



**Gachuri v Attorney General & another; Kenya Judges Welfare Association
& another (Interested Parties) (Constitutional Petition E304 of 2023)
[2024] KEHC 5836 (KLR) (Constitutional and Human Rights) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E304 OF 2023
EC MWITA, PM NYAUNDI & LN MUGAMBI, JJ
MAY 24, 2024**

BETWEEN

PETER MWANGI GACHURI PETITIONER

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

THE SALARIES AND REMUNERATION COMMISSION 2ND RESPONDENT

AND

KENYA JUDGES WELFARE ASSOCIATION INTERESTED PARTY

THE JUDICIAL SERVICE COMMISSION INTERESTED PARTY

Revocation of the taxable car allowance benefit for purchase of motor vehicles for private use by judges a threat to the independence of the Judiciary

The petition challenged the action by the Salaries Remuneration Commission (SRC) to terminate the taxable car allowance for judges. The court held that the benefit acquired constitutional protection under article 160(4) and for that reason, the benefit could not be taken away as that would amount to a variation of judges' terms and conditions of service to their disadvantage. The court further issued a declaration that the SRC's letter purporting to revoke the taxable car allowance contravened article 160(4) of the Constitution and was a threat to the independence of the Judiciary and was therefore unconstitutional.

Reported by Kakai Toili

Constitutional Law – Judiciary – independence of the Judiciary – claim that the revocation of the taxable car allowance benefit for purchase of motor vehicles for private use by judges by the Salaries and Remuneration Commission (SRC) was a threat to the independence of the Judiciary - whether the taxable car allowance benefit for purchase of motor vehicles for private use by judges could be taken away, altered or varied to the disadvantage



of judges - whether the revocation of the taxable car allowance benefit for purchase of motor vehicles for private use by judges by the SRC was a threat to the independence of the Judiciary and thus unconstitutional – Constitution of Kenya, articles 160(4), 210(3), 230(4), and Sixth Schedule sections 6 and 7.

Jurisdiction – *jurisdiction of the Employment and Labour Relations Court vis a vis the High Court – distinction - what was the distinction between the jurisdiction of the Employment and Labour Relations Court and the High Court – Constitution of Kenya, article 165(3); Employment and Labour Relations Court Act (cap 8E) section 12.*

Constitutional Law – *interpretation of the Constitution - proper way to interpret the Constitution - what was the proper way to interpret the Constitution.*

Brief facts

The petitioner’s case was that prior to the promulgation of the Constitution of Kenya, 2010, on August 27, 2010, (the effective date), judges enjoyed a duty-free car grant benefit (the benefit) which they used to purchase motor vehicles for their private use. Judges continued to enjoy that benefit even after the effective date until July 12, 2021 when the 2nd respondent, the Salaries Remuneration Commission (SRC) purported to terminate the benefit through a letter addressed to Head of Public Service. The petitioner stated that the benefit was renamed “Taxable Car Allowance” in the circular dated July 7, 2011 by which time the SRC had not been constituted. The benefit was then reviewed upwards through circulars by the Head of Public Service dated June 2, 2015 and June 4, 2018, and judges continued to access the benefit.

By the letter dated July 12, 2021, the SRC requested the Head of Public Service to revoke the three circulars on grounds that it had the exclusive mandate to set and regularly review remuneration and benefits for all State officers. The petitioner sought among other orders; a declaration that the taxable car allowance for purchase of motor vehicles for judges as it existed at the end of June, 2021 constituted a benefit payable to and in respect of judges which could not be reviewed to the disadvantage of judges.

The 1st respondent, the Attorney General, raised a preliminary objection that the court had no jurisdiction to hear the petition and that the proper forum was the Employment and Labour Relations Court (ELRC). The 1st respondent contended that the petition sought to usurp the constitutional mandate conferred on the SRC. The SRC urged that as at July 7, 2011, the Head of Public Service lacked the constitutional mandate to introduce, confer a benefit or vary any remuneration or benefit in respect of State officers.

Issues

- i. Whether the revocation of the taxable car allowance benefit for purchase of motor vehicles for private use by judges by the SRC was a threat to the independence of the Judiciary and thus unconstitutional.
- ii. Whether the taxable car allowance benefit for purchase of motor vehicles for private use by judges could be taken away, altered or varied to the disadvantage of judges.
- iii. What was the distinction between the jurisdiction of the Employment and Labour Relations Court and the High Court?
- iv. What was the proper way to interpret the Constitution?

Relevant provisions of the Law

Constitution of Kenya

Article 160 - Independence of the Judiciary

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 person or authority.*
2. *The office of a judge of a superior court shall not be abolished while there is a substantive holder of the office.*
3. *The remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund.*
4. *Subject to Article 168(6), the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.*



5. *A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.*

Held

1. Jurisdiction was what gave a court power or authority to hear and determine a dispute presented before it. Where doubt was raised regarding the jurisdiction of the court to hear a matter, it was a threshold question. The court had to carefully weigh the objection and determine the fundamental question whether it had or did not have jurisdiction over the matter. If the court determined that it had no jurisdiction to hear a matter, it should not take any further step. It must down its tools as that was the end of that matter.
2. From a reading of the Constitution and section 12 of the Employment and Labour Relations Court Act, the core jurisdiction of the ELRC was to determine disputes that arose out of the employer-employee relationship. On the other hand, the jurisdiction of the instant court was donated by article 165(3) of the Constitution. The instant court had the jurisdiction to hear among other matters, any question respecting the interpretation of the Constitution including the determination of the question whether any law was inconsistent with or in contravention of the Constitution; the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution.
3. The import of article 165(3) of the Constitution, was to authorise the High Court to decide all matters other than those reserved for other courts as contemplated in article 162(2) of the Constitution and as restricted by article 165(6). The sweep of the constitutional authorisation given to the High Court could not be lightly taken and should not be easily given up. That was; the court had wide jurisdiction to hear and determine various matters that may be brought before it. The question of whether or not the court had jurisdiction to hear and determine the petition must, therefore, be viewed through the lens of article 165(3)(d)(ii).
4. Under rule 11(1) and (2) of the Constitutional and Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (*Mutunga* Rules), it was not mandatory that a petition be supported by an affidavit except where a party relied on the documents. The court took cognisance of article 22(3)(d) of the Constitution under which the *Mutunga* Rules were formulated, that while observing the rules of natural justice, the court was not to be unreasonably restricted by procedural technicalities. That was also emphasised in article 159(2)(d) of the Constitution. Therefore, the petition as pleaded, raised clear constitutional issues for determination and was, thus competent.
5. There was no merit in the submission that the opinion dated May 22, 2023 was privileged communication under sections 134 and 137 of the Evidence Act and section 6 of the Access to Information Act. That was because;
 1. the Attorney General was a public office which advised all Government institutions and State organs;
 2. It did not also represent the SRC in the proceedings;
 3. The nature of that opinion was to enable the SRC to determine the legality of the action it had taken; and
 4. the SRC as the recipient, had placed the same document before the instant court, thus there was no dispute to the existence of the opinion or its contents.
6. The court should not isolate one provision of the Constitution and interpret it singularly. That may give a distorted interpretation, thus lose the meaning the people intended. When interpreting the Constitution, the court must take into account both the context of the provision, including its history, and use text to give effect to that context. That was, the court must take into account both the letter and spirit of the articles of the Constitution to achieve the intention of the people.
7. Constitutional provisions must be interpreted broadly and liberally, avoiding a narrow, pedantic or restrictive interpretation that would distort true constitutional intent and bear in mind that the



- Constitution was an organic document intended to endure. It must be purposively interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation in the articulation of the values bonding its people and disciplining its government. The court had an obligation to remain true to meaning and objects of the Constitution as a living instrument.
8. The office of judge was one of the constitutional offices under the repealed Constitution. Parliament enacted the Constitutional Offices (Remuneration) Act whose objective was to fix salaries and allowances of persons holding certain constitutional offices. Section 104(3) of the repealed Constitution thus ring-fenced judges' salaries and allowances so that their salaries and allowances could not be altered to the disadvantage of the judges while in office.
 9. During the repealed constitutional regime, the Government introduced an allowance called duty-free car grant to certain cadre of constitutional office holders, including judges. They were allowed to buy or import vehicles duty free for private use. That meant, the benefit existed prior to the effective date. Judges were among the officers who enjoyed that benefit up to the effective date.
 10. Judges enjoyed the benefit up to the effective date. The benefit transitioned to the Constitution of Kenya, 2010. That was borne by the fact that the Constitution abhorred a vacuum. That was buttressed by sections 6 and 7 of the Sixth Schedule to the Constitution. The Head of Public Service, aware of sections 6 and 7 of the Sixth Schedule as well as articles 160(4) and 210(3) of the Constitution, and in order to obviate a constitutional vacuum, correctly issued the impugned circular, thereby legally transitioning the benefit from a duty-free car grant under the repealed Constitution to a taxable car allowance, accessible to officers mentioned in the circular, including judges to conform with the Constitution of Kenya, 2010.
 11. The taxable car allowance was a benefit to judges. The allowance was a benefit attaching to the office of judge to be enjoyed by the holder of that office on appointment and not to an individual judge. That was because article 160(2) of the Constitution protected the office of judge of superior courts so that the office could not be abolished while there was a substantive holder thereof. The benefit was enjoyed by virtue of holding the office and, therefore, the benefit was to the office.
 12. The scheme of article 160 of the Constitution was to protect the independence of the Judiciary. Judicial independence meant shielding the Judiciary and judges from external interference by the political branches (Executive and Legislative power) and any other non-judicial actor in the discharge of its mandate to adjudicate on disputes presented before it.
 13. Judicial independence was critical for maintaining judges' impartiality in determining disputes before them, thus promoting the rule of law, democracy and constitutionalism. For judicial independence to thrive, institutional and individual judges' independence must be secured from both internal and external actors. For that reason, institutional, legal and operational arrangements were put in place, designed to safeguard that independence.
 14. Article 160 of the Constitution was designed to protect both institutional and individual judges' independence. Article 160 thus protected both institutional independence of the Judiciary and the independence of office of judge, a key feature in maintaining the rule of law, a founding value of the nation and a constitutional imperative in a democratic state. The protection envisaged under article 160 of the Constitution guaranteed the independence of the Judiciary and the office of judge in the discharge of their functions and duties.
 15. It was not clear whether the Head of Public Service acceded to the SRC's request to revoke the impugned circulars. Constitutional provisions must be read in harmony. In that regard, article 230(4) of the Constitution which mandated the SRC to set and regularly review the remuneration and benefits must be read alongside article 160(4) of the Constitution which ring fenced benefits to the office of judge to bring them into harmony. It was therefore a misapprehension on the part of the SRC to read article 230(4) in isolation of article 160(4) where a benefit was already available to the judges.



