with Petition No 14 of 2013 and 15 of 2013 [2014] eKLR ('JMVB (1)') settled the first question conclusively when it held that courts lack jurisdiction to review the process or outcome of the vetting process by the Board. Further, the trial judges held that in *Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association & another*, SC Petition No 29 of 2014; [2014] eKLR ('JMVB (2)') this court determined that courts may intervene in decisions of the Board only where the Board exceeds its constitutional and statutory mandate and more specifically, where there is proof that the Board considered matters outside the period provided under the law.

10. Upon analysis of each magistrate's case, the learned judges concluded that the Board acted within its powers under section 14 of the Act and took into account relevant considerations comprised in section 18 of the Act during the vetting exercise. Consequently, they dismissed all the petitions with no order as to costs.

ii. Proceedings at the Court of Appeal

11. Aggrieved by the decision of the High Court, the 1st to 4th respondents filed four appeals being, Civil Appeals Nos 457, 458, 466 & 475 (Consolidated) of 2018. From the grounds raised in the appeals, the Court of Appeal, by a majority judgment penned by Kiage JA (Kantai, JA concurring) framed two issues for determination as: (i) whether the Supreme Court has conclusively determined the question on report of magistrates; (sic) and (ii) whether the ouster clause in section 23(2) of the sixth schedule to the *Constitution* applies to the Board's decisions in regard to magistrates.

12. It was the appellate court's position that the Supreme Court in JMVB (1) never addressed the question as to whether the reference to a 'judge' under section 23(2) of the sixth schedule extended to include a 'magistrate'. This is because the issue before the court at the time related to decisions of the Board concerning the removal of a judge from office. Consequently, the Court of Appeal held that the Supreme Court had not determined with finality the issue of the High Court's jurisdiction over decisions by the Board in respect of magistrates as it is only judges who are exclusively mentioned. This conclusion was based on the reasoning that the manner in which section 23 is framed reflects a deliberate and conscious decision on the part of the drafters of the *Constitution* to limit the exclusion of judicial question, enquiry or review to the removal or process leading to the removal of judges only. Thus, the exclusion of the word 'magistrate' from the provision was not accidental or unintended.

13. The appeals were allowed by the appellate court and the trial court's judgment set aside with orders that the constitutional petitions be listed for hearing and determination by a judge or a bench comprising an odd number of judges of the High Court, other than Lesiit, Wakiaga, Ng'enye, Mativo and Onyiego, JJ whose decision was subject of the appeal.

14. Okwengu JA in her dissenting opinion pointed out that there was only one main issue for determination: whether section 23 (2) of the sixth schedule to the *Constitution* is applicable to magistrates. Placing reliance on this court's decision in *JMVB (1)*, the learned judge of appeal concluded that section 23(2) is an ouster clause that gives exclusive jurisdiction to the Board in the vetting of judges and magistrates. Despite, faulting the trial court's interpretation of section 23(2), she affirmed that it arrived at a correct conclusion. She held that the fact that the said section does not explicitly state 'magistrate' does not exclude magistrates from the applicability of the section taking into account the historical context of the provision and broad interpretation of the *Constitution* in consonance with the spirit, values and principles espoused in the *Constitution*.

C. Proceedings Before the Supreme Court

i. Appellant's case

15. The appellant, dissatisfied with the decision of the Court of Appeal, has now filed the instant petition of appeal on the grounds that the learned judges of appeal, by a majority, erred:

    a. By holding that the Supreme Court did not determine with finality the question of whether the High Court lacks jurisdiction to adjudicate upon the suitability of a judge or magistrate to continue serving;

b. By holding that section 23(2) of the sixth schedule to the *Constitution* does not oust the jurisdiction of the High Court to review the decision of the Board regarding magistrates and as such the learned judges were at fault in declaring themselves devoid of jurisdiction and thereby failing to go into consideration of the petitions before them on merit;

c. Failing to note that the Judges and Magistrates Vetting Board is no longer in existence and as such cannot revisit any of its decisions; and

d. Failing to recognize the special circumstances of this case - namely the transition period under the *Constitution* and which involved the vetting process for judges and magistrates- was concluded and can no longer be reopened.

16. On that account, the appellant seeks the following reliefs:

a. The petition be allowed and the judgement and order of the Court of Appeal dated and delivered on October 22, 2021 be set aside and the judgment and decree of the High Court dated and delivered on June 22, 2018 be upheld.

b. A declaration be and is hereby made that section 23(2) of the sixth schedule of the *Constitution* is an ouster clause that insulates the determination of the Vetting Board in regard to the suitability of judges and magistrates, from the review jurisdiction of the courts.

c. A declaration be and is hereby made that no court is clothed with the jurisdiction to review the determination, and the process leading thereto, of the now defunct Judges and Magistrates Vetting Board unless it is shown that the Board exceeded its constitutional and statutory mandate.

d. A declaration that the Judges and Magistrates Vetting Board - the 2nd respondent herein, is no longer in existence and as such cannot revisit any of its decisions.

e. A declaration that the transition period under the *Constitution*, and which involved the vetting process for judges and magistrates was concluded and can no longer be reopened.

f. Costs of the appeal.

g. Any further relief that this honourable court may deem fit to grant in the interest of justice.

17. In support of its petition of appeal, the appellant relies on submissions dated May 25, 2022 and filed on May 27, 2022. The appellant affirms that this court has jurisdiction to determine the appeal under article 163(4)(a) since it involves the interpretation and application of section 23(2) of the sixth schedule to the *Constitution*. The appellant relies on this court's decisions including in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & anor* [2012] eKLR, to support its submission.

18. On the High Court's lack of jurisdiction to review decisions on the suitability of a judge or magistrate to continue serving *vis-à-vis* the provisions of section 23(2) of the sixth schedule, the appellant submits that this issue was conclusively determined in *JMVB* (1) and *JMVB* wherein the Supreme Court found that section 23(2) is an ouster clause that insulates the determination of the Board regarding the suitability of judges and magistrates from the review jurisdiction of the courts.

19. The appellant further submits that section 23(2) of the sixth schedule cannot be read in isolation and must be read with section 23(1) of the sixth schedule, articles 159(2)(e) and 259 of the *Constitution* as well as the preamble to the Act. Therefore, it follows that a contextual interpretation of the aforesaid provisions leads to the conclusion that section 23 applies to both judges and magistrates.

20. Besides, the appellant contends that due to the non - existence of the Board, there cannot be a revisit of any of its decisions. In that regard, the vetting process cannot be reopened to subject the 1st to 4th respondents to a fresh vetting. Moreover, that it would be discriminatory to exclude judges from having the Board's decisions reviewed by the courts but allow magistrates to seek redress. The appellant urges this court to allow the appeal and grant the reliefs sought.

i. Respondents' case

a. 1st, 2nd and 3rd respondents

21. In opposing the appeal, the 1st, 2nd and 3rd respondents rely on the replying affidavit by the 3rd respondent sworn on March 15, 2022 on his own behalf and on behalf of the 1st and 2nd respondents, and their written submissions dated March 15, 2022 and filed on November 3, 2022 on their behalf. They identify the main issue for determination as being whether section 23(2) of the sixth schedule to the *Constitution* ousts the jurisdiction of the High Court from reviewing the decision by the Board to remove a magistrate from office.

22. They submit that section 23(2) does not apply to magistrates for the reason that the word 'magistrate' does not appear in the section; that the *Constitution* does not in other provisions, including articles 161 and 260, use the word 'judge' to refer to a magistrate but rather, uses the two words whenever it refers to judges and magistrates; and that since the subordinate courts, unlike the High Court, have no supervisory jurisdiction over bodies exercising judicial or quasi-judicial function, such as the Board, there is zero likelihood of conflict of interest by magistrates as opposed to judges being allowed to supervise the process leading to their vetting and possible removal.

23. To support their submission, these respondents refer to the *Report by the Final Committee on Constitutional Review* wherein the distinction between judges and magistrates was clear in the minds of the drafters of the *Constitution*. On that account, they contend that to read the word 'magistrate' into section 23(2) of the sixth schedule would not be an act of interpreting the *Constitution* but rather an act of amending it.