16. The SRC's mandate under article 230(4) of the Constitution to set and regularly review the remuneration and benefits of judges, must be rationalised and harmonised with article 160(4) of the Constitution, so that where a benefit had already accrued and was thus ring fenced by article 160(4), that benefit was beyond the reach of the SRC. The benefit could only be reviewed, but not in a manner that was to the disadvantage of the judge. Article 160(4) prohibited in no uncertain terms the variation or alteration of an accrued benefit to the disadvantage of a judge. In that respect, the attempt by the SRC whether as purported by its letter of July 12, 2021, or any other letter to terminate the benefit, was constitutionally impermissible.
17. Remuneration of judges was one of the tenets of the independence of the Judiciary and that was why the remuneration and benefits payable to, or in respect of a judge was constitutionally ring fenced and were not to be varied to the disadvantage of the judge and the retirement benefits of a retired judge were not to be varied to the disadvantage of the retired judge during the life time of the retired judge.
18. The Constitution was not silent on the ring fencing of the judges' remuneration and benefits which aimed at ensuring that the judges rendered their services and mandate independently and impartially, free from undue influence or wrong albeit any uncertainties the future may hold. The judicial independence had everything to do with remuneration and benefits of the judges contrary to the assertion by the respondents herein.
19. At the time the two circulars issued in 2015 and 2018 reviewing the taxable car allowance upwards were issued, the SRC had been constituted. By 2018, the SRC had held several engagements with the 2nd interested party, the Judicial Service Commission (JSC) over the remuneration and benefits of judges and judicial officers.
20. The court was not persuaded that the SRC only learnt of the existence of the circulars in 2021 and that the judges were accessing the taxable car allowance in 2023. The SRC was aware of the two circulars upon their issuance. Consequently, the SRC was not being candid as to when it became aware that judges were accessing the taxable car allowance.
21. The mandate of the SRC under article 230(4) of the Constitution was, among other things, to set and regularly review the remuneration and benefits of all State officers. When the SRC was constituted in 2012, the benefit was already set and in existence following the transition pursuant to the circular dated July 7, 2011 in conformity with article 210(3) as read with article 160(4) and section 6 and 7 of the Sixth Schedule to the Constitution.
22. At that point the SRC's duty was limited to reviewing that which was already in place. In spite of that, and being a recipient of the two circulars, the SRC did not protest or assert its mandate in relation to those reviews. It maintained a studious silence and allowed the benefit to accrue and crystallized under article 160(4) of the Constitution, thus had been accessed by judges as reviewed. The SRC's prolonged inaction allowed the benefit to accrue and it thus became one of the terms and conditions of service for judges.
23. Judges had been appointed since 2011 and had been enjoying that benefit since then. By parity of reasoning, the benefit acquired constitutional protection under article 160(4) and for that reason, the benefit could not be taken away as that would amount to a variation of judges' terms and conditions of service to their disadvantage.
24. The SRC's prolonged inaction coupled with the enjoyment of the benefit by judges for a long period, sanctioned the reviews contained in the two circulars dated June 2, 2015 and June 4, 2018 and the benefit acquired constitutional protection under article 160(4) of the Constitution.

Petition allowed.

Orders

- i. *A declaration was issued that the taxable car allowance for purchase of motor vehicles for private use by judges that existed prior to July 12, 2021 constituted a benefit payable to and in respect of judges under article 160(4) of the Constitution and could not be varied or altered to the disadvantage of judges.*



- ii. *A declaration was issued that the SRC's letter dated July 12, 2021 purporting to revoke the taxable car allowance contravened article 160(4) of the Constitution, was a threat to the independence of the Judiciary and was therefore unconstitutional, null and void.*
- iii. *An order of certiorari was issued quashing the SRC's letter dated July 12, 2021 to the extent that it purported to revoke the taxable car allowance for judges.*
- iv. *An order was issued compelling the Principal Secretary, National Treasury and Economic Planning to forthwith process and pay, and continue to pay, the taxable car allowance to judges as and when it fell due.*
- v. *No order to costs.*

Citations

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Kenya

1. *Clerk, Nakuru County Assembly v Kenneth Odongo & others* Civil Appeal E136 & E137 of 2022 (Consolidated); [2023] KECA 427 (KLR) - (Applied)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2014] KESC 53 (KLR) (Consolidated) - (Applied)
3. *Dida, Mohammed Abduba v Debate Media Limited & another* Civil Appeal 238 of 2017; [2018] KECA 642 (KLR) - (Explained)
4. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR) - (Explained)
5. *In the Matter of the Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Applied)
6. *Katiba Institute v Attorney General & 9 others* Petition 17 of 2020; [2023] KESC 47 (KLR) - (Explained)
7. *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties)* Petition 206 of 2020; [2021] KEHC 442 (KLR) - (Applied)
8. *Kenya County Government Workers' Union v County Government of Nyeri & another* Petition 10 of 2015; [2015] KEELRC 100 (KLR) - (Applied)
9. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Explained)
10. *Mate & another v Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Explained)
11. *Mumo, Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Applied)
12. *Munene, Jonathan v Attorney General & 2 others; Kenya Judges Welfare Association (Interested Party)* Petition 404 of 2019; [2021] KEHC 12643 (KLR) - (Applied)
13. *Muya, Martin Mati v Judicial Service Commission & another* Petition 154 of 2019; [2019] KEELRC 722 (KLR) - (Explained)
14. *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* Civil Appeal 656 of 2022; [2023] KECA 80 (KLR) - (Applied)
15. *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* Civil Appeal 656 of 2022; [2023] KECA 80 (KLR) - (Applied)
16. *Ngonga, Samson O v Public Service Commission & 5 others* Petition 4 of 2013; [2013] KEELRC 46 (KLR) - (Applied)
17. *Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* Petition 369 of 2019; [2020] KEHC 9228 (KLR) - (Applied)
18. *Njuguna, James Davis v James Chacha (Sued as Chairman Parklands Sports Club & 3 others* Civil Case 198 of 2012; [2013] KEHC 1886 (KLR) - (Applied)
19. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR) - (Applied)



20. *Parliamentary Service Commission & 4 others v Salaries and Remuneration Commission & 7 others* Civil Application E409 of 2020; [2021] KECA 234 (KLR) - (Applied)
21. *Parliamentary Service Commission v Salaries Remuneration Commission; Attorney General & 3 others (Interested parties)* Miscellaneous Application 686 of 2017; [2018] KEHC 9804 (KLR) - (Applied)
22. *Pevans East Africa Ltd & another v Chairman Betting Control and Licensing Board & 7 others* [2017] KEHC 9684 (KLR) - (Applied)
23. *Public Service Commission & 4 others v Cheruiyot & 20 others* Civil Appeal 119 & 139 of 2017 (Consolidated); [2022] KECA 15 (KLR) - (Applied)
24. *Republic v Chengo & 2 others* Petition 5 of 2015; [2017] KESC 15 (KLR) - (Applied)
25. *Seven Seas Technologies Limited v Eric Chege* Miscellaneous Application 29 of 2013; [2014] KEELRC 588 (KLR) - (Applied)
26. *Sollo, Nzuki v Salaries and Remuneration Commission & 2 others* Petition 18 of 2018; [2019] KEHC 1511 (KLR) - (Applied)
27. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)

Uganda

1. *Attorney General of the Republic of Uganda v Masalu Musene Wilson & Ors* [2008] UGSC 13 - (Applied)
2. *Tinyefuze v Attorney General of Uganda* [1997] UGCC 3 - (Explained)

Namibia

Government of the Republic of Namibia and another v Cultura 1994 (1) SA 407 - (Applied)

Zambia

Sangwa v Attorney General & Law Society of Zambia CCZ/0012) [2023] ZMCC 6 (31 July 2023) [2023] ZMCC - (Explained)

India

S P Gupta v Union of India & another 982 AIR 149; 1982(2) SCR 365 - (Explained)

Regional Court

Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 - (Applied)

Texts

1. Barak, A (2006), *The Judge in a Democracy* Princeton: Princeton University Press p 80
2. Saunders, JB., Burrows, R., (Eds) (1989), *Words and Phrases Legally Defined* London: Butterworths Vol 3 p 113
3. Smit, JVZ., (2015), *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A compendium and Analysis of Best Practice* The British Institute of International and Comparative Law, pg xix

Statutes

Kenya

1. Access to Information Act (cap 7M) section 6(1)(j)- (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 19 rule 3- (Interpreted)
3. Constitution of Kenya articles 2, 3(1); 22; 27; 41; 47(1); 156(6); 159(2)(d); 160; 162(2); 165(3)(b)(d); 171; 172; 210; 230; 249(1)(2); 250(8); 258; 259(11); Schedule Sixth; section 6, 7(2), 23, 24, 25(2), 32- (Interpreted)
4. Constitution of Kenya (Repealed) section 104(2)(3)(4)- (Interpreted)
5. Constitutional of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 11(1)(2)- (Interpreted)
6. Constitutional Offices (Remuneration) Act (cap 423) section 2; Schedule Second- (Interpreted)



7. Employment and Labour Relations Court Act (cap 8E) sections 4, 12(1)- (Interpreted)
8. Evidence Act (cap 80) sections 64, 65, 66, 134, 137- (Interpreted)
9. Income Tax Act (cap 470) section 13(2) - (Interpreted)
10. Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 (cap 412D Sub Leg) regulations 12, 13(2) - (Interpreted)