24. In addition, they contend that this court never conclusively addressed the question as to whether a magistrate is a judge for the purposes of section 23(2) in both JMVB (1) and JMVB (2). They argue that should this court fault the Court of Appeal on the ground that it failed to follow the binding decisions in JMVB (1) and JMVB (2), then this court should expressly identify with precision its determination on the question of whether magistrates are regarded as judges in the two decisions. They urge this court to dismiss the appeal and affirm the Court of Appeal's decision.

b. 4th respondent

25. The 4th respondent, in opposing the appeal, relies on his grounds of objection contained in his response to the appeal dated December 18, 2021 and filed on December 20, 2021 together with his written submissions dated June 6, 2022 and filed on June 13, 2022. Therein, the 4th respondent agrees with the majority decision by the Court of Appeal and avers that any contrary finding would be against the provisions of articles 1, 2, 159, 165, 172 and 260 of the *Constitution*. In that event, he is of the view that the provisions of section 22(4) of the Act are inconsistent with the provisions of section 23(2) of the sixth schedule. The 4th respondent maintains that the Supreme Court in JMVB (1) did not determine with finality, the High Court's lack of jurisdiction to review decisions by the Board on removal of magistrates. Accordingly, he prays for the dismissal of the appeal.

c. 5th and 6th respondents

26. The 5th and 6th respondents in support of the petition rely on their written submissions dated June 27, 2022 and filed on July 7, 2022. They submit that a reading of section 23 of the sixth schedule shows that there are no ambiguities. The main aim of the Board was to determine the suitability of all judges and magistrates who were in office on the effective date to continue serving in accordance with the values and principles set out in articles 10 and 159 of the *Constitution*. For that reason, the intention of the drafters of the *Constitution* cannot therefore be alleged to exempt magistrates from the process just because section 23(2) did not capture the term 'magistrates'.

27. They further submit that it was conclusively determined by this court in JMVB (1) and JMVB (2) with the common finding being that section 23(2) of the sixth schedule is an ouster clause that insulates the determination of the Board regarding the suitability of judges and magistrates from the review jurisdiction of the courts. To that end, this court's decisions remain binding to all other courts.

28. Alternatively, they assert that section 23(2) of the sixth schedule cannot be read in isolation for it must be read together with section 23(1) of the sixth schedule; article 159 and 259 of the *Constitution*; as well as the preamble to the *Vetting of Judges and Magistrates Act*. They state that the section must be read holistically and with a purposive interpretation as held by this court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR.

D. Issues for Determination

29. Giving consideration to the foregoing and the arguments put forth by the parties, the following issues fall for our determination:

    i. Whether section 23(2) of the sixth schedule to the *Constitution* applies to magistrates; and

    ii. What the appropriate available reliefs are.

E. Analysis and Determination

30. At the onset, we need to satisfy ourselves of our jurisdiction over any matter before us, taking into account our limited jurisdictional contours. This arises from the well settled edict that a court can only exercise jurisdiction as circumscribed in the *Constitution* or statute or both.

31. We note that none of the parties objected to our jurisdiction in this matter. The appellant has nevertheless specified with precision that it invokes this court's jurisdiction, as of right, under article 163(4)(a) of the *Constitution*. The constitutional question identified by the appellant relates to the interpretation and/or application of section 23(2) of the sixth schedule to the *Constitution* in relation to magistrates. We have made numerous pronouncements including, *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* SC Petition No 3 of 2012 [2012] eKLR and *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013 [2014] eKLR where we have enunciated that where issues of contestation revolve around the interpretation or application of the *Constitution* the same ought to have been canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach this court by way of an appeal as contemplated under article 163 (4)(a) of the *Constitution*.

32. The present appeal easily meets the requisite jurisdictional threshold since it involves the interpretation of section 23(2) of the sixth schedule to the *Constitution* *vis-à-vis* its applicability to magistrates which issue has been subject of the litigation and transcended through the superior courts to this court. In any event, the said constitutional provision has previously been before this court through JMVB 1 and

JMVB 2 the effect of which is partly in issue in the present appeal. Having dispensed with the court's jurisdiction, we now move to the crux of the dispute.

i. Whether section 23(2) of the sixth schedule to the Constitution applies to magistrates

33. To get its proper perspective and context, section 23 of the Sixth Schedule to the *Constitution* provides:

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

34. The appellant; the 5th and 6th respondents contend that section 23(2), which cannot be read in isolation of section 23(1), is an ouster clause that applies to the Board's decisions relating to both judges and magistrates. This is firmly opposed by the 1st to 4th respondents who aver that there is a clear difference between judges and magistrates and that the drafters of the *Constitution* were aware and could not have used the term 'judge' to refer to both judges and magistrates. For this reason, it is the 1st and 4th respondents' contention that the absence of the word magistrate in section 23(2) was not intentional as the said section was not intended to apply to magistrates.

35. It is appreciated by all the parties, following our decision in JMVB 1 and JMVB 2 that section 23(2) of the sixth schedule to the *Constitution* ousted the jurisdiction of the courts. Indeed, the majority judgment, appreciating the binding nature of this court's findings on superior courts below, alluded to the same position in the following manner:

> " 31 Regarding the 1st issue, there is no dispute that the applicability and efficacy of article 23(2) of the 6th schedule has been conclusively determined by the Supreme Court... It is enough that the Supreme Court declared the ouster clause valid."

The bone of contention which is subject of litigious contestation and remains alive in the present appeal is whether the ouster applies to magistrates or was only limited to judges. The applicable provision which extended ouster of the Board's decision to magistrates is section 22(4) of the Act which provides:

> " 22 Review
>
> (4) A removal or a process leading to the removal of a magistrate from office under this Act shall not be subject to question in, or review by, any court."

This provision is buttressed by the provision of section 22(5) which states that "the decision by the Board under the review provision shall be final."

36. The proponents of the ouster clause applying to magistrates argue that this was the import of the decision in JMVB cases and that section 23(2) of the sixth schedule cannot be read in isolation of

section 23(1) thereof but rather in a manner that sustains both. On the other end of the argument comes the 1st to 4th respondent who maintain that the magistrates are excluded from the ouster set out in section 23(2). This is because the drafters of the *Constitution* were very deliberate in differentiating the judges from the magistrates in the different provisions such as article 160, 167 and 168; that in the JMVB cases decisions, the Supreme Court did not address itself to the ouster of magistrates as none of them was party to the case and that extending section 23(2) to include magistrates amounts to amending the *Constitution*, a jurisdiction that the court is not clothed with. Peripheral to these arguments is the constitutionality of section 22(4) of the Act which the 4th respondent urged us to find as unconstitutional.

37. In unravelling this contestation, we have to address ourselves to these three questions: a) What is the import of JMVB 1 and 2 in so far as they apply to magistrates? b) is section 22(4) of the Act unconstitutional? and c) Does the ouster in section 23(2) apply to magistrates?

a. The JMVB 1 and JMVB 2

38. The superior courts below took divergent views with the High Court and appellate court arriving at different conclusions on the finality of the Board's decisions under section 23(2) in relation to magistrates. Considering the binding nature of the said decisions on the courts below as dictated by article 163(7) of the *Constitution*, we thought the dragon was slayed and would not have foreseen that there would arise fundamental differences as to the import of the said decisions. The present case presents the proverbial phoenix that resurrected the discussion surrounding section 23(2) of the sixth schedule. This makes it imperative for us to restate our position on the said decisions, notwithstanding the fact that magistrates were never part of the litigants.

39. In JMVB 1, the main issue before us was "whether section 23 (2) of the sixth schedule to the *Constitution of 2010* ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board declaring a judge (or magistrate) as being unsuitable to continue serving as such". In our determination we stated as follows:

> " [200] ... We would clarify that by the terms of the Constitution itself, the High Court's general supervisory powers over quasi-judicial agencies, and its mandate in the safeguarding of the fundamental rights and freedoms of the Constitution, by no means qualify the ouster clause which reserves to the Judges and Magistrates Vetting Board the exclusive mandate of determining the suitability of a judge or magistrate in service as at the date of promulgation of the Constitution, to continue in service. The basis of the said ouster clause is found in the history attending the Constitution; in the requirement of the Constitution for essential transitional arrangements; and in the express terms of the Constitution, by virtue of which the Vetting Board was established to determine the suitability of certain judicial officers, for the purposes of the values and principles declared in the Constitution itself."