Advocates

Mr Gachuiiri for the applicant

JUDGMENT

1. Peter Mwangi Gachuiiri, (Mr Gachuiiri), an advocate of this court and a public interest litigant, has brought a petition dated August 23, 2023, against the Attorney General (The AG) the legal adviser to the national government, and Salaries and Remuneration Commission (the SRC), a constitutional Commission established under article 230 of the Constitution, with the mandate to set and regularly review remuneration and benefits for all state officers, as the 1st and 2nd respondents respectively.
2. Mr Gachuiiri has joined Kenya Judges Welfare Association (KJWA), an association of judges, and the Judicial Service Commission, (the JSC), a constitutional Commission established under article 171 of the Constitution, with among others, the mandate to promote the independence of the judiciary, as the 1st and 2nd interested parties respectively.
3. The petition challenges the action by the SRC to terminate the taxable car allowance for judges,

Petitioner's Case

4. The case presented by Mr Gachuiiri is that prior to the promulgation of the 2010 Constitution on August 27, 2010, (the effective date), judges enjoyed a duty-free car grant benefit (the benefit) which they used to purchase motor vehicles for their private use. Judges continued to enjoy this benefit even after the effective date until July 12, 2021 when the SRC purported to terminate the benefit through letter of the same date addressed to Head of Public Service.
5. Mr Gachuiiri states that the benefit was renamed "Taxable Car Allowance" in the circular Ref OP/CAB.56/2A dated July 7, 2011 by which time the SRC had not been constituted. The benefit was then reviewed upwards through circulars by the Head of Public Service Reference Nos OP/CAB.56/2A dated June 2, 2015 and OP/CAB.56/2A dated June 4, 2018, and Judges continued to access the benefit.
6. By letter dated July 12, 2021, the SRC requested the Head of Public Service to revoke the three circulars on grounds that under article 230(4) of the Constitution, it has the exclusive mandate to set and regularly review remuneration and benefits for all State officers. Mr. Gachuiiri states that the SRC's action is a violation of article 160(4) of the Constitution. According to Mr Gachuiiri the benefit was meant to enable judges purchase vehicles which they use on occasions when their official transport is not available, or official vehicles have broken down.
7. Mr Gachuiiri further states that the SRC's action contravenes articles 27, 41, 47(1) and 160 of the Constitution. He also takes the view, that the AG's legal opinion dated May 22, 2023 to the SRC, came two years after the letter purporting to terminate the benefit and was not only a manifestation of bad faith, but was also intended to sanitize an unconstitutional action.



8. Regarding the preliminary objection by the AG that this court has no jurisdiction to hear the petition, Mr Gachuiiri argues that there is no employer-employee relationship that would bring the petition within the ambit of article 162(2) of the Constitution. Mr Gachuiiri asserts that the petition is brought under articles 22 and 258 of the Constitution, and relies on articles 3(1), 22, 258, 165(3) (b) and(d) of the Constitution for the position that this Court is the proper forum to hear the petition.
9. Mr Gachuiiri further cites section 12(1) of the Employment and Labour Relations Court Act and the decisions in Clerk, Nakuru County Assembly v Kenneth Odongo & others (Civil Appeal 136 of 2022 (Consolidated with Appeal 137 of 22)) and National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) (3 February) (Judgment), to support his argument.
10. On the main petition, Mr Gachuiiri argues that the court should apply the principle of harmonization in interpreting the Constitution. He urges the court to consider what benefits accrued to judges relating to the benefit prior to the effective date, and if the court finds that a benefit existed, it should hold that such a benefit could not be taken away without violating the Constitution.
11. Mr Gachuiiri invites the court to consider the fact that the change of name from duty-free car grant to taxable car allowance was not a new benefit to judges, but only a change in name, otherwise the benefit existed prior to the effective date under the Constitutional offices (Remuneration) Act. Once this fact is appreciated, the argument by the AG and the SRC that a new benefit had been conferred to judges dissipates.
12. Concerning the AG's opinion to the SRC, Mr Gachuiiri argues that the AG wrongly advised the SRC that the allowance would apply only to judges appointed before the effective date. According to him, this is an admission by the AG that the benefit existed prior to the effective date and, therefore, could not be terminated. Mr Gachuiiri takes the view, that the AG misapprehended the benefit as one attached to the person of a judge rather than to the office of judge. Mr Gachuiiri faults the interpretation that the benefit could be accessed only by judges appointed prior to the effective date as it would result in discrimination and unfair labour practices in violation of articles 27 and 41 of the Constitution.
13. Mr Gachuiiri points out that at the time of the letter of July 12, 2021 by the SRC, the benefit had already accrued to the persons holding the position of judge. For that reason, the benefit could not be taken away without violating article 160(4) of the Constitution.
14. Mr Gachuiiri argues that action by the SRC is an infringement to the independence of the Judiciary which is safeguarded by article 160 of the Constitution. He cites Justice Aharan Barak in his book, A Judge in a Democracy where he states that "Judicial independence is essential for fair and just resolution of disputes in individual cases, it is also the life blood of constitutionalism in democratic societies."
15. He also relies on the decision in Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR to support this position.
16. Based on the above arguments, Mr Gachuiiri seeks the following reliefs:
 1. A declaration that the taxable car allowance for purchase of motor vehicles for judges as it existed at the end of June, 2021 constituted a benefit payable to and in respect of judges which cannot be reviewed to the disadvantage of judges.
 2. A declaration that the 2nd respondent's letter dated 12/07/2021 purporting to scrap the taxable car allowance for purchase of motor vehicles for judges as confirmed in the Circular by the Head of Public Service dated 4/06/2018 contravenes article 160(4) of the Constitution and the same is therefore invalid.



3. A declaration that by purporting to scrap the Taxable Allowance for purchase of motor vehicle, the 2nd respondent threatens the independence of the Judiciary which is protected under article 160 of the Constitution.
4. A declaration that the 1st respondent in giving his opinion to the 2nd respondent post facto which opinion was sought to sanitize an unconstitutional and unlawful decision already taken in 2021 by the 2nd respondent in violation of article 160(4) of the Constitution, the 1st respondent failed in his constitutional obligation to promote, protect and uphold the rule of law and protect the public interest within the meaning of article 156(6) of the Constitution.
5. A declaration that the 1st respondent's opinion advising the application of the allowance for purchase of motor vehicles to only judges who were appointed before the promulgation of the Constitution violates the right to freedom from discrimination and the right to fair labour practices of judges appointed after the promulgation of the Constitution contrary to articles 27 and 41 of the Constitution.
6. An order compelling the national government offices namely the Attorney General, the National Treasury and the Head of Public Service to forthwith process and pay, and to continue processing and paying, the Car Grant to Judges as had been the position prior to the 2nd respondent's unconstitutional and unlawful advice that resulted in the withdrawal of the same.
7. Costs of the Petition be provided for.

1st Respondent's Case

17. The AG has opposed the petition through a notice of preliminary objection dated September 25, 2023 and grounds of opposition dated September 27, 2023, respectively.
 - (i) Preliminary objection
18. In the preliminary objection, the AG argues, first; that since the gravamen of the petition is the revocation of a benefit arising out of the employer-employee relationship between judges and the state, the petition has been filed in violation of the doctrine of constitutional avoidance.
19. Second, the petition violates the provisions of article 162(2)(a) of the Constitution to the extent that this court has no jurisdiction to hear this petition. The AG contends that the proper forum is the Employment and Labour Relations Court (ELRC). Reliance is placed on the decisions in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 on the definition of a preliminary objection; *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR; *Words and Phrases Legally defines* -Volume 3:I-N page 113, *Seven Seas Technologies Limited v Eric Chege* [2014] eKLR, (Petition No 459 of 2011); *Samson O Ngonga v the Public Service Commission & Ors*, and *James Davies Njuguna v James Chacha (Sued as Chairman Parklands Sports Club & 3 others* [2013] eKLR, on this issue.
20. The AG further relies on *Martin Muya v Judicial Service Commission & another* [2019] eKLR on whether a judge is an employee; and *James Davies Njuguna v James Chacha (Sued as Chairman Parklands Sports Club & 3 others* (supra) that the matter should be transferred to the ELRC.
 - ii) Grounds of opposition
21. In the grounds of opposition, the AG contends that the petition is brought in bad faith; the petition seeks to usurp the constitutional mandate conferred on the SRC by article 230(4)(a) of the



- Constitution; seeks to obstruct the purposes, values and principles of the Constitution and negates good governance. According to the AG, the SRC's mandate is clear, thus the petition is a "scheme to chip away" that mandate.
22. The AG urges the court to be guided by decisions of both the Supreme Court and the Court of Appeal and exercise deference to the constitutional mandate of the SRC. The AG relies on the decision of the Supreme Court in Julius Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR on separation of powers and on the allocation of specific mandates and functions to an agency.
 23. In addition, the AG cites the decision of the Court of Appeal in Pevans East Africa Ltd & another v Chairman Betting Control and Licensing Board & 7 others [2013] eKLR that where the Constitution has reposed specific functions in an institution or organ of state, the court must give those organs sufficient leeway to discharge that mandate, and only accept an invitation to intervene where those bodies are demonstrably shown to have acted in contravention of the Constitution or the law.
 24. The AG also contends that article 249(1) provides for the objects, authority and funding of constitutional commissions and independent offices, while article 249(2) states that commissions and holders of independent offices are subject only to the Constitution and the law; are independent and not subject to direction or control of any person or authority. In this regard, the AG relies on the decisions in Communication commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR; Re The matter of Interim Independent Electoral and Boundaries Commission [2011] eKLR (para 59) and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (para49-), on separation of powers.
 25. The AG again argues that the supporting affidavit contains matters not within the petitioner's knowledge and is inadmissible as it does not disclose the source thereof, thus is contrary to order 19 rule 3 of the Civil Procedure Rules. That the affidavit does not also annex the documents alluded to in paragraphs 4, 5, 6, 9 which renders the averments inadmissible as this contravenes section 66 as read with sections 64 and 65 of the Evidence Act.
 26. The AG further argues that the petition is pegged on alleged official correspondence between public bodies and Mr Gachuri has not shown how the correspondence was obtained, thus rendering the petition bad in law. The AG takes the view, that its advice to the SRC is privileged communication protected under section 6(1)(j) of the Access to Information Act as well as sections 134 and 137 of the Evidence Act.
 27. The AG maintains that the petition is premised on an erroneous interpretation of article 160(4) of the Constitution and that there can be no legitimate expectation founded on an illegality.