40. Having set out the applicable parameters under the *Constitution*, our historical perspective including the views of the citizens as collected and collated leading to the referendum and eventual promulgation of the *Constitution*, we appreciated the disruptive potential of litigation against the decisions of the Board in the wake of the transitional provisions that bestowed upon the High Court, supervisory jurisdiction over bodies or authority exercising judicial or quasi-judicial functions. The Board by its function fell under such body that would, but for the ouster provided in the transition clause, be

subject to the jurisdiction of the High Court, presided over by Judges. Underscoring the centrality of the vetting process we concluded as follows:

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

41. Appreciating the exclusive mandate of the Board in determining the suitability of a judge or magistrate in service at the date of promulgation of the *Constitution*, we directed the superior courts below to dispose of the pending matters against the board in line with our decision.

42. The 1st to 4th respondents argue that our decision in *JMVB* cases was *obiter dictum*. The 4th respondent goes a step further to argue that our decision was made per incuriam rendering it non-binding on the courts below. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* SC Petition No 4 of 2012 [2013] eKLR we expressed ourselves as follows:

> "It is a general rule that the court is not bound to follow its previous decision where such decision was an *obiter dictum* (side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement that is *obiter dictum* is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the case. And a decision per incuriam is mistaken, as it is not founded on the valid and governing pillars of law."

43. In the *JMVB* case, the focus of our decision was the mechanism contemplated under section 23 of the sixth schedule. This mechanism revolved around the operations and functions of the Board as per the legislation enacted under section 23(1). To us, it did not matter whether the judges, magistrates or any other litigant, considering the expanded scope of access to justice that the *Constitution* brought with it, were challenging the decisions or mechanisms of the board in relation to vetting. That explains why in framing the issue in JMVB 1, the focal point was the ouster of the jurisdiction of the court to review the decision of the Board arising out of the vetting exercise. Our position was further manifested in our finding affirming that the process or outcome attendant upon the operations of the Board were not subject to review by the superior courts.

44. However, noting that the board would sometimes stretch the vetting exercise to consider matters beyond the promulgation of the *Constitution*, it was necessary to clarify the effect of our decision in JMVB 1. In *JMVB* 2 we not only affirmed our position in *JMVB* 1 regarding the frontiers of section 23(2) of the sixth schedule, but also reiterated the obtaining legal position as follows:

> "39. Having extensively considered the frontiers of section 23(2) of the sixth schedule to the Constitution, this court (at paragraph 202) stated categorically as follows:
>
> ...
>
> 40. In other words, this court consciously articulated the state of the law, in accordance with the Constitution: the removal of a judge or magistrate, or a process leading to such removal by virtue of the operation of the Judges and Magistrates Vetting Act by the Vetting Board, cannot be questioned in any court of law. That remains the valid position, under the law." [Emphasis added]

45. However, to avert the potential excesses by the board in the vetting of magistrates and judges, it was necessary to clarify and delineate the time zone within which the board was to consider its activities. The board having been established as a transitional institution was expected to consider the conduct of the serving judges and magistrates as at the effective date of the promulgation of the *Constitution*. Any consideration beyond that date would turn it into what we equated to the "unruly dog" as espoused by Lord Mersey. To rehash our position, we stated as follows:

> "(63) We find and hold that the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in section 23 of the sixth schedule to the Constitution of 2010, can only investigate the conduct of judges and magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date. To hold otherwise would not only defeat the transitional nature of the vetting process, but would transform the Board into something akin to what Lord Mersey once called "an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be" (Lord *Mersey in G & C Kreglinger v New Patagonia Meat & Cold Storage Co Ltd* (1913). Lord Mersey used the analogy of "a dog" to refer to the "Equity of Redemption" in the law of mortgages. Here, we use it to refer to "a jurisdictional mandate" within our constitutional set-up; and not, the Board per se."

46. Before concluding this aspect, it is incumbent upon us to address the assertion that magistrates were not represented in the JMVB cases before us. It is also not entirely accurate to proclaim that magistrates were not represented in the JMVB cases. Indeed, while the JMVB cases pitted at least 7 judges, serving at the time, amongst the litigants were the appellant and the Kenya Judges and Magistrates Association (KJMA) – the umbrella body dealing with the welfare of judicial officers to which magistrates comprise a large constituency. The KMJA was at all times capable of articulating the position of magistrates alongside those of judges.