2nd Respondent's Case

28. The SRC opposes the petition through a replying affidavit sworn on October 12, 2023 by its Chief Executive Officer(CEO) Ms Anne R Gitau. The SRC gives a historical background on the issue of the Car grant benefit for judges and how section 104 of the repealed Constitution provided for remuneration and benefits for a certain group of public officers. Section 2 of Constitutional Offices (Remuneration) Act, cap 423 authorised the President to set remuneration and allowances for the officers.
29. Section 13(2) of the Income Tax Act allowed the Minister for Finance to grant tax exemption and it was on that basis that judges, among other constitutional officer holders, were exempted from paying tax when purchasing vehicles.



30. The SRC further states that prior to the effective date, the entire question of remuneration of state and public officers was done in an unstructured manner. This is what informed the establishment of the SRC whose constitutional mandate is to set and regularly review the remuneration and benefits of all state officers, including judges.
31. It is the SRC's position, that judges appointed under the retired constitutional order were sworn afresh into office under the 2010 Constitution, with the mandate to impartially discharge justice as prescribed by the Constitution. The shift on the remuneration and benefits of state officers, including judges, led to the automatic repeal of the Constitutional Offices (Remuneration) Act. All state officers are now subject to the new constitutional order without qualification or exception.
32. It is the SRC's case that, even if Constitutional Offices (Remuneration) Act has not been repealed, with the current Constitution in place, the mandate to set and review salaries and benefits for judges was transferred to the SRC. No power can be exercised under that Act with regard to the benefit since this falls under its mandate. The Constitution also significantly affected judges, including vetting, abolished the term of Chief justice and judges were made to swear allegiance to the current Constitution which included establishment of the SRC.
33. The SRC argues that Mr. Gachuri wants the court to read into the Constitution what is not in the Constitution itself. According to the SRC, article 2 of the Constitution binds all persons and state organs and no one can exercise authority except as provided for under the Constitution.
34. SRC posits that, the genesis of the dispute is the letter dated July 7, 2011 when the office of the President wrote to accounting officers granting taxable car allowances. The SRC argues that the letter was intended to circumvent the Constitution and its mandate since the letter could not confer a benefit under the current constitutional order.
35. The SRC urges that as at July 7, 2011, the Head of Public Service lacked constitutional mandate to introduce, confer a benefit or vary any remuneration or benefit in respect of state officers. In doing so, the Head of Public Service violated article 230(4)(a) of the Constitution which is a standalone clause. And by dint of section 7(2) of the Sixth Schedule to the Constitution, it prevails over the provisions of the Constitutional Offices (Remuneration) Act.
36. The SRC further states that under section 25(2) of Part 6 of the Sixth Schedule to the Constitution, it was to be constituted within nine months after the effective date. The SRC was, thus already vested with the mandate to set and regularly review the remuneration and benefits of state officers.
37. The SRC takes the position, that pending its establishment, the remuneration and benefits of state officers, including Judges, set under the Constitutional Offices (Remuneration) Act, only applied subject to the provisions of article 210 of the Constitution, and a benefit prior to the promulgation of the Constitution cannot transform into an allowance.
38. The SRC maintains that the promulgation of the Constitution set a new order and scheme of governance thereby restricting the exercise of public power. The SRC argues, therefore, that it is the only organ mandated to set and review remuneration and benefits. SRC asserts that, judges are subject to remuneration and benefits prescription policy that applies to all other state officers. It is the SRC'S position that under article 210 (3) of the Constitution, there can be no grant of permanent and special tax exemptions to judges qua judges, or cushion them against tax.
39. The SRC maintains that at the time it undertook the review of Judges' remuneration and benefits in 2014, 2017 and 2018, it was not made aware of any additional remuneration or benefit available to judges. It only became aware of the circulars conferring the benefit in 2021.



40. SRC admits the revocation of the benefit, but states that the Head of Public Service merely communicated its decision that the allowance had been terminated in July 2021. On January 16, 2023, the Principal Secretary, Ministry of Public Service Gender and Affirmative Action also confirmed to Chief Registrar of the Judiciary, (CRJ), that the benefit was no longer available. It is the SRC's position that it only learnt of the existence of the benefit from the JSC on February 7, 2023. The SRC was emphatic that it had constitutional mandate to revoke the benefit.
41. According to the SRC, the benefit adversely impacted the affordability and fiscal sustainability of the public wage bill; resulting in inequity, disparity in benefits to state officers and, therefore, had to be revoked. The SRC maintains that the benefit amounts to double compensation in view of the fact that Judges have official transport.
42. The SRC takes the position, that it has set official transport in form of motor vehicles purchased and maintained by the government for use by the state officer; or official transport in form of motor vehicle reimbursements, car maintenance allowance and mileage reimbursement; or commuter/ transport allowance for those without official transport. With regard to officers within the executive and constitutional commissions and independent offices, the state officers are provided with official transport. The SRC has also set a car loan benefit at an interest of 3% per annum for all State officers, including Judges.
43. Responding to the claim that other state officers receive car grant, the SRC states that members of Parliament and county assemblies are provided with official transport in the form of motor vehicle reimbursement, car maintenance and mileage claims to ensure that they can purchase and maintain cars for official use due to the nature of their responsibilities. The SRC asserts that on July 1, 2011, the Ministry of Finance recommended that the Judiciary establish a car loan scheme where individual judges would own and maintain their own vehicles.
44. On the possible challenges regarding vehicle repairs and delays in issuing official vehicles to new judges on appointment, the SRC argues that it advised the JSC on May 17, 2019 to facilitate judicial officers to perform their duties within the prevailing transport policy that conforms to prudent financial management. The SRC further states that it advised the JSC that it could hire and lease vehicles in consultation with the government agencies as an interim measure while waiting for official vehicles to ensure efficient use of public resources.
45. According to the SRC, it has provided for transport benefits as follows: Official transport in the form of a motor vehicle purchased and maintained by the government for the use by the state officer or; official transport in the form of motor vehicle reimbursement, car maintenance allowance and mileage reimbursement or; commuter/ transport allowance.
46. On the basis of the foregoing, the SRC maintains that the benefit was illegal and could not enjoy protection under article 160(4) of the Constitution. The SRC further maintains that by dint of article 249(2)(b) of the Constitution, it is only subject to the Constitution and the law, thus the benefit conferred to state officers on July 7, 2011 by the Head of Public Service and the subsequent reviews of 2015 and 2018 amounted to usurpation of its mandate.
47. During the oral highlighting of submissions, the SRC posited that the communication that purported to enhance the taxable car allowance to Kshs 2m and then to Kshs 5m and finally to Kshs 10m was not copied to them and there is a possibility that it was not aware. When it got to know about this benefit, it requested that the letters be revoked on grounds that the benefit was illegally conferred; amounts to a double benefit; is not affordable or sustainable and is not enjoyed by other state officers.



48. The SRC maintains that it continues to discharge its mandate, and with regard to the judiciary, it reviewed remuneration and benefits as per circular dated as June 10, 2023. The effect being that salaries structure before that date ceased to exist. The SRC asserts that if the petition is allowed, judges will get double benefits one of which was conferred by the Head of Public Service. The SRC maintains that it did not set the benefit; it is unclear how much the benefit was on the effective date and it is only after it has set the benefit that such benefit cannot be altered under article 160(4).
49. Regarding the AG's opinion, the SRC admits that the opinion was wrong in supporting payment of the benefit to judges in office on the effective date.
50. SRC relies on the following decisions; *Parliamentary Service Commission & v Salaries and Remuneration Commission; Attorney General & 3 others* [2018] eKLR (on constitutional mandate of SRC); *Mohammed Abduba Dida v Debate Media Limited & Anor* [2018] eKLR (on discrimination) and *Parliamentary Service Commission & 4 others v Salaries and Remuneration Commission and 7 others* [2021] KECA 234(KLR) (December 3, 2021) (Ruling) (on constitutional mandate.)
51. According to the SRC, the petition should fail for two reasons: firstly, Judges cannot enjoy a benefit that was unconstitutionally conferred. Secondly, the declarations sought are intended to sanitize the actions of the Head of Public Service.

1ST Interested Party's Case

52. In response to the preliminary objection, KJWA contends that the petition does not violate article 162(2)(a) since the crux of the petition is not a dispute arising out of an employer-employee relationship, but one arising out of various violations of the provisions of the Constitution.
53. KJWA supports the petition through a replying affidavit sworn on September 5, 2023. It confirms that the taxable car allowance is one of the benefits that judges have been enjoying and was in place before the effective date. KJWA asserts that the benefit was preserved by sections 6 and 32 of the sixth schedule to the current Constitution, thus the SRC cannot vary or terminate the benefit to the disadvantage of the Judges as this is a violation of article 160(4) of the *Constitution*.
54. Section 6 provides that, "Except to the extent this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national Government or the Republic under this Constitution."
55. It is also KJWA's case, that the benefit was revoked without taking into account the principle of transparency and fairness in that judges were neither consulted nor given notice of the intended revocation. The effect of the revocation is that judges appointed prior to the effective date would continue to enjoy the benefit while those appointed after the effective date would not resulting into unfair discrimination, a violation of article 27 and 41 of the *Constitution*.
56. KJWA submits that the purported scrapping of the benefit is a threat to the independence of the judiciary. It relies on the decision of *Sollo Nzuki v Salaries and Remuneration Commission & 2 others* [2019] eKLR.
57. Regarding the AG's opinion, KJWA contends that the AG failed in its constitutional obligation to uphold the rule of law and protect public interest. KJWA cites the decision in *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties)* (Petition 206 of 2020) [2021] KEHC 442 (KLR) (Constitutional and Human Rights) in support of its position.