47. Flowing from above, our findings in JMVB cases on the interpretation of section 23(2) of the sixth schedule was adequate. In arriving at the said decision, we considered the tenets of the interpretation of the *Constitution*, the history, purpose, objective and unique circumstances of our country. As the apex court, we want no more than undertake our constitutional and statutory duty in settling the legal position surrounding the dictates of the people of Kenya, on whose behalf we exercise judicial authority.

48. To our minds therefore our findings in JMVB cases were neither per incuriam nor *obiter dictum*. As explained, the alleged absence of magistrates among the direct litigants did not overshadow the constitutional imperative which shielded the operations of the Board itself under which both the judges and magistrates fell. We note that the mandate of the Board itself is not at the moment under challenge and the respondents willingly submitted to its jurisdiction both at the first instance and in appellate capacity when they sought a review of the Board's decision.

b. Is section 22(4) of the Act unconstitutional?

49. We note that this is an issue that was brought up by the 4th respondent in his submissions. Considering the nature of our jurisdiction, we appreciate that this is not an issue that was at the centre of the arguments and court determination by the superior courts below. As set out in *Lawrence Nduttu* case (*supra*) this issue does not qualify to attract our resolution under article 163(4)(a) of the *Constitution*.

As stated above, the constitutionality of section 22(4) of the Act was not framed by either of the superior courts as an issue for determination. At the heart of the dispute now on appeal was the interpretation of section 23(2) of the sixth schedule of the *Constitution* and whether the ouster contemplated under section 23(1) of the sixth schedule extended to magistrates.

50. We point out that, as already stated, we considered the import of section 22(4) of the Act in JMVB 1. Undeniably, the first issue for determination as framed in JMVB 1 was:

> "78 . . .
>
> i) whether section 23(2) of the sixth schedule to the Constitution and section 22(4) of the Vetting of the Judges and Magistrates Act oust the jurisdiction of the High Court to review the decision of the Judges and Magistrates Board; and" (Emphasis ours)

It is our painstaking view that the court, in interrogating the provisions of section 23(2) of the sixth schedule was mindful of not only its application to magistrates but of the enabling statutory provision contained in section 22(4) of the Act. Undoubtedly, the constitutionality of this statutory provision would only be weighed against the provisions of section 23(2) of the sixth schedule, something that has already received sufficient judicial consideration.

51. Moreover, in Nairobi High Court Petition No 146 of 2011, *Dennis Mogambi Mong'are v Attorney General & 3 others*, the petitioner unsuccessfully sought a declaration that Section 23 of the Sixth Schedule to the *Constitution* together with the *Vetting of Judges and Magistrates Act* are unconstitutional. This position was affirmed by the Court of Appeal and we took cognisance of this fact in *JMVB 1*.

52. It therefore serves no further purpose to spend judicial time and resources in answering a peripheral question by way of unconstitutionality of section 22(4) of the Act, the main constitutional provision of section 23(2) of the sixth schedule to the *Constitution* having already been addressed by this court. In any event, the 4th respondent never put a spirited attempt to make his argument around the constitutionality of this statutory provision as to try to persuade us otherwise.

c. Does the ouster in section 23(2) of the sixth schedule to the Constitution apply to magistrates?

53. The crux of the appeal is whether section 23(2) of the sixth schedule to the *Constitution* apply to magistrates. The appeal calls for our interpretation of the said constitutional provision in light of the arguments before us. We remain alive to the previous decisions and positions taken by this court in the JMVB cases. We also remain alive to the fact that this court is not bound by its previous decisions. To this end, article 163(7) of the *Constitution* provides that:

> "(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."

The 1st to 4th respondents hinge their argument in favour of an interpretation against the ouster of the jurisdiction of the High Court, on the main fact that we are dealing with magistrates and not judges, unlike the JMVB cases. To them, any other interpretation of the provision amounts to equating magistrates to judges contrary to the other provisions of the *Constitution*.