58. KJWA further asserts that the SRC acted in bad faith and malice by arbitrarily terminating the benefit without any prior consultations. It relies on the decision in *Kenya County Government Workers' Union v County Government of Nyeri & another* [2015] eKLR.

2nd Interested Party's Case

59. The JSC also supports the petition through a replying affidavit by Anne Amadi, the CRJ sworn on October 19, 2023. The JSC states that the letter by the SRC dated July 12, 2021 terminating the benefit violated the provisions of articles 47(1), 160(4) and 172(1) of the *Constitution*, is invalid and should be declared null and void.
60. The JSC points out that the repealed Constitution provided for remuneration of certain constitutional office holders, including judges, whose salaries and benefits were to be prescribed by or under the *Constitutional Offices (Remuneration) Act*. Section 104 (5) provided for the Constitutional Office holders, section 104(2) provided that salaries and benefits of the constitutional office holders were to be a charge on the Consolidated Fund, while section 104(3) provided that the salary payable to those constitutional office holders and their terms of service were not to be altered to their disadvantage.
61. The JSC contends that section 2 of the Act as read together with the Schedule to the Act, prescribed the salary scale that the different constitutional office holders were entitled to. The Act also allowed the President to grant other benefits to the constitutional office holders as he deemed fit. The Act has not been repealed.
62. According to the JSC, article 172 of the current Constitution sets out its mandate while article 160 affirms the independence of the Judiciary. Articles 171(1), 172(1), 172(1)(b) and 172(1)(e) are clear that the JSC is to set terms and conditions of service for judges and judicial officers other than their remuneration. The JSC maintains, therefore, that the constitutional intent is clear that the SRC is to only review remuneration of judges and other judicial officers.
63. The JSC cites article 160(4) of the *Constitution* and section 6 of the Sixth Schedule to the Constitution to argue that the benefit of a duty-free car grant that existed prior to the effective date was a benefit to judges. It was changed to taxable car allowance to conform with the current Constitution even before the SRC was established. The Head of Public Service did not, therefore, usurp the SRC's mandate or functions.
64. The JSC asserts that section 6 of the Sixth Schedule to the *Constitution* retained all rights, duties and obligations of the government, however arising, which were to continue as obligations under the new Constitution. For that reason, the benefit has been enjoyed by judges under both the repealed Constitution and the current Constitution.
65. The JSC further argues that section 32 of the sixth schedule to the *Constitution* safeguards the interest of constitutional officeholders appointed under the retired Constitution, including terms of their pensions, gratuities and other benefits. It is the case of the JSC, that the transitional clause in section 32 of the sixth schedule to the *Constitution* mirrors what existed under section 104(3) of the *retired Constitution*, thus the decision by the SRC to withdraw the benefit is a violation of article 160(4) and an interference with the independence of the Judiciary.
66. Regarding the AG's opinion dated May 22, 2023 to the SRC, the JSC takes the position that the opinion was correct to the extent only, that the allowance was a benefit available to judges before the effective date. The suggestion that the benefit could be paid only to judges appointed before the effective date was, however, erroneous. Similarly, the SRC's decision to terminate the benefit violated the Judges' legitimate expectation to continue enjoying a benefit attached to their office.



67. The JSC rejects the contention by the SRC that it conducted stakeholders' engagement with the Judiciary in line with article 259(11) of the Constitution and regulations 12 and 13(2) of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations.
68. In response to the preliminary objection, the JSC submits that it is misconceived, bad in law and should be struck out. The JSC asserts that the dispute does not stem from an employer-employee relationship, and that the petition raises fundamental issues on the interpretation of the Constitution.
69. The JSC submits that section 104 of the Retired Constitution was the framework on which the benefit was anchored; the salaries and benefits paid to constitutional office holders then was a charge on the Consolidated Fund and was, thus constitutionally protected as were other terms of service for judges.
70. The JSC argues that the current Constitution gave the judiciary special recognition and introduced new features such as vetting of judges, removal of the Chief Justice and changed the retirement age for judges-(sections 23 and 24, Part 5 sixth schedule to the Constitution). The JSC contends, therefore, that if the intention of the framers of the Constitution was to remove any benefits paid to judges prior to the effective date, such an intention would have found its place in the Constitution.
71. The JSC asserts that article 160(3) replicates section 104 (2) of the repealed Constitution that remuneration and benefits of judges is a charge on the Consolidated Fund, while article 160(4) is clear that remuneration and benefits for judges cannot be altered to the disadvantage of the judge, just as was section 104(3) of the repealed Constitution. The JSC relies on the decision in Sollo Nzuki v Salaries and Remuneration Commission & 2 Others (Supra) and Jonathan Munene vs Attorney General & 2 others; Kenya Judges Welfare Association (Interested Party) [2021] eKLR.
72. The JSC further cites the 2015 Publication of the British Institute of International and Comparative Law, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A compendium and Analysis of Best Practice (at page xix) which states that "judicial salaries and benefits should be set by an independent body and their value should be maintained."
73. The JSC contends that its mandate under article 172(6) is to promote the independence of the judiciary and to review and make recommendations on conditions of service within the judiciary, other than remuneration. The JSC takes the view, therefore, that it has the sole mandate to review conditions of service in the judiciary, while the SRC is left with review of remuneration, but not benefits. This, the JSC argues, was intended to avoid a clash of mandate between the two organs.
74. It is the case of the JSC, that if the action by the SRC is allowed, it would also introduce discrimination and unfair labour practices, a violation of articles 27 and 41 of the Constitution, since section 104 of the retired Constitution set the framework for the benefit, so that salaries and benefits paid to constitutional office holders was a charge on the Consolidated Fund. The benefits paid to judges are not pegged on the date of appointment but the constitutional office held.
75. The JSC further relies on the following decisions to bolster its case; Republic v Karisa Chengo & 2 others [2017] eKLR; Public Service Commission & 4others v Cheruiyot & 20 Others (Civil Appeal 119 & 139 of 2017) (Consolidated) [2s022] eKLR; and National Social Security Fund Board of Trustees vs Kenya Tea Growers Association & 14 others [2023] eKLR, among others.

Analysis and Determination

76. Upon considering the pleadings, responses and arguments by parties, we have distilled the following issues for determination:
1. Whether this court has jurisdiction



2. Whether the taxable car allowance is a benefit to judges
3. Depending on the answer to issue 2 above, whether termination of the allowance contravened article 160(4) of the *Constitution*.

Jurisdiction

77. The AG has challenged this court's jurisdiction to hear and determine the petition. The argument is that the gravamen of the petition relates to employer-employee relationship and for that reason, the proper court to hear the petition is the ELRC under article 162(2) of the *Constitution*. The SRC supports the Preliminary Objection.
78. Mr. Gachuiiri, KJWA and the JSC on the other hand, maintain that there is no employer-employee relationship, and that the petition raises various constitutional issues, thus the petition falls within the Jurisdiction of this court.
79. The preliminary objection attacks this court's jurisdiction to hear this petition. The main argument is that the petition falls within the jurisdiction of the ELRC by virtue of the issues raised therein.
80. We have considered the arguments by the parties in support of their respective positions on this issue. Jurisdiction is what gives a court power or authority to hear and determine a dispute presented before it. Where doubt is raised regarding the jurisdiction of the court to hear a matter, it is a threshold question. The court has to carefully weigh the objection and determine the fundamental question whether it has or does not have jurisdiction over the matter. If the court determines that it has no jurisdiction to hear a matter, it should not take any further step. It must down its tools as that is the end of that matter. (See *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR).
81. In *Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, the Supreme Court stated:
 - (68) A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... without jurisdiction, the court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.
82. *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011 [2011] eKLR, after referring to the Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited(supra), the Supreme Court stated:

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.
83. Article 162(2)(a) required Parliament to establish courts with equal status to the High Court to hear and determine disputes relating to Employment and Labour Relations. Parliament enacted *Employment and Labour Relations Court Act* No 20 of 2011, establishing the ELRC under section 4. Section 12 of the Act, provides for the jurisdiction of the ELRC which has exclusive, original and



appellate jurisdiction to determine all disputes referred to it in accordance with article 162(2) of the Constitution, the provisions of the Act, and any other written law that extends jurisdiction to that court.

84. The jurisdiction of the ELRC is on:
- a. disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade union's organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.
85. From a reading of the Constitution and section 12 of the ELRC Act, the core jurisdiction of the ELRC is to determine disputes that arise out of the employer-employee relationship.
86. On the other hand, the jurisdiction of this court is donated by article 165(3) of the constitution. This court has the jurisdiction to hear among others, (d) any question respecting the interpretation of this Constitution including the determination of—(i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (emphasis).
87. The import of article 165(3), is to authorise the High Court to decide all matters other than those reserved for other courts as contemplated in article 162(2) and as restricted by article 165(6). The sweep of the constitutional authorisation given to the High Court cannot be lightly taken and should not be easily give up. That is; this court has wide jurisdiction to hear and determine various matters that may be brought before it. The question of whether or not this court has jurisdiction to hear and determine the petition must, therefore, be viewed through the lens of article 165(3)(d)(ii).
88. The petition, in the main, challenges the constitutionality of the SRC's action to terminate the benefit. Looking at the totality of the issues raised in this petition, we cannot trace employer-employee relationship. The case is not against the Judiciary as the employer of Judges, but centres on whether the SRC's action is inconsistent with, or in contravention of, the Constitution. In that respect, we find and hold that the issues raised in the petition fall within the ambit of article 165(3)(d)(ii) and, therefore this court has jurisdiction.
89. The AG has raised another preliminary issue challenging the competence of the petition, which we find appropriate to address at this point. At grounds 5, 6 and 7, the AG attacks the competence of the petition on the basis that the documents referred to in paragraphs 4,5 and 9 of the supporting affidavit are not attached contrary to section 64 and 65 of the Evidence Act. Further, that the affidavit does not disclose the source of information in contravention of order 19 rule 3 of the Civil Procedure Rules which makes the affidavit and the matters deponed therein inadmissible.



90. We have considered this argument against the import of rule 11(1) and (2) of the *Constitutional and Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules*, 2013 (Mutunga Rules). Under this rule, it is not mandatory that a petition be supported by an affidavit except where a party relies on the documents. A reading of the petition and the responses yields the view, that the facts of the case as pleaded and responded to are not disputed. What is in dispute is the constitutionality of the impugned action (termination of the benefit).
91. We take cognisance of article 22(3)(d) of the *Constitution* under which the Mutunga Rules were formulated, that while observing the rules of natural justice, the court is not to be unreasonably restricted by procedural technicalities. This is also emphasised in article 159(2)(d). We, therefore, find that the petition as pleaded, raises clear constitutional issues for determination and is, thus competent.
92. The AG again contends that the opinion dated May 22, 2023 is privileged communication under sections 134 and 137 of the *Evidence Act* and section 6 of the *Access to Information Act*. We find no merit in that submission. First; because, the AG is a public office which advises all government institutions and state organs. It does not also represent the SRC in these proceedings. The nature of that opinion was to enable the SRC determine the legality of the action it had taken. Finally, and most importantly, the SRC as the recipient, has placed the same document before this court, thus there is no dispute to the existent of the opinion or its contents.

Whether the allowance is a benefit to judges

93. This issue calls for interpretation of the Constitution. For this reason, it is important to briefly consider the principles that guide courts when interpreting the Constitution.
94. Article 259 provides how the constitution should be interpreted. *In Re the Matter of the Interim Independent Electoral and Boundaries Commission*, Application No 2 of 2011, [2011] eKLR the Supreme Court addressed itself on article 259(1) as follows;
- In Article 259(1) the *Constitution* lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that-(a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; and (c) contributes to good governance.
95. In *Communication Commission of Kenya v Royal Media Services and 5 others* [2014] eKLR, the Supreme Court observed that “the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.”
96. The Constitution should be holistically, purposively and liberally interpreted so as to advance its purposes, give effect to its intents and illuminates its contents. In this respect, the Supreme Court stated in *Re the Speaker of the Senate & another v Attorney General & 4 others* – Supreme Court Advisory Opinion No 2 of 2013 [2013] eKLR:
- [156]...Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship.



97. The people of Kenya adopted a transformative Constitution that radically changed not only the structure, but also governance of the country. This requires the court to take into account that structure in its interpretation and give effect to the aspirations of the people.
98. *In Re, the Matter of the Speaker of the Senate & another v Attorney General & 4 others (supra)*, the Supreme Court again stated:
- (51) Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on.
99. The Constitution should also be interpreted as an integrated whole, each provision supporting and not destroying the other. In this regard, the Supreme Court stated in *Katiba Institute v Attorney General & 9 others* (Petition 17 of 2020) [2023] KESC 47 (KLR) (16 June 2023) (Judgment):
- (66) To understand the import and tenor of a provision of the Constitution, the entire Constitution has to be read as an integrated whole, because the Constitution embodies certain fundamental values and principles which require that its provisions be construed broadly, liberally and purposely to give effect to those values and principles.
100. In the same vein, the Constitutional Court of Uganda stated in *Tinyefuze v Attorney General of Uganda* [1997] UGCC3:
- 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.
101. The principle laid down in the decisions cited above, is that the court should not isolate one provision of the Constitution and interpret it singularly. This may give a distorted interpretation, thus lose the meaning the people intended. When interpreting the Constitution, the court must take into account both the context of the provision, including its history, and use text to give effect to that context. That is, the court must take into account both the letter and spirit of the articles of the Constitution to achieve the intention of the people.
102. In that regard, constitutional provisions must also be interpreted broadly and liberally, avoid a narrow, pedantic or restrictive interpretation that would distort true constitutional intent and bear in mind that the Constitution is an organic document intended to endure. It must be “purposively interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation in the articulations of the values bonding its people and disciplining its government.” (*Government of the Republic of Namibia and another v Cultura* 2000 and another 1994(1) SA 407.)
103. The court has an obligation to remain true to meaning and objects of the Constitution as a living instrument. It is in the light of the above that PN Bhagwati, J, writing for the Supreme Court of India, in *SP Gupta v Union of India & another* 1982 AIR 149; 1982(2) SCR 365, stated on the duty of the court to be faithful to the objects and goals of the constitution as follows:
- We can always find some reason for bending the language of the constitution to our will, if we want, but that would be rewriting the constitution in the guise of interpretation. We must also remember that the constitution is an organic instrument intended to endure and its provisions must be interpreted having



regard to the constitutional objectives and goals and not in the light of how a particular Government may be acting at a given point of time. Judicial response to constitutional interpretation must not suffer from the fault of emotionalism or sentimentalism which is likely to cloud the vision when judges are confronted with issues of monumental importance.

104. With these principles in mind, we turn to consider whether the taxable car allowance is a benefit to the office of judge.
105. Mr Gachuri with whom KJWA and the JSC agree, argues that the benefit existed under section 104(3) of the *retired Constitution* as read with section 2 and the Second Schedule to the *Constitutional Offices (Remuneration) Act*. According to Mr Gachuri the benefit enjoyed under the retired Constitution transitioned into the current Constitution from a duty-free car grant to a taxable car allowance and for that reason, it is a benefit under article 160(4).
106. The AG and the SRC do not contest the fact that the benefit existed under the old constitutional order. Their case is that the benefit expired with the coming into force of the current Constitution. The AG takes a further view, that even if the benefit exists, it is only available to the judges appointed before the effective date.
107. Section 104 of the retired Constitution which fell under chapter, VII headed “Finance”, provided as follows;
 1. There shall be paid to the holders of the offices to which this section applies such salary and such allowances as may be prescribed by or under an Act of Parliament.
 2. The salaries and any allowances payable to the holders of the offices to which this section applies shall be charged upon the Consolidated Fund.
 3. The salary payable to the holder of an office to which this section applies and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment.
 4. When a person’s salary or other terms of service depend upon his option, the salary or terms for which he opts shall, for the purposes of subsection (3), be deemed to be more advantageous to him than any others for which he might have opted.
 5. This section applies to the offices of judge of the High Court, judge of the Court of Appeal, member of the Public Service Commission, member of the Electoral Commission, Attorney-General and Controller and Auditor-General.
108. The office of judge was one of the constitutional offices under the repealed Constitution. Parliament enacted *Constitutional Offices (Remuneration) Act* whose objective was to fix salaries and allowances of persons holding certain constitutional offices. Section 2 of the Act states that; (1) the salaries to be paid to the holders of those offices specified in the first column of the Schedule to the Act, being the offices mentioned in section 104 of the Constitution, were, with effect from the July 1, 2008, to be at the annual salary scales specified in relation to those offices in the second column of that Schedule.
109. There was a proviso to the section that where a salary scale is specified, the holder of the office was to be paid such salary, within the scale, as the President would determine having regard to seniority and difference in skills, workloads and accountabilities attached to the office. The holders of the offices specified in the first column of the Schedule, (including all Judges), were to be paid such allowances as would be determined from time to time by the President.



110. Section 4 stated that nothing contained in the Act was to preclude the payment to the holder of the offices specified in the first column of the Schedule any allowance not determined in accordance with the Act which he was eligible to receive other than or by virtue of the Act. Section 104(3) of the repealed Constitution thus ring fenced judges' salaries and allowances so that their salaries and allowances could not be altered to the disadvantage of the judges while in office.
111. During the repealed constitutional regime, the government introduced an allowance called duty-free car grant to certain cadre of constitutional office holders, including Judges. They were allowed to buy or import vehicles duty free for private use. That means, the benefit existed prior to the effective date. Judges were among the officers who enjoyed this benefit up to the effective date.
112. There is no doubt and, indeed there is consensus among all parties herein, that judges enjoyed this benefit up to the effective date. The point of divergence is whether the benefit transitioned to the present Constitution.
113. In our considered view, the benefit transitioned to the new Constitution. This is borne by the fact that the Constitution abhors a vacuum. This finding is buttressed by sections 6 and 7 of the sixth schedule.
114. Section 6 provides-

Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this Constitution.

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

115. The SRC Act came into force on July 29, 2011 and the first Commissioners of the SRC were appointed on January 10, 2012. On July 7, 2011, before the SRC Act came into force, Amb Francis K Muthaura, Permanent Secretary, Secretary to the Cabinet and Head of Public Service had issued a circular Ref OP.CAB.56/2A, addressed to the Attorney General, Permanent Secretaries/ Accounting Officers, Registrar of the High Court and the Secretary of Public Service Commission.
116. The Circular under reference; Taxable allowances for Purchase of motor vehicles, stated-
- Incompliance with the Constitutional requirement under article 210(3) which prohibits exclusion of state officers from payment of taxes on benefits accruing to state officers by the nature of their work, the earlier provision whereby the government has been paying duty free on vehicles bought for private use by some of the public servants has been removed.
- It has been decided, that in place of the provision for duty free facility a taxable allowance of a maximum of 2 million will be granted to eligible office holders starting July 1, 2011. The following conditions will apply.
- The allowance will be granted every four years on production of documents supporting the purchase of the vehicle. The motor vehicle be purchased must be for personal use, not for commercial purposes.
- Serving officers will qualify for the allowance 4 years after the last vehicle was purchased under the old arrangement.... (emphasis.)



117. We find and hold that the Head of Public Service, aware of sections 6 and 7 of the Sixth Schedule to the *Constitution*, as well as articles 160(4) and 210(3) of the *Constitution*, and in order to obviate a constitutional vacuum, correctly issued the circular referenced above, thereby legally transitioning the benefit from a duty-free car grant under the repealed Constitution to a taxable car allowance, accessible to officers mentioned in the circular, including Judges to conform with the 2010 Constitution.
118. Our finding is buttressed by the decision of Supreme Court in *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* [2014] eKLR (CCK case). In that case, the argument was that the promulgation of the Constitution on the 27th of August, 2010 immediately rendered Communication Commission of Kenya (CCK) and all its actions thereafter unconstitutional. The Supreme Court rejected that argument holding:
- [206] ...The transition Chapter and clauses in the Constitution are meant not only to ensure harmonious flow from the old to the new order, but also to preserve the Constitution itself, by ensuring that the rule of law does not collapse owing to disruptions arising from a vacuum in the juridical order. Unless it is demonstrated that the legislation establishing CCK was incapable of being construed with the necessary alterations and exceptions, so as to bring it into conformity with the Constitution, pending the three-year legislative intervention, it would be improper in law and in principle, to declare CCK unconstitutional.
119. In the same vein, the argument by the AG and the SRC that the benefit ceased to exist on the effective date and did not transit into the new Constitution, is devoid of merit given that the benefit (to judges) was ring fenced by section 104(3) of the *retired Constitution* and could not be taken away to the disadvantage of Judges contrary to article 160(4) of the current *Constitution*.
120. In the circumstances, we have no difficulty in finding, which we hereby do, that the taxable car allowance is a benefit to Judges. We must also state that the allowance is a benefit attaching to the office of judge to be enjoyed by the holder of that office on appointment and not to an individual judge as argued by the AG. This is because article 160(2) protects the office of Judge of superior courts so that the office cannot be abolished while there is a substantive holder thereof. The benefit is enjoyed by virtue of holding the office and, therefore, the benefit is to the office.
121. This view finds support in the persuasive decision of the Supreme Court of Uganda in *Attorney General of the Republic of Uganda v Masalu Musene Wilson & ors* [2008] UGSC 13 (14 October 2008) where the court observed that when a law refers “a justice of the High Court” it can only mean that any person holding that office is affected. The law thus applies to judges as a class irrespective of whether they were in office when the law was enacted. What the government did was to extend a special privilege to judges by introducing a new term of service. The new term of service was in effect at the coming into force of the 1995 Constitution.
122. Having determined that the allowance is a benefit to the office of judge, the next issue is whether termination of the allowance contravened article 160(4) of the *Constitution*.

Whether termination of the benefit contravened Article 160(4) of the Constitution

123. Mr Gachuri argues that termination of the benefit violated article 160(4) and amounts to interference with the independence of the Judiciary. This position is supported by KJWA and the JSC. The AG and the SRC take the opposite position, arguing that the promulgation of the *2010 Constitution* brought in a different constitutional architecture and everybody is bound by this architectural design. The benefit was, thus abolished by constitutional operation.



124. SRC further asserts that under the 2010 Constitution, it has exclusive mandate to set and regularly review remuneration and benefits for all state officers. Accordingly, the action by the Head of Public Service to confer the benefit was a usurpation of its mandate.
125. We have already held that the taxable car allowance is a benefit to Judges. Any question regarding its termination must, therefore, be considered against article 160 generally and article 160(4) in particular.
126. The scheme of article 160 is to protect the independence of the judiciary. Judicial independence means shielding the Judiciary and judges from external interference by the political branches (Executive and Legislative power) and any other non-judicial actor in the discharge of its mandate to adjudicate on disputes presented before it.
127. Judicial independence is critical for maintaining judges' impartiality in determining disputes before them, thus promoting the rule of law, democracy and constitutionalism. For Judicial independence to thrive, institutional and individual judges' independence must be secured from both internal and external actors. For this reason, institutional, legal and operational arrangements are put in place, designed to safeguard this independence.
128. Justice Aharon Barak at Page 80 of his book A Judge in a Democracy, quoted Chief Justice Lamer of the Supreme Court of Canada who stated:

Judicial independence is essential for fair and just dispute resolution in individual cases. It is also the life blood of constitutionalism in democratic societies. Without Judicial independence there is no preservation of democracy and its values

Institutional independence is designed to build a protective wall around judicial branch that prevents the legislative and executive branches from influencing the way judges realise their roles as protectors of the constitution and its values. The judicial branch must therefore be run, on the organisational level in an independent manner. It should not be part of the executive branch and not be subject to administrative decisions of the executive branch.

129. In Zambia, the Constitutional Court of Zambia stated in Sangwa v Attorney General & Law Society of Zambia CCZ/0012) [2023] ZMCC 6 (31 July 2023) [2023] ZMCC 6:

(47) ...We are alive to the fact that the concept of judicial independence is broad and has two main facets namely, independence of the individual judges which includes issues of appointment, security of tenure, removal procedure and remuneration, among others, and the independence of the Judiciary as a State organ.

(49) It is thus not in doubt that both aspects of individual and institutional independence are cardinal to ensure judicial independence.

130. In Attorney General of the Republic of Uganda v Masalu Musene Wilson & ors (supra), the Supreme Court of Uganda had the following to say on judicial independence:

We agree that article 128(7) is meant to be a pillar for the independence of the judiciary. The need for the judicial officers to be well compensated to be able to uphold their judicial independence cannot be overstated. We agree with Mpagi- Bahigene JA when she states in her judgment:

‘the underlying principle in the entire article 128 is the issue of judicial independence and security of tenure, the latter being among the traditional



safeguards of the former. This means among other things that the term of office, emoluments and other conditions of service of judicial officers generally shall not be varied or altered to their detriment or disadvantage. This is an elementary safeguard to be found in most developed legal systems where it took many historic struggles to establish on a firm footing as the most fundamental of all safeguards to judicial officers' security of tenure. When this safeguard is destroyed by whittling away the provisions of article 128(7) and judicial officers are put at the sufferance of the executive or the whims of the legislature, the independence of the judiciary is the first victim. The rationale under article 128(7) is that there should be adequate salaries and pensions for judicial officers commensurable with their status, dignity and responsibility of their office.'

131. Article 160 of the *Constitution* is designed to protect both institutional and individual judges' independence. In that respect, article 160 provides:
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 person or authority.
 2. The office of a judge of a superior court shall not be abolished while there is a substantive holder of the office.
 - (3) The remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund.
 - (4) Subject to article 168(6), the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge. (emphasis).
132. Article 160, thus protects both institutional independence of the judiciary and the independence of office of judge, a key feature in maintaining the rule of law, a founding value of our nation and a constitutional imperative in a democratic state.
133. Article 160(1) demands that the judiciary acts only in accordance with the *Constitution* and the law and should not be under the control or direction of any person or authority. This is institutional protection from non-institutional actors such as the executive and legislative branches of government and other non-state actors.
134. Article 160(2) protects the office of judge so that the office cannot be abolished while the holder is in office, while article 160(3) ensures that remuneration and benefits payable to judges is a charge on the Consolidated Fund. This guarantees remuneration and benefits payable to the judge while in office so that judges' remuneration and benefits are available when due to enable them meet their financial obligations and avoid financial embarrassment. In the same vein, article 160(4) protects remuneration and benefits payable to judges from arbitrary withdrawal or diminution to the disadvantage of the judge.
135. The protection envisaged under article 160 guarantees the independence of the judiciary and the office of judge in the discharge of their functions and duties. The question that we must answer, is whether the action by SRC to withdraw, or better still, revoke the taxable car allowance is a violation of article 160(4) of the *Constitution*.



136. On July 12, 2021, the SRC wrote to Dr. Joseph Kinyua, EGH, Head of the Public Service, Executive Office of the President letter reference SRC/TS/CHMLS/3/13 (117) captioned; taxable car allowance for the purchase of motor vehicles. The letter referred to circulars Ref numbers OP/CAB/.56/2A dated July 7, 2011; OP/ CAB 56/2A dated June 2, 2015 and OP/CAB.56/2A dated June 4, 2018.
137. After drawing his attention to its mandate under article 230 of the *Constitution* and article 230(4), the SRC stated that whereas prior to the promulgation of the Constitution of Kenya, by dint of the repealed Constitution and relevant statute, constitutional office holders were paid remuneration and benefits, determined by the executive and other officials, this changed with the new Constitution which gave it (the SRC) that mandate.
138. The SRC further stated that it had come to its attention that by a circular dated July 7, 2011, the Head of Public Service awarded a taxable car allowance for purchase of motor vehicles to several offices, including judges. These were subsequently reviewed on June 2, 2015 and June 4, 2018.
139. The SRC then stated; “the purpose of this letter therefore, is to request your esteemed office to revoke the circulars in question to wit, circulars Ref, OP/CAB/.56/2A dated July 7, 2011, OP/ CAB. 56/2A dated June 2, 2015 and OP/ CAB.56/2A dated June 4, 2018. Kindly note that the applicable remuneration and benefits for state officers is as set by the SRC.”
140. On January 16, 2023, in a letter captioned, ‘Request for Taxable Allowance to Purchase Motor Vehicle’, the Principal Secretary, Ministry of Public Service, Gender and Affirmative Action, State Department of Public Service, Mr Amos N Gathecha, EBS, wrote to the CRJ informing her of the SRC’s decision as follows, “The Salaries and Remuneration (SRC) Commission has terminated this benefit from July last year. We have tried to engage SRC to reverse this decision but all in vain. This explains the reason we have taken long to respond to this. Meanwhile, the benefit is not available but we are still engaged in discussions. Kindly advise the applicants accordingly. Attached are copies of letters from SRC for ease of reference.”

SRC did not provide to the court the letters that were attached to that communication.

141. On February 7, 2023, the CRJ wrote to the SRC under subject; “Taxable Allowance for Purchase of Motor Vehicles” stating-

We kindly seek confirmation that the referenced circular dated July 12, 2021 does not apply to Judges. (emphasis)

It is not clear to the court whether the SRC responded to this letter.

142. Mr Gachui argues that the letter dated July 12, 2021 purporting to terminate the benefit is in violation of article 160(4) of the *Constitution* and an affront to the independence of the Judiciary. This position is supported by KJWA and the JSC.
143. The AG and SRC hold the contrary view. The SRC maintains that under article 230(4) of the *Constitution*, it is the body that has the exclusive mandate to set and review the benefit and it acted within its mandate in terminating the benefit.
144. We have considered the trail of communication between the SRC, Head of Public Service and the JSC over this issue. It is not clear to us whether the Head of Public Service acceded to the SRC’s request to revoke the circulars. This emerges clearly from the communication dated January 16, 2023 from Principal Secretary, Ministry of Public Service, Gender and Affirmative Action, State Department of Public Service, Mr Amos N Gathecha EBS, being his response to communication from the CRJ,



indicating that whereas the benefit was not available, they were “still engaged in discussions with the SRC over the issue.”

145. Given the inconclusive nature of the communication, the CRJ wrote to the SRC on February 7, 2023 seeking clarification. It is again not clear to us whether the SRC responded to that letter. Even with no conclusive decision on the matter, it would, however, appear that it was taken that the benefit had been ‘terminated’.
146. We have carefully considered the parties’ arguments on this issue. We have already determined on issue (iI), that the allowance was a benefit to the office of Judge. We must therefore point out that constitutional provisions must be read in harmony. In this regard, article 230(4) which mandates the SRC to set and regularly review the remuneration and benefits must be read alongside article 160(4) which ring fences benefits to the office of judge to bring them into harmony. It is, therefore, a misapprehension on the part of the SRC to read article 230(4) in isolation of article 160(4) where a benefit is already available to the judges.
147. The principle of constitutional harmonisation was well articulated by the Supreme Court *in the Matter of the Kenya National Human Rights Commission*, Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR, where the Supreme Court stated that a Constitution should be holistically and contextually interpreted, reading and analysing, one provision, alongside and against the other, 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.
148. This means, therefore, that the SRC’s mandate under article 230(4) to set and regularly review the remuneration and benefits of judges, must be rationalised and harmonised with article 160(4), so that where a benefit has already accrued and is thus ring fenced by article 160(4), that benefit is beyond the reach of the SRC. The benefit can only be reviewed, but not in a manner that is to the disadvantage of the judge.
149. We say this, cognisant that article 160(4) prohibits in no uncertain terms the variation or alteration of an accrued benefit to the disadvantage of a Judge. In this respect, the attempt by the SRC whether as purported by its letter of July 12, 2021, or any other letter to terminate the benefit, is constitutionally impermissible.
150. We are fortified in our finding by the decision in *Sollo Nzuki v Salaries and Remuneration Commission & 2 Others* [2019] eKLR, where the court stated:
- Remuneration of Judges, in my view, is one of the tenets of the independence of the judiciary and that is why the remuneration and benefits payable to, or in respect of a Judge is constitutionally ring fenced and are not to be varied to the disadvantage of the judge and the retirement benefits of a retired judge are not to be varied to the disadvantage of the retired judge during the life time of the retired judge.
151. A similar view was taken in *Jonathan Munene v Attorney General & 2 others; Kenya Judges Welfare Association (interested Party)* [2021] eKLR, that:
- The Constitution is not silent on the ring fencing of the judges on the remuneration and benefits which aims at ensuring that the judges render their services and mandate independently and impartially, free from undue influence or wrong albeit any uncertainties the future may hold. The judicial independence has everything to do with remuneration and benefit of the judges contrary to the assertion by the respondents herein.

We fully associate ourselves with this pronouncement.



152. That is not the end of the matter. The letter dated July 12, 2021 sought revocation of two other circulars; OP/CAB. 56/2A dated June 2, 2015 and OP/ CAB.56/2A dated June 4, 2018. Having upheld the validity of the circular of July 7, 2011 (OP/CAB.56/2A) transitioning the benefit from the retired Constitution to the 2010 Constitution, what then is the fate of the circulars issued in 2015 and 2018, reviewing the taxable car allowance upwards?
153. It is appreciated that at the time the two circulars were issued, the SRC had been constituted. It is also not in dispute that by 2018, the SRC had held several engagements with the JSC over the remuneration and benefits of Judges and Judicial officers. That notwithstanding, the SRC states that the circulars reviewing the taxable car allowance were never brought to its attention. Yet, in the letter dated July 12, 2021, the SRC stated that the existence of the three circulars had “come to its attention” and, therefore, it sought their revocation.
154. Further still, in the affidavit sworn on October 12, 2023 by Anne R Gitau, (the CEO of the SRC), in response to the petition, she deposes at paragraph 36 as follows:
- That upon being informed by the Head of Public Service that SRC had terminated the taxable car allowance, on February 7, 2023, the Judicial Service Commission, wrote to SRC and indicated that the taxable car allowance concerning judges is subject to the protection of article 160 (4) and 250(8) of the Constitution. The 2nd interested party further claimed that the said allowance cannot be withdrawn. This was the first time the judicial service commission brought bare the existence of a benefit that judges have been enjoying unconstitutionally and illegally. (Emphasis).
155. The deposition in the affidavit clearly contradicts the SRC’s position in the letter dated July 12, 2021 where it stated that it was aware of the circulars of 2011, 2015 and 2018, and even mentioned the state officers who were accessing the taxable car allowance, including judges.
156. In any event, a perusal of the two circulars (dated June 2, 2015 and June 4, 2018), shows that they were addressed to, All Principal Secretaries/Accounting Officers; Registrar of the High Court; The Auditor General and the Secretary Public Service Commission. In our view, the circulars were addressed to, among others, all accounting officers who must have included the accounting officer of the SRC.
157. We are, therefore, not persuaded that the SRC only learnt of the existence of the circulars in 2021 and the that judges were accessing the taxable car allowance in 2023. The only conclusion we can make is that the SRC was aware of the two circulars upon their issuance. Consequently, we find that the SRC is not being candid as to when it became aware that judges were accessing the taxable car allowance.

SRC’s inaction

158. There is no dispute that the mandate of the SRC under article 230(4) is, among others, to set and regularly review the remuneration and benefits of all state officers. When the SRC was constituted in 2012, the benefit was already set and in existence following the transition pursuant to the circular dated July 7, 2011 in conformity with article 210(3) as read with article 160(4) and section 6 and 7 of the sixth schedule to the Constitution.
159. At that point the SRC’s duty was limited to reviewing that which was already in place. In spite of this, and being a recipient of the two circulars, the SRC did not protest or assert its mandate in relation to those reviews. It maintained a studious silence and allowed the benefit to accrue and crystallized under article 160(4) of the Constitution, thus has been accessed by judges as reviewed.



160. Our finding is reinforced by the decision of the Supreme Court in Attorney General of the *Republic of Uganda v Masalu Musene Wilson & ors [supra]*. The brief facts of that case were as follows: The Respondents filed a petition before the Constitutional Court of Uganda challenging the imposition of income tax on magistrates' remuneration. The constitutional court allowed the petition, prompting the Attorney General to appeal to the Supreme Court.
161. The Supreme Court reversed the decision of the constitutional court, holding that magistrates were not entitled to a tax exemption. Nevertheless, the Supreme Court in interpreting article 128(7) of the Ugandan Constitution, the equivalent of our article 160(4), stated;
- However, as we have already noted, the appellants and other judicial officers of the rank of Registrar or magistrate have been enjoying the privilege of tax exemption for over three years. The appellant did not apply for stay of execution of the judgment of the constitutional court and the Government has in its wisdom not been taxing the emoluments of the said judicial officers. It would be unconscionable and contrary to the spirit of provisions of article 128(7) of the *Constitution* to remove the tax exemption.
162. In this petition, the SRC's prolonged inaction allowed the benefit to accrue thus became one of the terms and conditions of service for judges. Judges have been appointed since 2011 and have been enjoying this benefit since then. By parity of reasoning, the benefit acquired constitutional protection under article 160(4) and for that reason, the benefit cannot be taken away as this would amount to a variation of Judges' terms and conditions of service to their disadvantage.
163. We therefore find and hold, that the SRC's prolonged inaction coupled with the enjoyment of the benefit by judges for a long period, sanctioned the reviews contained in the two circulars dated June 2, 2015 and June 4, 2018 and the benefit acquired constitutional protection under article 160 (4).

Conclusion

164. Having regard to the foregoing, we now must arrive at the following conclusions;

First, this court has jurisdiction to hear and determine the petition. This is because article 165(3)(d) (ii) of the *Constitution* confers on the court jurisdiction to determine whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of the constitution. The petition challenges the constitutionality of the action taken by the Salaries and Remuneration Commission which had nothing to do with employer-employee relationship.

Second, the taxable car allowance is a benefit to the office of a Judge. It was conferred under the retired Constitution as a duty free car grant which enabled judges to purchase vehicles for private use. The benefit transitioned to the 2010 Constitution by virtue of sections 6 and 7 of the sixth schedule to the Constitution as read with article 210(3) of the *Constitution* as a benefit under article 160(4).

Third, the taxable car allowance benefit and subsequent reviews is ring fenced and protected under article 160(4) of the Constitution and cannot, therefore, be taken away, altered or varied to the disadvantage of judges.

Disposition

In view of our conclusions above, the appropriate orders that commend themselves to us and which we hereby make are as follows:



1. A declaration is hereby issued that the taxable car allowance for purchase of motor vehicles for private use by judges that existed prior to July 12, 2021 constituted a benefit payable to and in respect of judges under article 160(4) of the Constitution and cannot be varied or altered to the disadvantage of judges
2. A declaration is hereby issued that the Salaries and Remuneration Commission's letter dated July 12, 2021 purporting to revoke the taxable car allowance contravenes article 160(4) of the Constitution, is a threat to the independence of the judiciary and is therefore unconstitutional, null and void.
3. An order of certiorari is hereby issued quashing the Salaries and Remuneration Commission's letter dated July 12, 2021 to the extent that it purported to revoke the Taxable Car allowance for Judges.
4. An order is hereby issued compelling the Principal Secretary, National Treasury and Economic Planning to forthwith process and pay, and continue to pay, the taxable car allowance to Judges as and when it falls due.
5. This being a public interest litigation we make no order to costs.

Dated, Signed and Delivered at Nairobi this 24th Day of May, 2024.

E C MWITA

JUDGE

P M NYAUNDI

JUDGE

L. N. MUGAMBI

JUDGE

0	JUDGMENT PETITION NO E304 OF 2023
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