54. Jaclyn L Neo (ed) *Constitutional Interpretation in Singapore; Theory and Practice* (Routledge, 2017) at page 1, states that constitutional interpretation introduces additional factors for consideration as compared to the interpretation of statutes. With that in mind, a holistic reading of the *Constitution* is

imperative to give it a purposive and contextual interpretation taking cognizance of other provisions as well as Kenya's historical context with the view of protecting and promoting the purpose, effect, intent and principles of the *Constitution*. In *In the Matter of Kenya National Commission on Human Rights* SC Advisory Opinion Reference No 1 of 2012 [2014] eKLR we expressed ourselves as follows:

> "But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

55. In construing the *Constitution*, article 259 posits that interpretation ought to be in a manner that promotes its purpose, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the bill of rights; permits the development of the law; and contributes to good governance. Being the court of final judicial authority, this court is tasked with asserting the supremacy of the *Constitution* and sovereignty of the people of Kenya by providing an authoritative, impartial and ultimate interpretation of the *Constitution* having due regard to circumstances, history and cultures of the people of Kenya. This results in development of rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth. This court appreciates its solemn duty and clear obligation to provide firm and recognizable reference-points, devoid of contradictions, that lower courts can rely on when called upon to interpret the *Constitution*, see *In the Matter of the Speaker of the Senate & another* SC Advisory Opinion Reference No 2 of 2013 [2013] eKLR.

56. The context of our decision in *JMVB* cases remains and there is no argument about it. And in order to put the dispute in context, various proposals were made to the Committee of Experts (hereinafter "CoE") on how to shepherd the intended transformation from the old to the new constitutional dispensation. The Final Report on the Committee of Experts on Constitutional Review categorized the proposals by Kenyans into two. One, that the entire judiciary be reappointed (with the judicial officers or at least all judges being treated as having lost their jobs but permitted to reapply); and two, the judicial officers remain in office but be required to take a new oath and undergo a vetting process. On careful consideration, the CoE decided that a wholesale reappointment was not appropriate. Instead, some form of vetting was proper, similarly, as it was done in Bosnia-Herzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe.

57. The main aim of the vetting process was to ensure that any serious complaints against sitting judicial officers were properly considered. Even though CoE's recommendation on vetting was limited to judges, it was alive to the fact that most of the public's experiences of the justice system were at the magistracy level. However, the challenge faced was that the magistracy was large and would pose implications in the operations of subordinate courts; and by reason of judges having stronger protection, their removal being a rare occurrence. Nevertheless, before the draft *Constitution* was submitted to the people of Kenya in the ensuing referendum, the vetting process was extended to cover both judges and magistrates who were in office on the effective date of August 27, 2010. Resultantly, it led to the transition clause contained in section 23 of the sixth schedule of the *Constitution* as promulgated.

58. As previously observed, the suitability of a judicial officer to continue in service under the new constitutional dispensation, is a matter reserved by law to the Board. Hardly any cogent argument has been advanced before this Court, that the *Judges and Magistrates Vetting Act*, which implemented the

ouster clause, is not indeed the legislation contemplated under section 23(1) of the sixth schedule to the *Constitution*; and as there is no other legislation such as would claim that status, we have come to the conclusion that there is nothing out of harmony in the common purpose of the *Constitution*, section 23 of its sixth schedule, and the relevant statute – the *Judges and Magistrates Vetting Act*.

59. It follows that a contest to the decision of the Judges and Magistrates Vetting Board, insofar as such a decision affects particular judges involved in the vetting process, is in effect, a collateral challenge to the Board's authority: and this would be inconsistent with the terms of the *Constitution*. This is what we held in the *JMVB* cases. We have not been persuaded to alter our position in the *JMVB* Cases. Nothing has been tabled before us to warrant a review of our own decision as settled in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition (App) No 4 of 2012; [2013] eKLR, *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* SC Petition No 6 of 2014 [2017] eKLR and contemplated by section 21(A) of the *Supreme Court Act*.

60. Shielding the vetting process by the Board from the review jurisdiction of the courts in our view represents the unique situation that we found ourselves in as a country that was transitioning from the old order. In any event, the transition only operated in a specific time frame and historical context of our country. Moreover, this transition between the old Constitution and the new one was more people centric having accrued from a referendum. It is within this prism that we went for the broader consideration of the vetting exercise in the transition context. The only logical conclusion out of the vetting exercise by the Board was to either recommend suitability of judges and magistrates to continue serving or unsuitability with the latter resulting to removal. There was no expectation that the judges and magistrates would expect different treatment before the Board undertaking a similar vetting exercise.

61. This by no means amounted to a reading in of the specific provisional *Constitution* in section 23(2) of the sixth schedule, or equating magistrates to judges. The vetting or judges and magistrates was a constitutional requirement that was time bound under article 262 of the *Constitution*. Any legislative enactments made to effect the sixth schedule to the *Constitution*, including section 23 thereof had to be sustained.

62. On the contention by the 1st to 4th respondents that the drafters of the *Constitution* knew the difference between magistrates and judges and used the words in the *Constitution* deliberately, nothing could be further from the truth. In the transition context, articles 160, 167 and 168 are inapplicable, and are thus unavailable for comparative purposes. The issue, as we see it, appears to be more of grievances regarding the outcomes for the specific respondents who did not agree with the decisions of the Board.

63. In the end, and having clarified JMVB 1 and JMVB 2 in so far as it applies to magistrates, we find merit in the appeal and reiterate that section 23(2) of the sixth schedule, in so far as it implicates the function of the Board in the vetting of judges and magistrates, is not subject to the review jurisdiction of the High Court. This leads us to the consideration of the appropriate reliefs in the circumstances.

ii. What are the appropriate available reliefs

64. Apart from urging us to allow the appeal by setting aside the judgment of the Court of Appeal and upholding that of the High Court, the appellant seeks declaratory reliefs on the interpretation of section 23(2) of the sixth schedule to the *Constitution* as an ouster clause and that no court is clothed with jurisdiction to review the determination and the process leading thereto of the now defunct Board. The appellant further seeks a declaration that the Board is no longer in existence and as such the vetting process can neither be reopened nor can its decisions be revisited.

65. The 1st to 3rd respondents oppose these proposed declarations on the basis that the unavailability of the remedies cannot be a ground that would lead a court to fail to consider a matter on merit. They contend that the Board's jurisdiction to give magistrates a hearing and entertain review applications was done and completed. Hence, once the matter is before the High Court, the existence of the Board becomes irrelevant and nothing can go back there. That the court is to determine the matters before it conclusively, therefore, existence of the Board becomes irrelevant.

66. It is apparent that the appellant seeks declarations with regard to a process that was time bound as it was to conclude not later than December 31, 2015 and the Board be subsequently dissolved within thirty (30) days as per the Act. As it stands, the Board is non-existent. Moreover, the declarations the appellant seeks were not matters that were before the superior courts for their determination. Can a party contend that the unavailability of the remedies is ground that would result in a court's failure to consider a matter on merit?

67. Clearly the issues raised in the appeal do no more than seek clarity on a legal position that we have previously provided. We do not see any purpose to be served by making declarations touching on the defunct Board in light of our findings. We nevertheless add that it matters not that the term of the Board may have lapsed. That is to say, lapse of time is not a factor that contributes towards the interpretation and/or application of the *Constitution* when the jurisdiction is properly invoked and more so, found to have merit.

68. On the issue of costs, in *Kenya Revenue Authority v Export Trading Company Limited* (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment) we opined that public bodies and organizations which ordinarily exist to serve a country's government and who are acting within their mandate need not be condemned to pay costs where such an entity has brought or defended proceedings while acting purely in that regulatory capacity. Therefore, award of costs against such entities should only be made where such an entity has acted unreasonably or in bad faith. That said, to us the appellant being an independent commission and having filed the petition in that capacity undoubtedly did so with no ill intent but rather to clarify the position in relation to the litigants. Similarly, we cannot punish the respondents, particularly the 1st to 4th respondents for pursuing their legitimate right to access justice under the *Constitution*. Thus, we are not persuaded to make any order for costs for or against any of the parties.

69. We thank all the counsel for their input, research and presentation in the course of this matter.

F. Orders

70. In the end, we make the following orders:

    1. The petition of appeal dated December 1, 2021 and filed on December 3, 2021 is allowed to the extent that:

        a. The judgment and order of the Court of Appeal dated and delivered on October 22, 2021 be and is hereby set aside.

        b. The judgment and decree of the High Court dated and delivered on June 22, 2018 is upheld.

    2. Each party shall bear their own costs.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL, 2023.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA