



# DETERMINATIONS: TRANSCRIPTS OF THE FINDING

VOL 2      2014-2016



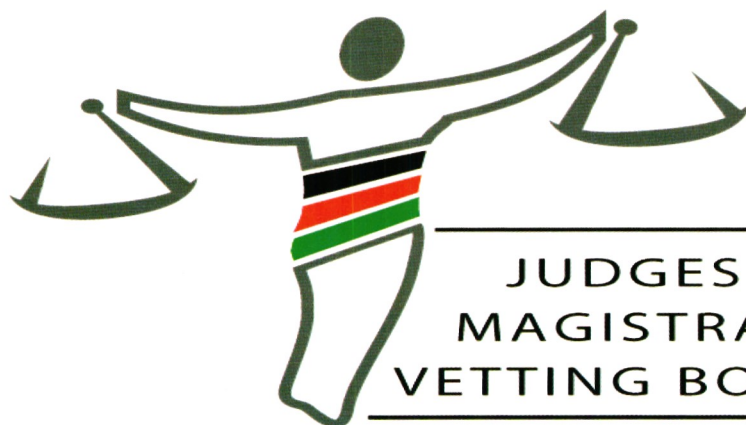
JUDGES AND  
MAGISTRATES  
VETTING BOARD

Restoring Confidence in the Judiciary

# DETERMINATIONS: TRANSCRIPTS OF THE FINDINGS

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VOL 2 2014–2016



JUDGES AND  
MAGISTRATES  
VETTING BOARD

Restoring Confidence in the Judiciary

**JUDGES AND MAGISTRATES VETTING BOARD**

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Professor Ngotho Wa Kariuki (*Chairperson*)  
Roseline Odede  
Justus Munyithya



## CONTENTS

<i>Abbreviations</i> .....	<i>vii</i>
<i>About the Contributors</i> .....	<i>x</i>
<i>Introduction</i> .....	<i>xvi</i>
The Tenth Announcement.....	1
The Eleventh Announcement .....	8
The Twelfth Announcement .....	19
The Thirteenth Announcement.....	32
The Fourteenth Announcement.....	40
The Fifteenth Announcement .....	52
The Sixteenth Announcement .....	68
The Seventeenth Announcement.....	76
The Eighteenth Announcement .....	94
The Nineteenth Announcement .....	99



## ACRONYMS AND ABBREVIATIONS

<b>AFRICOG</b>	The African Centre for Open Governance
<b>ICJ</b>	International Commission of Jurists
<b>KPTJ</b>	The Kenyans for Peace with Truth and Justice
<b>LSK</b>	Law Society of Kenya
<b>JMVB</b>	Judges and Magistrates Vetting Board
<b>VJMA</b>	Vetting of Judges and Magistrates Act
<b>EACC</b>	Ethics and Anti-Corruption Commission
<b>KMJA</b>	Kenya Magistrates and Judges Association
<b>PICK</b>	Party of Independent Candidates Kenya



## ACKNOWLEDGEMENT



The Vetting of Judges and Magistrates Act of 2011, Section 18, identified key public bodies as sources of information on judges and magistrates for use in the vetting process. The key bodies identified for participation in the process were the Law Society of Kenya, Ethics and Anti-Corruption Commission, Advocates Disciplinary Tribunal, Advocates Complaints Commission, Attorney General, Public Commission on Administrative Justice, Kenya National Human Rights Commission, Judicial Service Commission and the National Police Service Commission. The Board reached out to these institutions during the vetting process for information about the judges and magistrates who were vetted. Indeed without the input of the institutions the work of the Board would have been shallow. The Board is eternally thankful to each and every one of these institutions for their commitment to the vetting process.

The Board wishes to thank the individual patriotic Kenyan citizens who brought information on the Judges and magistrates to the Board. The Board would have been rendered toothless without your input.

The Board is especially grateful to the Editorial Sub-committee led by Board member Prof. Ngotho wa Kariuki and staff of the Board led by Ms. Jemimah Keli, Mr. Alex Kiiru and Jane Njoroge for the long hours they put into producing this thematic report. The same gratitude is extended to the Editorial Committee, made up of the Chair, Prof. Ngotho Wa Kariuki; the Vice Chair of the Board, Ms. Roselyne Odede, and Board members Mr. Abdirashid Abdullahi and Mr. Justus Munyithya.

We hereby acknowledge and express our sincere gratitude to the Government of Kenya for its unabated support of the exercise throughout the vetting period. We also are sincerely grateful to the Japan International Co-operation Agency (JICA), The United Nations Development Programme (UNDP) and the Embassy of Netherlands for their active financial support.

The production of this Report was effectively co-ordinated by the CEO's office. We are also indeed grateful to the entire secretariat of the Board for the various input they had in the vetting process.

**REUBEN CHIRCHIR**

*BOARD SECRETARY/CHIEF EXECUTIVE OFFICER*



## BOARD MEMBERS



Mr Sharad Rao

*Chairman*

Sharad Rao is a Barrister at Law of Lincoln's Inn, London. He formerly served as the Deputy Public Prosecutor in the office of the Attorney-General and also on occasions as the Acting Attorney General. He served on the panel of the Iran-US Claims Tribunal at the Hague, an arbitration panel to resolve disputes between Iran and the US. Sharad is Legal Advisor to the Commonwealth Games Federation and is a member of the Court of Arbitration for Sport and has served on the panel of international judges at the ad hoc Court of Arbitration at the Olympic Games in Athens in 2004, Beijing 2008 and London 2012. He is Honorary Legal Adviser to the National Olympic Committee of Kenya and is the Chair of the Centre for Resolution of Sports Disputes established by the National Olympic Committee of Kenya. He is also a member of the Code

of Conduct Committee of the International Cricket Council and a member of the Appeals Committee of the International Basketball Federation. He is the first and only Kenyan on the China International Economic and Trade Arbitration Commission.



Ms Roselyne Odede:

*Vice-Chairperson*

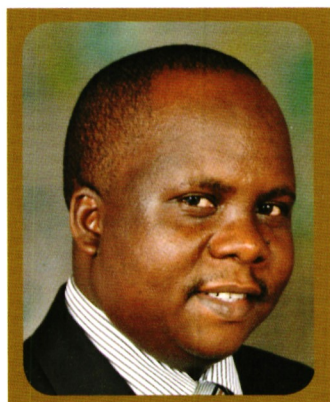
Roseline Odede is an Advocate of the High Court of Kenya with over twenty-five years' experience in private practice and strategic leadership in various professional organizations. She served as a member of the Council of Legal Education where she chaired the Staff Affairs Committee, and sat on the Finance Committee from 2005 to 2011. Roseline was a Council Member of the Law Society of Kenya for close to 10 years, the East Africa Law Society and the Commonwealth Lawyers Association and is currently a Council Member FIDA(K). Roseline is passionate about community service. For over 15 years, she offered *pro bono* legal services for gender and family related issues in the North Rift. Ms Odede was awarded the East Africa Law Society recognition for distinguished legal services and a Head of State Commendation (HSC), Civilian Division, by His Excellency the President for offering *pro bono* legal services. She is also a

founding member and Chair of the Eldoret Hospice Board, a charitable organisation. She is Honorary Legal Counsel for the Kenya Medical Association, Eldoret. Ms Odede holds a Masters degree in Law from Witwatersrand University, South Africa, and an LLB degree from the University of Nairobi. Roseline lectured at Moi University and has undertaken several legal audits and consultancies. She is a certified Member of the Chartered Institute of Arbitrators, and is currently working towards fellowship. She has also taken courses in Project Management, Governance and Management. Roseline strongly believes in giving back to society and is engaged in several charitable activities.



Mr Abdirashid Abdullahi  
*Member*

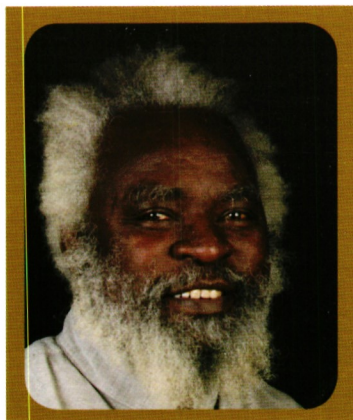
Abdirashid Abullahi Hussein is a conflict resolution practitioner with more than 15 years of experience working in conflict and hostile environments in the Greater Horn of Africa. He has experience in designing and implementing long-term developmental as well as short-term emergency humanitarian projects to mitigate human suffering resulting from conflicts and natural disasters such as drought and floods. Over the years, he has also acquired monitoring and evaluation skills relating to the impact of various projects. Mr Abdirashid served as an expert/member with the Committee of Experts on the Constitutional Review of Kenya that drafted and successfully delivered a new Constitution for the country. Prior to that, he served as a regional co-ordinator for Muslim Aid UK, a humanitarian organisation based in London with programmes in Kenya, Somalia, Sudan and Ethiopia. Abdirashid has a M.Sc. degree in Conflict Analysis and Resolution as well as a MA in African History.



Mr Justus Munyithya  
*Member*

Justus Munyithya is an Advocate of the High Court of Kenya, is a former Vice Chair of the Law Society of Kenya from 2005 to 2008, council member of the Law Society of Kenya from 2005 to 2008 and council member of the Law Society of Kenya from 2010. Justus is a trainer and member of the Kenya Faculty of the Justice Africa Trial Advocacy programme implemented in collaboration with the Washington Law School, Kenya School of Law and Kituo Cha Sheria. He served as a treasurer for the East Africa Law Society from 2003 to 2010. Justus has also served as the chairman of the National Committee on Adoption under the Ministry of Gender, Children and Social Services from 2005 to 2011. Due to his exemplary performance, he was awarded the Head of State Commendation (HSC) for distinguished service by His Excellency the President, Hon. Mwai Kibaki, on 12 December, 2010. Justus is a gazetted sexual and gender-based violence (SGBV) prosecutor on a *pro bono* basis.

He was also the top *pro bono* award winner of The CRADLE children's foundation in 2002. He is a Certified Public Secretary (CPS), a member of the Legal Advisory Committee at Transparency International – Kenya, a member of the Advocacy and Legal Advisory Centre – Mombasa, a mediator and a member of the Chartered Institute of Arbitrators. He holds LLB from UON and LLM (Law Democracy and Good Governance from the University of Nairobi). Justus is also a member of the National NGO Regulatory Committee. He is currently studying towards his 2nd Masters in Human Rights and Development; MA in Human Rights (University of Nairobi). Mr. Munyithya is also a board member at the LSK SACCO and at the Human-Right Agenda, a coast region based NGO.



Professor Ngotho wa Kariuki  
Member

Prof. Ngotho wa Kariuki is a renowned tax specialist and scholar, having taught and consulted on taxation and accounting in many countries in Africa. He is one of the founding members of the Institute of Certified Public Accountants of Kenya (ICPAK), and has authored books on taxation in Kenya, Namibia and recently in Cameroon. He has developed training programmes on Government accounting, auditing and taxation for civil service in Namibia, Zimbabwe, Swaziland, Lesotho and South Africa. Prof. Kariuki is a former Dean of the Faculty of Commerce, University of Nairobi. He is a former Head of Department of Accounting of University of Nairobi, Mutare, Zimbabwe, University of Namibia, and University of Burea. He is a Certified Public Secretary (CPS) Kenya and a Patron of Certified Forensic Investigating Professionals (CFIP), Africa. The Professor was seconded as a Commonwealth Expert/Advisor and Visiting Professor of Finance, Accounting and Taxation to the Government of the Republic of Cameroon, University of Burea. Prof. Ngotho wa Kariuki has been active in the fight for justice and democracy since the 1970s. He was detained without trial for these activities between 1986 and 1988, and was tortured in the Nyayo House torture chambers during the *Mwakenya* crackdown. He was arrested again and charged with treason, later changed to sedition, in the infamous so-called Mutugi's Bar Conspiracy (1990).

The Anyona Four were found guilty on all seven accounts and sentenced to seven years on each account. They were incarcerated at the Naivasha Maximum Security prison. In 1992, after the repeal of section 2A and the return to democracy, they were released on bail pending appeal by Justice Oguk. On appeal, the new Attorney-General did not support the conviction and they were later acquitted. Prof. Kariuki thereafter went out of the country in 1993 and returned in 2011.

Professor Kariuki released two books on his personal experience *Two Weeks in Hell* (Inside Nyayo House torture chambers) and *My Years of Detention*. He is currently working on his memoirs.



Ms Meuledi Iseme  
Member

Ms Meuledi Mabruki Iseme has had a distinguished career in public and private service spanning over 30 years, with several years of experience at senior management level. She holds a Master's degree in Business Administration (Finance Major) and Bachelor of Commerce degree (Accounting Option) both from the University of Nairobi. Prior to being appointed a member of the Judges and Magistrates Board, Meuledi was serving as a Board Member of Kenya Investment Authority and a Member of the KRA Eldoret Local Committee. She has also served as the Deputy Managing Director of Kenya Seed Company, the Industrial Development Bank as a Principal Accountant, and in various ministries. Meuledi has also worked as a private consultant in the areas of SMEs, finance and women empowerment including training. In addition

to her professional qualifications, Meuledi has attended several management and technical workshops, seminars and courses both locally and overseas. Meuledi has also been actively involved in community development, focusing on education and philanthropy. She has been a member and chairperson of several school boards in Trans Nzoia County and an active member of Lions Club, Kitale. Meuledi is a proud mother of four children and a grandmother of two.



**Hon. Justice (Rtd.)  
Barnabas Albert Samatta**  
Member

Justice Barnabas Albert Samatta was the Chief Justice of the United Republic of Tanzania and Chairman of the Judicial Service Commission in 2000-2007. He graduated from the University of East Africa in 1966 with an honours degree in Law. In the same year, he was appointed a State Attorney, rising rapidly to become Senior State Attorney in 1971, and Director of Public Prosecutions in 1972 at the age of 32. He was appointed to the High Court of Tanzania in 1976, and served as a Judge of that Court until 1989. He was also a Judge of the High Court of Zimbabwe from 1984 to 1987. From 1989 he served as Principal Judge of the High Court of Tanzania, until his appointment in 1997 as a Justice of Appeal of Tanzania. He was a Member of the Judicial Service Commission from 1989. In 2000, he was appointed Chief Justice of the United Republic of Tanzania and Chairman of the Judicial Service Commission. Justice Samatta was a member of the Judicial System Review Commission (1974-1977), member of the Legal Task Force (1993-1996), Chairperson of the Appointments Committee (2000-2007), and Vice Chairperson of the Southern African Judges Commission (2005-2007). He is the Chancellor of Mzumbe University, Tanzania. In 2011, a felicitation volume, *Rule of Law vs. Rulers of Law: Justice Barnabas Albert Samatta's Road to Justice*, was published by the School of Law, University of Dar es Salaam, "to celebrate him as an example of an ethical lawyer whose integrity cannot be questioned, making him a worthy model for the younger generation to emulate and draw inspiration from".



**Hon. Justice (Rtd.) Joseph  
Asoka Nihal De Silva**  
Member

Hon Justice (Rtd) Joseph Asoka Nihal De Silva was the Chief Justice of the Democratic Socialist Republic of Sri Lanka and the Chairman of the Judicial Service Commission from 2009-2011. Justice De Silva graduated with an honours degree in Law from the University of Ceylon Colombo in 1971. Thereafter, he graduated as an advocate from the Sri Lanka Law College and was admitted to the roll of Advocates in the year 1972. He joined the Attorney General's Department in 1974 as a State Counsel and was promoted to Senior State Counsel in 1981 and Deputy Solicitor General in 1988. Whilst working in the Attorney General's department, he obtained his Masters degree in Constitutional and Administrative Law from the University of Colombo in 1982.

After 21 years of service in the AG's Department, in 1995 he

was elevated to the Court of Appeal, which is the second highest Court in Sri Lanka, as Judge of that Court. After serving as a Court of Appeal judge for five years he was made the President of that Court and within 8 months he was promoted to the apex Court viz the Supreme Court of Sri Lanka in 2001.

In 2004, Hon Koffi Annan, the Secretary General of the United Nations appointed him as a permanent Judge of the International Court for Rwanda in which capacity he served in Arusha, Tanzania for 4 years. In 2008 he reverted to the Supreme Court of Sri Lanka and was appointed the Chief Justice in 2009. On his retirement, the President sought his services as a Presidential Adviser on International affairs. He served in that capacity for a short period after which he was appointed by His Excellency President Uhuru Kenyatta, the President of the Republic of Kenya, as one of the Commonwealth judges to the Judges and Magistrates Vetting Board.

Justice De Silva has done post graduate courses in the following institutions: International Criminal Justice–University of Illinois, Chicago; 1987-1988; Drafting of Legal and contractual documents–University of London; 1994; Environmental Law–International Development Institute, Rome; 1993 and Judicial Ethics and Anti-corruption Law, I.D.C.I. Sydney, Australia.

Other positions that he has held include: Member of the Council of Legal Education in Sri Lanka; 1982-1994. He has been a Visiting Lecturer on Administrative Law for MBA students at Sri Jayaradefan University, Colombo. He has also been an External Examiner LLB–University of Colombo and a Lecturer on Constitutional Law–Sri Lanka Law College Authority. He served as a Consultant to Environmental Authority in Sri Lanka.

Justice De Silva has represented Sri Lanka at many conferences including; The Sustainable Development Conference in Rio de Janeiro, Brazil and Kenya; 1990-1991, Narco Terrorism Conference in Chicago and Montreal, Canada; 1987-1991, Refugee Law Conference in India and Switzerland, International Trade Law in Jakarta and Sri Lanka National Law conference.



Hon Lady Justice (Rtd.  
DCJ) Alice Mpagi-  
Bahigeine  
*Member*

Hon Lady Justice (Rtd. DCJ) Alice Mpagi-Bahigeine is a retired judge having served as a judge for over 25 years in her country, Uganda. She was born in 1942. She graduated with an LLB degree from University of London (Holborn College of Law) in 1967. She is a Barrister at Law–Gray’s Inn. Lady Justice Alice Mpagi-Bahigeine retired from the Judiciary of Uganda having rose through the ranks to the office of the Deputy Chief Justice. She also served at the Court of Appeal from 1997 before being appointed as acting Supreme Court Judge. She was appointed the Deputy Chief Justice of Uganda in 2009. She handled numerous sensitive cases in Uganda. The Honourable Lady Justice chaired the Committee of Inquiry into the Ministry of Justice (1986) whose recommendations were wholly implemented. She also served in the Committee on Judicial Reform committee where she participated in the implementation of the reforms in the civil procedure rules. The

honourable judge was once a member of the Judicial Training Committee; founder chairperson of FIDA, Uganda in 1972.

Reuben K. Chirchir is the Secretary and Chief Executive Officer, and, therefore, the head of the Secretariat and accounting officer for the Board. Mr. Chirchir is a manager with vast experience having served in various national and regional institutions. Reuben holds an M.Sc. degree (Natural Resource Management) from the University of Edinburgh, a B.Sc. (Biochemistry) from University of Nairobi, and an LLB from University of Huddersfield. Mr. Chirchir is also a registered Environmental Impact Assessment Lead Expert. Prior to joining the Board, Mr Chirchir was a consultant with UNDP supporting the Task Force on Developed Government (TFDG), under the Ministry of Local Government in the development of Devolution Bills and sessional papers. He has also previously worked as the Operations Officer/Deputy Executive Secretary for the Lake Victoria Environmental Management Programme (EPS) where he spearheaded integrated management of environmental resources in the Lake Victoria basin. More recently, he worked for the DANIDA programme and participated in the drafting of National Environment Policy under the Ministry of Environment.

## INTRODUCTION



The Board's mandate is derived from section 23 of the Sixth Schedule to the Constitution, which deals with transitional matters. It provides:

(i) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Articles 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.

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

Parliament duly enacted the Vetting of Judges and Magistrates Act 2011 which came into force on 22nd March, 2011. The Act establishes an independent Board, known as the Judges and Magistrates Vetting Board<sup>1</sup>. Section 23(2) of the Vetting of Judges and Magistrates Act was deleted by the Statute Law (Miscellaneous Amendments) Act 2012 ("the amending Act"), which was signed by the President on the 6th July, 2012, and gazetted on 12th, July 2012. The amending Act inserted the following two subsections in its place:

- (2) The Board shall be divided into three panels for purposes of vetting, and the three panels shall vet the judges simultaneously while the Judicial Service Commission shall vet the Magistrates.
- (3) The vetting process once commenced shall be concluded not later than the 28th February, 2013, and any review of the decision of the Board or of the Judicial Service Commission shall be heard and concluded within the above specified period.

This amendment had the effect of taking away the task of vetting Magistrates from the jurisdiction of the Board. It also removed the internal time frames that had earlier been set for vetting of various judicial officers, as they had been found to be problematic. There was a lot of hue and cry about the intention to remove the vetting of Magistrates from the jurisdiction of the Board from across a section of justice sector players and stakeholders. These provisions were, therefore, further amended on 14th December, 2012. The amendment deleted section 23(2) and (3), and inserted the following new subsections to Sections 7 and 23 of The Vetting of Judges and Magistrates (Amendment) Act No. 43 of 2012;

- (i) 7(2) The Board may for the purposes of vetting Magistrates co-opt such members of the Judicial Service Commission as it considers necessary to its membership provided that such co-opted members are not serving Magistrates.

- (ii) 23(2) The vetting process once commenced shall be concluded not later than 31st December, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.<sup>1</sup>
- (iii) 23(3) despite sub-section (2), the Board shall conclude the process of vetting all Judges, Chief Magistrates and Principal Magistrates not later than 23rd March, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.

These new sub-sections provided that the Board would vet the magistrates, and may for purposes of expediency incorporate members of the Judicial Service Commission into the panels as and when deemed necessary. It also introduced a new internal time frame, by providing that Judicial Officers of the rank of Principal Magistrate and above be vetted on or before 28th March, 2013. The purpose of this was to put pressure on the Board to vet all those officers likely to handle election petitions by the end of March, 2013.

The Board welcomed the reverting of the vetting of magistrates to it, and endeavoured to meet the 28th March deadline with regard to the Judicial Officers of the rank of Principal Magistrate and above.

The Vetting of Judges and Magistrates Act, provides that the Board shall be constituted of three serving or retired non-citizen Commonwealth Judges (the foreign Judges), three lawyers and three non-lawyers.

The Board carries out the vetting in panels of three. Each panel must by law have one foreign Judge, one lawyer and one non-lawyer. The Board had at the beginning of the year 2013 only two foreign Judges. The Board, could not, therefore, constitute three panels. The provision for co-opting from the Judicial Service Commission could not also be employed, as the Judicial Service Commission does not have foreign Judges. The Board was, therefore, forced to work with two panels, and overtasked the two foreign Judges in trying to meet the deadline. The Board put in long hours, and worked round the clock to try and deliver on time, but it proved impossible. By 28th March the Board had only managed to vet 55 of the 184 judicial officers in that category.

As at 1st April 2013, the Board was left with only one foreign Judge whose term was also due to expire on 30th May, 2013. The Board was thus crippled in its operations. The Board had as early as November, 2012 put in request for the early approval of replacements for the three foreign Judges whose terms were expiring. The process requires parliamentary approval. The names were placed before the National Assembly; unfortunately the same was not handled by the time Parliament was prorogued.

The Board thus had to wait till the elections were held and a new National Assembly constituted. The Board engaged the relevant authorities to ensure that the names were placed before the National Assembly, and the replacements Justice Alice Mpagi-Bahigeine former Deputy Chief Justice, Uganda, Justice Barnabas Samatta former Chief Justice, Tanzania and Justice Joseph Asoka De Silva former Chief

1. The Board consists of Sharad Rao as the Chairperson, the Deputy Chairperson, Roselyne Odede and seven other Members, namely Justice Barnabas Samatta from Tanzania, Justice Joseph De Silva from Sri Lanka, Justice Alice Mpagi-Bahigeine from Uganda, Justus Munyithya, Prof. Ngoto wa Kariuki, Meuledi Iseme and Abdirashid Abdullahi.

Justice of Sri Lanka were approved and gazetted on 28th June, 2013 and were able to join the Board on 31st July, 2013 when they took oaths of office.

Fully constituted the Board resumed vetting in full earnest on 22nd July 2013. The Board paused vetting of Judicial Officers of the rank of Principal Magistrate and above due to expiry of the internal time frame, and commenced vetting Judicial Officers of the rank of Senior Resident Magistrate and below. As December 31st, 2013 approached, it heralded the end of the term of the Board, the work however was not complete due to challenges with the appointment of Board members as explained above.

On 5th December, 2013 the National Assembly passed an amendment extending the term of the Board. The amendment was as follows:-

- (i) Section 22 of the principal Act is amended in sub-section (1) by deleting the words “the same panel” and substituting, therefore, the words “a new panel to be constituted by the Chairperson of the Board”.
- (ii) Section 23 of the principal Act is amended:
  - (a) In subsection (1) by deleting the words “a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year” and substituting, therefore, by the words “the period specified by this section”;
  - (b) In subsection (2) by deleting the expression “2013” and substituting, therefore, the expression “2015”;
  - (c) By deleting subsection (3) and substituting, therefore, the following new subsection; Despite the provisions of this section, where the time prescribed lapses while a matter is part-heard before the Board, that time shall be deemed extended to enable a fair and just and timely conclusion of the part-heard matter.

The amendment introduced the requirement that reviews be heard by a new panel and not the panel that conducted the initial interview; it also extended the term of the Board to 31<sup>st</sup> December, 2015. The amendment however overlooked the need to remove the internal time frames that provided that Magistrates of the rank of Principal Magistrate and above be vetted by 28<sup>th</sup> March, 2013. This meant that the Board could continue vetting Magistrates of the rank of Senior Resident Magistrate and below only. The Board continued this in earnest as it pursued an amendment to remove the internal time frame, as the affected Magistrates were greatly affected by their delayed vetting. Most of them missed out on promotions as the Judicial Service Commission required them to undergo vetting before they could be considered.

As at June 2015, the Board had vetted almost all Magistrates of the rank of Senior Resident Magistrate and below, and yet the amendment removing the internal time frame affecting the 131 Principal Magistrates and above had not been effected. The term of the Board was set to end on 31<sup>st</sup> December, 2015. The Board approached the Legal Committee of the National Assembly chaired by Hon. Samuel Chepkonga, and explained the dire situation to them. The National Assembly acted with haste and the amendment was assented to on 31<sup>st</sup> July, 2015 and commenced on 6<sup>th</sup> August, 2015. The amendment provided as follows:

- (i) The Vetting of Judges and Magistrates Act is amended by deleting Section 23(3) and substituting, therefore, the following new subsection;

(3) Where the time prescribed in this Section lapses when the Board has commenced hearing of a matter, but it has not made a determination under Section 21, the time shall be deemed to have been extended until such determination is made, and shall not exceed three months from 31<sup>st</sup> December, 2015.

The Board has worked tirelessly from August 2015, and has completed vetting all Judicial Officers. This volume contains all the determinations in respect to all the Magistrates vetted. The pending review determinations in relation to those found unsuitable in the first instance, shall be published on our website.

The vetting of Magistrates was also affected by litigation. On 7th February, 2014, Kenya Magistrates and Judges Association (KMJA) sought a declaration in the High Court that the Board “cannot lawfully investigate the conduct, acts, omissions and information on the part of a judicial officer arising after the 27th August, 2010”. This date is generally known as the “effective date”, the date on which the *Constitution of Kenya 2010*, was promulgated. The KMJA also argued that as a Constitutional remedy, the High Court read words to that effect into Section 18(1) of the Vetting of Judges and Magistrates Act. It sought a further declaration that any Judge or Magistrate, who had been found unsuitable in respect of his or her conduct after the effective date, be declared to have been subjected to unlawful and unfair treatment.

On 26th March, 2014, the Hon. Justice Ngugi granted the orders sought in the declaration, and affirmed that the Board’s jurisdiction to assess the suitability of Judges and Magistrates who were in office on the date the Constitution came into effect, was confined to matters that arose before the Constitution came into effect.

The Board was aggrieved by the decision, and had to pause the vetting and review applications of all judicial officers likely to be affected by the decision, as it appealed the decision. The Court of Appeal and the Supreme Court both dismissed the appeal and upheld the finding of Justice Ngugi. The Supreme Court rendered its decision on 19th December, 2014 and the Board duly resumed vetting and hearing of the review applications it had paused. An expounded recital of the facts and issues argued in the cases can be found in our eleventh and twelfth announcements herein. The Board lost a whole year in respect of the affected judicial officers awaiting the outcome of this case. Once the decision was made, the Board proceeded with zeal to try and deliver on its mandate by the deadline of 31st December, 2015. The Board has worked tirelessly and put in a lot of extra effort to deliver on its mandate. I commend the team.

## THE TENTH ANNOUNCEMENT

Tenth announcement of determinations pronounced on 31<sup>st</sup> January, 2014.

### INDEX

•	Introduction.....	Para 1
•	Main Issues Arising.....	Para 5
•	Determinations .....	Para 12
•	Conclusion .....	Para 46
1.	Hon. Michael Oduor Kizito .....	Para 13
2.	Hon. Teresia Muthoni Mwangi .....	Para 17
3.	Hon. Hobinson Oigara Onyoni .....	Para 26
4.	Hon. Wilson Kaberia Nkunja.....	Para 35
5.	Hon. Okore Celesa Asis .....	Para 4
6.	Hon. Elizabeth Chepkoech Tanui	
7.	Hon. Christopher Yalwala Ligalaba	
8.	Hon. Faith Karimi Munyi	
9.	Hon. Mburu David Wanjohi	
10.	Hon. Naomi Wairimu	
11.	Hon. Ooko Peter Oduor	
12.	Hon. Richard Kipkemoi Koech	
13.	Hon. Samson Omwenga Ongeru	
14.	Hon. Benson Musyoki Nzakyo	
15.	Hon. Josphat Waititu Gichimu	
16.	Hon. Theresa Bosibori Nyangena	

## INTRODUCTION

1. The *Constitution of Kenya 2010*, and the Vetting of Judges and Magistrates Act 2010, both require the Board to undertake a vetting process that will determine the “suitability” of all the Judges and Magistrates who were in office on 27th August, 2010, the date the Constitution was promulgated.
2. The vetting interview process began on 23rd February, 2011, and to date over 154 judicial officers have been vetted. These are; all the eight Judges of the Court of Appeal, 44 Judges of the High Court and 101 Magistrates. 25 Judicial Officers have been determined unsuitable to continue serving in the Judiciary.
3. This is the tenth announcement of the Board, and it contains the determinations of the Board in relation to 16 Magistrates.
4. The Board is grateful to the National Assembly for amending the Vetting of Judges and Magistrates Act, to extend its term. The Board is now on track to conclude vetting of all judicial officers within its mandate in the period granted.

## MAIN FACTORS ARISING

5. The factors mentioned in the Ninth announcement remain as noted. These are competency, propriety, large bank deposits, poor oral and writing skills and lack of internal independence.
6. In addition, the Board has noted an increase in complaints alleging abuse of office by judicial officers. Some Judicial Officers have used their office and power to harass, intimidate and misuse staff serving under them. In one instance a judicial officer engaged a staff member to run his personal errands at his farm/garden during official working hours. This is deplorable.
7. It is also noted that there is a tendency for Magistrates to hear cases involving Magistrates serving at the same station. This practice must be discouraged as it affects the perception of justice. Indeed, it enhances perceptions of bias. Justice must not be done, but must be seen to be done.
8. The Board notes that several Magistrates are holding positions in “Acting” capacity. The promotions to the “Acting” positions it would seem were fast tracked. Some Magistrates were promoted to the “Acting” position within three months of their previous promotions. They have been holding the “acting” positions for unduly long. The concern however, is that several of the Magistrates in the “Acting” positions are not sufficiently skilled or experienced for the new portfolios, and are found to lack the competency to hold these positions. The Board, therefore, recommends that the Judicial Service Commission re-assess the said positions.
9. The Board also notes that most judicial officers have a challenge maintaining proper financial records. The financial records do not distinguish between business accounts and personal accounts. Few keep proper records and/or file returns with Kenya Revenue Authority regarding their additional income; this affects assessment of their financial probity. In some cases Judicial Officers permit funds belonging to their spouses to be channeled through their personal accounts. Most admit they do not know how to complete the Wealth Declaration Forms.
10. The Board also wishes to point out that there have been several instances when complainants or potential witnesses have been coerced to drop the complaints, or not to appear and testify. Such conduct is unbecoming. The integrity of the involved judicial officers is worrying.
11. The Board overall notes that this group is made up of Judicial Officers who are relatively new in the magistracy, and with effort there is room for improvement.

## DETERMINATION OF SUITABILITY

12. Below are the determinations:

### HONOURABLE MICHAEL ODUOR KIZITO

- UNSUITABLE
  - HANDLED CASE OF FELLOW MAGISTRATE IN SAME STATION
  - PERCEPTIONS OF BIAS/IMPARTIALITY
  - LARGE UNEXPLAINED DEPOSITS
13. The Magistrate at the time of vetting was serving as Principal Magistrate at Makindu Law Courts. A complainant alleged impropriety on the part of the Magistrate, claiming he had handled a case in which a Magistrate at the same station had been sued. The complainant stated that he did not believe justice was done as the case was handled by a colleague of the defendant. The complainant alleged that at one time he saw the Magistrate and the defendant walking together outside the court premises, and they were chatting and laughing.
14. The Magistrate did not appreciate the impropriety of his conduct and stated that he tried the matter with a very open and principled mind. The Board finds the Magistrate's conduct improper.
15. The Board examined the Magistrate's Wealth Declaration Forms, and financial records. The Board finds that the Magistrate failed to make full disclosure of his income and liabilities. There were several large cash and cheque deposits in the Magistrate's bank accounts. The Board having regard to all the documentation provided and answers provided by the Magistrate, finds that the responses are not credible. The Board finds that the Magistrate lacks financial probity.
16. Taking these factors into account, the Board unanimously determines that the HONOURABLE MICHAEL ODUOR KIZITO is NOT SUITABLE to continue serving as a Magistrate.

### HONOURABLE TERESA MUTHONI MWANGI

- UNSUITABLE
  - POOR KNOWLEDGE OF THE LAW
  - DENIED AN ACCUSED RIGHT TO CROSS EXAMINE WITNESSES
  - LACK OF CANDOUR
  - LARGE UNEXPLAINED DEPOSITS
17. The Magistrate was at the time of vetting serving as Principal Magistrate at Wang'uru Law Courts.
18. The Board received six complaints. One complaint related to a criminal trial. The matter went on appeal, and the High Court found that the Magistrate had wrongly convicted the accused person on a lesser charge. The Board engaged the Magistrate on the essential ingredients of the offence of robbery with violence. The Board finds that the Magistrate's appreciation of the law and legal knowledge is wanting.
19. Another complainant alleged that the Magistrate convicted him of a criminal offence yet the arresting officer did not testify. The Magistrate in her response confirms that indeed the arresting officer did not testify, but claims she relied on the testimony of the investigating officer. The Magistrate should be aware of the fundamental principles of law while convicting without the evidence of the arresting officer, and must clearly state the reasons and outline the justification for doing so in the judgment.

20. The third complainant alleged that the Magistrate had compromised his rights under Article 50 and did not afford him a fair trial. The Magistrate denied the allegations and claimed that the complainant's appeal was dismissed.<sup>1</sup> The court record however reveals that the appeal was upheld and the conviction set aside. When asked at the interview whether the appeal had been dismissed, the Magistrate tactfully stated that, "No in this one my appeal was quashed but for very different reasons."<sup>2</sup> The Magistrate is evasive and is being dishonest. The fact that the appeal was quashed for different reasons cannot be equated to a dismissal. The Board was not impressed by the Magistrate's lack of candour.
21. The Board engaged the Magistrate on an accused's rights to cross-examine. The Magistrate had in one instance denied an accused the right to cross-examine two witnesses. At the end of the witnesses evidence, the Magistrate recorded in the proceedings "Time is up, case adjourned, file referred for allocation".<sup>3</sup> The Magistrate failed to appreciate that the right to cross-examine a witness is a fundamental right, and failure to accord an accused the opportunity is a fatal omission. This is a basic principle of law, and the Magistrate's lack of appreciation of such a fundamental right impacts negatively on her competence.
22. The Board finds that the conduct and omissions of the Magistrate are serious, had grave consequences, and compromised the complainant's constitutional right to a fair hearing. The Magistrate appears to have been in a rush to leave Court rather than on delivering justice. The Board finds that the Magistrate lacks diligence and competence, her legal knowledge and appreciation of the law is inadequate.
23. The final complaint alleged that judgment had been outstanding for over two years. The Magistrate attributed the delay to workload. The Board does not find the explanation acceptable. It points to lack of diligence, and disregard for the litigant's rights. The Board has in previous decisions taken a negative view of delayed judgments. The Board finds that the delay herein was inordinate, and that no proper or credible justification has been tendered.
24. The Board examined the Magistrate's wealth declaration forms and financial records. The Board found that there were several large cash deposits that were not well accounted for. The Board gave the Magistrate an opportunity to explain the gaps. The Magistrate swore an affidavit stating that she lends money to her siblings and relatives, and that most of the cash deposits are refunds of monies she had lent to her siblings. The Board did not find the explanation credible. The deposits are for inordinately large amounts and are all in cash.
25. Taking all these factors into account the Board determines that the HONOURABLE TERESA MUTHONI MWANGI is NOT SUITABLE to continue serving as a Magistrate.

### HONOURABLE ROBINSON OIGARA ONYONI

- UNSUITABLE
  - ABUSE OF OFFICE
  - IMPROPRIETY
  - LACK OF GOOD JUDGMENT
  - INCOMPETENCE
  - LARGE UNEXPLAINED DEPOSITS
26. The Magistrate was at the time of vetting serving as Acting Senior Principal Magistrate in Embu law Courts.

1. Page 289 of the Reponse File.

2. Page 33 of the Hansard of 22nd August 2013.

3. Page 298 of the Response File.

27. The first two complaints against him related to abuse of office. In the first, the complainant took issue with the fact that the Magistrate who was a senior judicial officer used a junior staff to run his personal errands during working hours. The complainant was a watchman engaged to guard the Courts during the day, however the Magistrate would cause him to leave his post to run the Magistrate's personal errands. This is most irresponsible of the officer and encourages laxity at work.
28. In the second complaint the Board found that the Magistrate was motivated by personal factors to cause the arrest of a member of staff.
29. The Board took issue with the Magistrate for receiving a litigant in chambers in the absence of other parties to the case. The Board was also concerned that the Magistrate advised a litigant to file an application for reinstatement, and he subsequently heard the application and granted it. The Magistrate did not see anything wrong with his conduct. The Board is concerned that the Magistrate does not appreciate the impropriety of his conduct.<sup>4</sup>
30. The Board also questioned the Magistrate on whether it was judicious to dismiss an application for want of prosecution at the first hearing. The Magistrate stated that he did not consider that, when he dismissed the application. This indicates lack of good judgment.
31. The Board questioned the magistrate in relation to his entry of judgment on admission in a Children's Case. The Magistrate stated that he assumed that the statement by the defendant that "I have not failed to meet the expenses. I cannot pay the money to the plaintiff" amounted to an admission. The Magistrate was hard pressed to convince the Board that this was an admission, and finally stated that "I may have made a mistake"<sup>5</sup>, but did not out rightly admit to making the mistake.
32. The Board also pointed out that the Magistrate in his judgment made awards for maintenance without giving the parties a chance to present evidence or proof for or against the amounts claimed. The Magistrate either did not have any regard for Children's matters; or was induced to make an award in favour of the applicant. Quantum of maintenance is assessed, and custody granted without allowing the defendant an opportunity to contest the same; and without the plaintiff tendering any evidence in proof of the claims.
33. The Board examined the magistrate's wealth declaration forms and his bank statements. The Board noted large deposits and gave him an opportunity to explain the same. The Board did not find the explanation credible. The deposits are for inordinately large amounts and are all in cash.
34. Taking all these factors into account the Board unanimously determines that the HONOURABLE ROBINSON OIGARA ONYONI is NOT SUITABLE to continue serving as a Magistrate.

### HONOURABLE WILSON KABERIA NKUNJA

- UNSUITABLE
  - CORRUPTION
  - IMPROPRIETY
  - LACK OF CANDOUR
35. The Magistrate was at the time of vetting serving as Senior Principal Magistrate Kericho Law Courts.
  36. Eight complaints were received by the Board against the Magistrate. The majority of the complaints touched on the integrity of the Magistrate and alleged that the Magistrate was corrupt. All the

4. Page 56 of the Hansard of 22nd November 2013

5. Page 62 of the Hansard of 22nd November 2013.

complaints related to the time the magistrate served in Narok. The Board endeavoured to carry out its own investigations to verify the allegations. The Board finally summoned witnesses to appear at the interview to enable a better understanding and appreciation of the issues raised.



*From left, Vice Chair Ms. Odede - Board member, A.Abdirashid, The AG Prof. Githu Muigai, Hon. J. Sinyo (Reading braille), The Chair of the Board Sharad Rao, Members J. Munyithya and Prof. Ngotho wa Kariuki during the launch of JMVB Braille Report and publication at The Intercontinental Hotel, Nairobi in the year 2015.*

37. The first two witnesses were categorical that the Magistrate was corrupt. Other incidences of corruption were extracted from reports from the Judicial Service Commission to the Board and the Law Society of Kenya.
38. The Board was also shocked to learn that the Magistrate freely shared his phone number with litigants, and met litigants in his chamber in the absence of the other party. It is not befitting conduct for a judicial officer, and affects the propriety of the Court. A Magistrate must act in a manner that upholds the image and dignity of court, and must refrain from any acts that may lead one to have a perception of bias on the part of the Magistrate. Kajiado is a small town, if the Magistrate is seen in a hotel with a litigant it will inevitably be known to everyone. The Magistrate must be conscious of his office, and maintain propriety at all times.
39. The other issue was the complaint that the Magistrate had released fridges, items that had been attached in a non-judicious manner. The Magistrate stated that he could not have released the same as they were not brought to Court as exhibits. The court record however confirms that the magistrate gave an order for release of the said fridges, without affording the prosecution an opportunity to comment on the issue of release. The Board finds that the Magistrate lacks candour.
40. Taking all these factors into account, the Board determines that the HONOURABLE WILSON NKUNJA KABERIA is NOT SUITABLE to continue serving as a Magistrate.

## HONOURABLE OKORE CELESA ASIS

- UNSUITABLE
- INCOMPETENCE
- POOR APPRECIATION OF LAW
- POOR WRITING AND RESEARCH SKILLS

41. The Magistrate was at the time of vetting serving as acting Principal Magistrate at Narok Law Courts.
42. The Board discussed with the Magistrate various areas of the law to establish her appreciation of both the substantive and procedural law. The Board finds that the Magistrate's appreciation of the law is wanting, and that she does not comprehend basic principles of law.
43. She has poor research skills and needs to do a lot if she is to improve. The past work record submitted portrays her very negatively, and puts her in the lower cadre in terms of judicial competence and capacity.
44. Taking all factors into account the Board on a vote of 5 to 1 determines that the HONOURABLE OKORE CELESA ASIS is NOT SUITABLE to continue serving as a Magistrate.
45. The following magistrates were found suitable:
  - (i) Hon. Elizabeth Chepkoech Tanui
  - (ii) Hon. Christopher Yalwala Ligalaba
  - (iii) Hon. Faith Karimi Munyi
  - (iv) Hon. Mburu David Wanjohi
  - (v) Hon. Naomi Wairimu
  - (vi) Hon. Ooko Peter Oduor
  - (vii) Hon. Richard Kipkemoi Koech
  - (viii) Hon. Samson Omwenga Ongeru
  - (ix) Hon. Benson Musyoki Nzakyo
  - (x) Hon. Josphat Waititu Gichimu
  - (xi) Hon. Theresa Bosibori Nyangena

## CONCLUSION

46. The Board shall by the end of March have vetted another 48 Magistrates, and handled at least 14 review applications. The Board has also completed a report that contains all its previous announcements on its determinations. The same shall be launched soon.
47. As a Board, we would like to thank all our partners and stakeholders, and especially the Public for collaborating and supporting the process. There has been a marked increase in participation from the public spurred by the sensitisation meetings the Board has held throughout the country. The Board shall continue to engage the public and the media as the process continues.

Thank you all.

## THE ELEVENTH ANNOUNCEMENT

This chapter contains the Eleventh announcement of determinations pronounced on 15th July, 2014.

### INDEX

- Introduction .....Para 1
- Litigation and its Effect on the Board .....Para 4
- Main Themes Arising .....Para 21
- Conclusion .....Para 49

### DETERMINATIONS

1. Hon. Sogomo Gathogo .....Para 26
2. Hon. Innocent Maisiba Toyo .....Para 32
3. Hon. Orenge Isaac Karasi .....Para 39
4. Hon. James Macharia Muriuki
5. Hon. Orwa Jacinta Atieno
6. Hon. Aloyce Peter Ndege
7. Hon. Benson Nyaga Ileri
8. Hon. Ezekiel Obina Angaga
9. Hon. Samson Temu Omaiyo
10. Hon. kituku Justus Mulei
11. Hon. Mesa Linus Nyakundi
12. Hon. Muchangi David Ileri
13. Hon. Jacqueline Mukhwana Wekesa
14. Hon. Sammy Aswani Opande
15. Hon. Wangeci Ngumi
16. Hon. Mutai Samwel Kiprotich
17. Hon. Michieka Elvis Omaiyo
18. Hon. Acharo Duke Atuti
19. Hon. Omido Joe Mkutu
20. Hon. Obara Caroline Kenda
21. Hon. Angela Njeri Thuku
22. Hon. Esther Kalunde Kimilu Nduva
23. Hon. Joanne Namrome Wambilyanga
24. Hon. Cheruiyot Kenneth Kipkirui
25. Hon. Linus Kassan Poghon

26. Hon. Yusuf Shikanda Abdalla
27. Hon. Brenda Naswa Kituyi
28. Hon. Harrison Musa Sajide Adika
29. Hon. Gerald Muuo Mutiso
30. Hon. Brian Khaemba Mandila
31. Hon. Ekhubi Ben Mark
32. Hon. Kagoni Edgar Matsigulu
33. Hon. Washika Ronaldine Mocho
34. Hon. Joan Irura
35. Hon. Pamela Achieng
36. Hon. Meresia Ase Opondo
37. Hon. Virginia Wambui
38. Hon. Lester Simiyu
39. Hon. Kuto Derrick Khaemba
40. Hon. O'ngondo James O'ngondo
41. Hon. Nyongesa Emily Nafula

## INTRODUCTION

1. The *Constitution of Kenya 2010*; and the Vetting of Judges and Magistrates Act 2011; require a vetting process that will determine the “suitability” to continue to serve of all the Judges and Magistrates who were in office on the date the Constitution was promulgated. This happened on 27th August 2010, which is known as the “effective date”.
2. The Board began the vetting interview process on 23rd February, 2011 and has currently vetted over 200 judicial officers. Out of this number, 32 have been found unsuitable.
3. This is the eleventh announcement of the Board, and it contains the determinations of the Board in relation to 41 Magistrates.

## LITIGATION AND ITS EFFECTS ON THE BOARD

4. On the 4th of August 2010, the people of Kenya overwhelmingly voted in a national referendum to approve the *Constitution of Kenya*. This was the ushering in of a new constitutional dispensational era after more than two decades of struggle. The new constitution came into force upon its promulgation on 27th August 2010.
5. In the clamour for the new constitution, the Judiciary came under scrutiny. The public perception was that the Judiciary was corrupt. The report of the Constitution of Kenya Review Commission noted that “**The Judiciary rivals politicians and the police for the most criticised sector of the Kenyan public society today. For ordinary Kenyans the issue of delay, expense and corruption are the most worrying.**”

6. In the final report of the Task Force on Judicial Corruption (Ouko Report) it was stated that “corruption remains one of the greatest challenges to the judiciary. The task force received representations that whereas there have been measures to address corruption within the Judiciary, the results have been disciplined by the Judicial Service Commission on corruption claims or otherwise faced corruption charges in the courts of law. As a result, corruption remains a major contribution to the Judiciary’s institutional decline and low public confidence in the judicial process.”<sup>1</sup>
7. The *Constitution of Kenya 2010* thus provided for the vetting of all those who were serving as Magistrates and Judges as at the date of promulgation of the constitution. The Board’s mandate is derived from section 23 of the Sixth Schedule to the Constitution, which deals with transitional matters. It provides:
  - (i) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all Judges and Magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.
  - (ii) A removal, or a process leading to the removal, of a Judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.
8. Parliament duly enacted the Vetting of Judges and Magistrates Act 2011 which came into force on 22nd March, 2011. The Act establishes an independent Board,<sup>1</sup> known as the Judges and Magistrates Vetting Board.<sup>2</sup>
9. On 7th, February, 2014, the Kenya Magistrates and Judges Association (KMJA) filed a petition in the High Court seeking the following orders:
  - (a) A declaration that the Judges and Magistrates Vetting Board, in the exercise of its functions in accordance with section 23 of the sixth schedule to the *constitution of Kenya 2010*, cannot lawfully investigate the conduct, acts, omissions and information on the part of a judicial officer purportedly arising after the 27/8/2010.
  - (b) A declaration the judicial officers who were subjected to the exercise of vetting by the Judges and Magistrates Vetting Board in respect of allegations purportedly arising after the 27/8/2010 were subjected to unlawful and unfair treatment contrary to the provisions of articles 3, 47 and 50(1) of the *Constitution of Kenya 2010* and such treatment was, therefore, null and void to the extent of its reference to such conduct, acts, omissions and information.
  - (c) The High Court does hereby read in the provisions of section 18 of the Vetting of Judges and Magistrates Act immediately after the word “consider” in sub-section (1) the words in relation to conduct, acts and omissions of judicial officers allegedly arising on or before the effective date.

1. Section 6 of the Act.

2. The Board consists of Sharad Rao as the Chairperson, the Deputy Chairperson, Roseline Odede and seven other Members, namely Justice Barnabas Samatta from Tanzania, Justice Joseph De Silva from Sri Lanka, Justice Alice Mpagi-Bahigeine from Uganda, Justus Munyithya, Prof Ngotho wa Kariuki, Meuledi Iseme and Abdirashid Abdullahi.

10. The Board defended the matter and its position is that the process of vetting has been fair and proper, and is in line with the provisions of articles 10 and 159 of the *Constitution of Kenya 2010* and the Vetting of Judges and Magistrates Act 2011. The Board deponed that whereas the process extends to Judges and Magistrates who were in office on 27th August, 2010 – the date the constitution was promulgated, it is within its mandate and proper that it looks into matters arising after 27th August, 2010, as its mandate is to establish the suitability of a judicial officer to remain in office, and thus has to look at all matters brought to its attention that affect the suitability of a judicial officer even if it occurred after 27th August 2010.
11. The Board further averred that the affected Judges and Magistrates had submitted themselves to the jurisdiction of the vetting process and had not raised any objection regarding the date against which their suitability was evaluated.
12. On 26th March, 2014, Honourable Justice Mumbi Ngugi ruled on the petition and granted all the orders sought by the KMJA. The ruling essentially held that the Board cannot look into any complaints or misconduct of judicial officers arising after 27th August 2010. The Board was aggrieved by the ruling and appealed to the Court of Appeal, and sought orders of stay in the interim. The Court of Appeal declined to issue orders of stay but heard the matter expeditiously.
13. The Board based its appeal on four grounds, namely that the learned Judge had erred in law and fact by:
  - (i) Holding that the issues before court were not *res judicata*;
  - (ii) Finding that the first appellant could not vet judicial officers with respect to acts or omissions occurring after the effective date;
  - (iii) Finding that judicial officers vetted in respect of allegations arising after 27th August, 2010 were subjected to unlawful and unfair treatment contrary to Article 27 of the constitution; and
  - (iv) Finding that the court had jurisdiction to ‘read in’ into section 18 of the Vetting of Judges and Magistrates Act words that would confine vetting to acts and omissions occurring on or before the effective date.
14. The Court of Appeal in a unanimous decision delivered on 11th July 2014, upheld the High Court decision. The Court found that the focus of vetting is undoubtedly the pre-effective date conduct of Judges and Magistrates. The Court ruled that under Article 172(1) of the Constitution, it is the exclusive mandate of the Judicial Service Commission to investigate and remove from office or otherwise discipline magistrates. The mandate takes effect from the effective date. That if the Board looked at complaints after the effective date, the magistrate would be exposed to double jeopardy as the officer would still have to contend with the Commission. The court refused to adopt a literal reading of the statute.
15. The Board opines that the roles of the two institutions are distinct and different and that with due respect the Court of Appeal misdirected itself in the matter. The vetting process cannot be equated with, or closely modelled on, impeachment or a disciplinary hearing, or a criminal or civil trial, or a job interview or a security clearance. Its modalities have to be structured around the objectives, processes and values identified by the Constitution and the Act. The Board accordingly has

to function carefully and appropriately within these specific constitutional and statutory parameters.

16. The Board's role is not and has not been to carry out a purge but to conduct a vetting process purely to determine suitability of a Judge or Magistrate, subject to vetting, to continue. The vetting procedure is founded on the rule of law involving the assessment of an individual's responsibility in the light of an overall evaluation of the extent to which the conduct at issue is compatible with the criteria established by the Constitution and the Act. The Judicial Service Commission does not in our view have such a wide mandate, and will only investigate a complaint as framed before it.
17. Determinations of suitability cannot be made in a pre-ordained or mechanical manner. Nor can there be a one-size-fits-all formula applicable in all cases. Each determination must be fairly and appropriately arrived at, and has to be based on a holistic evaluation of suitability founded on the specific material before the Board, coupled with the answers given and the impression made by the Judge at the interview.
18. The Wanjiku view that was imported into the Constitution was to thoroughly examine and clean the Judiciary so as to restore the citizens' confidence in the institution. The Board cannot for instance envisage a situation where it is brought to its attention that a Magistrate is corrupt and has taken a bribe, but the Board turns a blind eye to it because it took place after 27th August, 2010. Would then the Board properly issue a finding of suitability in respect of such an officer? Corruption cannot have a timeline. The Board believes that it has a duty to all Kenyans to ensure that the person being certified as suitable is indeed suitable as at the date that certification is made; any other interpretation of the finding of suitability would be a sham and a white wash of the process.
19. The Board's argument holds especially in respect of a group of Magistrates who were employed in July 2010, but some have subsequently engaged in corrupt practices. Would the Board find them suitable merely because by 27th August, 2010 they had not worked and therefore there are no prior claims. The collective consciousness of the Board is that they would find it irresponsible, and a failure of duty to declare such an officer suitable. The intention of Section 23(1) of the transitional clauses of the *Constitution of Kenya* will not be achieved. The expected reforms in the judiciary will remain vacuous. The will of the Kenyan people will be negated.
20. The Court with due respect should have in our view given a more purposive interpretation, having due regard to the letter and spirit of the law and Kenyans clamour for a corrupt free Judiciary. To date there has been no conflict in the mandate of the Judicial Service Commission and the Judges and Magistrates Vetting Board.

The Board shall, therefore, in the public interest appeal against the decision to the Supreme Court.

## **MAIN THEMES ARISING**

21. The Board notes that the main themes arising in the vetting at this stage are; competency, propriety, large unexplained bank deposits, poor writing skills and

lack of internal independence. The Board notes that in several instances the competency levels are wanting. The Judicial Training Institute now offers training to its judicial officers, however some officers have still not attained the requisite standards.

22. There is no audit mechanism to monitor and appraise the performance of Judicial Officers, and most state that this is the first time in their careers that their work is being audited. There is also no mentorship programme in place and once appointed, a Judicial Officer has no one to mentor them. They adopt their own unique work-style approaches and continue without censure monitoring or control. Accordingly we recommend that it would be prudent to establish an audit and mentoring mechanism for all judicial officers.
23. The Board notes that most Judicial Officers still mention the name and identity of minors in their proceedings and judgments instead of using the initials as required. This is a rampant and a recurrent practice. The Board would like all Judicial Officers to protect the identity of minors in such proceedings, especially those involving sexual offences as per law required.
24. The Board undertakes a money trail audit in respect of each judicial officer, and notes that several of the vetted officers have large deposits in their bank accounts, which far exceed their earnings. The Board took a negative view of such deposits where the source of the same remained unexplained or doubtful.
25. The Board overall notes that this group is made up of Judicial Officers who are relatively new in the magistracy, and with effort there is room for improvement.

## **DETERMINATION ON SUITABILITY**

In this 11th Announcement, the Board announces the following determinations which are not affected by the Court of Appeal judgment of 11th July 2014.

### **HONOURABLE SOGOMO GATHOGO**

- UNSUITABLE
  - TEMPERAMENT
  - LACK OF DECORUM
  - IMPROPRIETY
  - LARGE UNEXPLAINED CASH DEPOSITS
26. The Board noted that the Magistrate was based in Moyale—a hardship area, since 2009.
  27. The Board was concerned by the language used by the Magistrate. He uses abusive and derogatory language. The general impression that the Board had from his interview was that the Magistrate was short tempered and abrasive.
  28. The Board felt that he easily lost his objectivity in circumstances where he felt that he was being challenged. Instead of responding with composure and an open mind to legitimate questions raised about his conduct he would retreat into an obdurate defensive/aggressive mode, personalise his response, and fail to manifest the serenity and objectivity required of a Magistrate. He gave long rambling answers to simple questions of judicial morality. His mind set shows

that he is out of sync with the values and conduct expected of a Magistrate. The morals of judicial conduct were clearly violated.

29. The Magistrate was questioned with respect to his income, assets and liabilities along with his bank statements and M-Pesa transactions. He explained that as head of station and Authority to Incur Expenditure holder, he would apply for, and procure imprest, for travel, expenditure and sustenance for both staff and himself thus the huge deposits and withdrawals from his account. He stated that there were no fuel pumps in Moyale, and suppliers would often resort to refined fuels procured from Ethiopia and for long trips the suppliers would advance him cash for purchase of fuel in Isiolo or Meru.



*Prisoners follow the proceedings during one of the prisons sensitization sessions. The Board considered witnesses, complaints and compliments from prisoners during the vetting process*

30. He stated that he was unable to provide concise information due to the vast time frames going back to the year 2009 and number of transactions involved. The Board finds that the Magistrate has failed to satisfactorily explain his financial transactions. The Magistrate gives a general response without adequate substantiation.
31. The Magistrate has good writing skills and a good grasp of the law, however his overall conduct falls short of the dignity and respect expected of a Magistrate.

## DETERMINATION

In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18, and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board unanimously determines that the HONOURABLE SOGOMO GATHOGO is NOT SUITABLE to continue serving as a Magistrate.

### HONOURABLE MAISIBA INNOCENT TOYO

- UNSUITABLE
  - DRUNKENNESS ON DUTY
  - OVER RELIANCE ON TECHNICALITIES
  - LARGE UNEXPLAINED CASH DEPOSITS
  - INCOMPETENCE, POOR RECORD KEEPING
32. The Board considered six complaints received against the Magistrate. Two of the complaints alleged that the Magistrate was drunk while conducting the proceedings in Court. The Judicial Service Commission also notified the Board that they had received complaints about the magistrate's habitual drunkenness and had warned him about it. The Magistrate denied the allegations. The Board however takes note that the Judicial Service Commission warned him about his drunkenness and he neither appealed the decision nor refuted the allegations which were the subject of the warning. The Board thus notes that despite absence of direct evidence of the Magistrate's drunkenness, the two complaints received are backed and corroborated by the Judicial Service Commission finding.
33. The Board has in the past ruled that conducting proceedings whilst under the influence of alcohol, greatly compromises the administration of justice in a fair and impartial manner, and also demeans the integrity and standing of the Court. Such conduct is deplorable.
34. The Board also considered a complaint regarding **Busia Chief Magistrate's Court Land Case No. 45 of 2007**. The complainant alleged that in a case where he was not a party to the land tribunal Award, he was enjoined in the subsequent court proceedings and orders issued to evict him from his land wherein his houses were demolished and property destroyed.<sup>3</sup>
35. In response, the Magistrate stated that the initial order of eviction was by another Magistrate. The application brought before him was seeking to stay the eviction orders. The Magistrate stated that he could not grant the orders as the complainant had not applied to be enjoined to the suit. The Board finds that the Magistrate over relied on technicalities to frustrate the complainant, and perpetrate an injustice. There were orders in the case file directly made against the applicant, thus making him an interested party, considering that property was at stake, the Magistrate should have in the interest of justice issued preservative orders. The petition is pending in the Bungoma High Court.
36. The Board examined the Magistrate's past work record. The Board finds that the Magistrate's record keeping is wanting. The Magistrate's court records are incomplete and confusing.
37. The Board queried the Magistrate on the several cash deposits in his bank account. The Magistrate explained that he shared the account with his wife.

3. Page 6 of Hansard proceedings dated 11th March 2014.

That his wife was a business woman involved in buying and selling of maize.<sup>4</sup> This contradicted what the Magistrate had previously indicated that the wife is involved in buying shoes from Kampala and selling them in Kenya.<sup>5</sup> Questioned about the contradiction, the Magistrate vehemently denied ever mentioning the shoes business. This impacted heavily on his integrity.

38. The Board notes that the account in issue is not a joint account. The explanation given is not satisfactory, and the numerous cash deposits, therefore, remain unexplained.

## DETERMINATIONS

In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18, and 21 of the Vetting of Judges and Magistrates Act No.2 of 2011, the Board determines that the HONOURABLE INNOCENT TOYO MAISIBA is NOT SUITABLE to continue serving as a Magistrate.

### HONOURABLE ORENGE ISAAC KARASI

- UNSUITABLE
  - RECEIVING DOUBLE SALARY FROM THE EXCHEQUER
39. The Board questioned the Magistrate over the salary he continued to receive from the Lands Ministry for a period of three and a half months after he resigned. The Magistrate stated that he only worked at Lands Office for 6 months and then joined the judiciary. The Magistrate states that his file was not transferred to Judiciary immediately as he had requested, and as a result he was not able to get a salary from the judiciary. In the meantime, the Lands Ministry continued to bank his salary into his account. The magistrate states that he had to personally go to the Lands Office to ask them to stop paying him and to transfer his file to Judiciary. It was only after his intervention that his file was transferred to judiciary. He never received a salary from Judiciary while Lands Ministry was paying him, however he received advanced drawings of his salary from Judiciary. He was subsequently also paid all his arrears.
40. The Magistrate states that at that point he wanted to refund all the money he was paid by Lands Ministry, but was told to wait for advice from the AG. He says he was told the money ought to be refunded to the exchequer and could only be done with the AG's approval. The Board notes that there is no proof of this averment.
41. The Magistrate states he was later asked by Judiciary to refund the money by salary check-off, and was given an option to pay in installments. He has managed to refund all of it. The Board gave him an opportunity to submit supporting documents.
42. The Magistrate submitted payslips for March 2011 to March 2012, when the deductions were effected. He also submitted a letter dated 12th November 2010 addressed to him from the Ministry of Lands informing him that he inadvertently received a total sum of Kshs. 124,352/30 as salary for the period July to October 2008, yet he ceased reporting on duty on 14th July 2008. The

4. Page 121 of the Hansard proceedings dated 21<sup>st</sup> March 2014.

5. Page 40 of Hansard proceedings dated 11<sup>th</sup> March 2014.

letter also indicates that the Magistrate informed the Ministry of Lands that he had been appointed a Resident Magistrate on 18th July 2008 and requested a transfer. The letter insinuates that the Magistrate did not wait for a response, neither did he give reasonable notice of his imminent move to the Judiciary, and was treated as one who absconded duty, by ceasing to report to work.

43. The Board notes that the letter was personal to the Magistrate, and was to be dealt with by the Magistrate as such. It appears that the Magistrate ignored the letter and did not respond to it, nor did he take steps to refund money that he had received two years back and converted to his own use.
44. On 19th January 2011, it appears that the Lands Ministry reported the issue to the Judiciary, as the Judiciary wrote to the Magistrate and informed him that they had received a report that he owed the Government the stated sum of Kshs.124,352/30, and he was requested to propose a repayment mode. The magistrate proposed to pay in monthly installments of Kshs.10,000 and the same were subsequently deducted from his salary. The submitted payslips demonstrate a deduction of Kshs.114,552 only as indicated on the payslip of March 2011.
45. The Board notes that while earning the Lands salary, the Magistrate also drew salary advances from Judiciary, so technically he was earning a double salary. The Board also notes that he converted the irregularly earned salary to his own use. That when he began earning from the Judiciary he never refunded the money he had wrongfully received. Indeed he used the money and went underground. The Ministry of Lands tracked him in 2010 two years later and asked him to pay, and he still did not pay. It took the intervention of the Judiciary to cause him to pay.
46. In past determinations the Board has taken a negative view of judicial officers who have received double salaries and not made effort to refund the same timeously. The Board finds the Magistrate's conduct in this regard deplorable and sufficient for a finding of unsuitability.
47. The Board then took the Magistrate through his past work records where it looked into 5 of his past judgments that he had presented to the Board. The Board noted that his judgment writing skills were wanting, and that he needed to improve. The Board pointed out his shortcomings in the discussions. The Magistrate admitted his shortcomings and stated that he was never trained on judgment writing, and that given time and training, and taking into account the issues pointed out to him, he will endeavour to improve.

## **DETERMINATION**

In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE ISAAC KARASI ORENGE is NOT SUITABLE to continue serving as a Magistrate.

48. The following magistrates were found suitable:
  - (i) Hon. James Macharia Muriuki
  - (ii) Hon. Orwa Jacinta Atieno
  - (iii) Hon. Aloyce Peter Ndege
  - (iv) Hon. Benson Nyaga Ireri

- (v) Hon. Ezekiel Obina Angaga
- (vi) Hon. Samson Temu Omiayo
- (vii) Hon Kituku Justus Mulei
- (viii) Hon. Mesa Linus Nyakundi
- (ix) Hon. Muchangi David Ileri
- (x) Hon. Jacqueline Mukhwana Wekesa
- (xi) Hon. Sammy Aswani Opande
- (xii) Hon. Wangechi Ngumi
- (xiii) Hon. Mutai Samwel Kiprotich
- (xiv) Hon. Michieka Elvis Omaiyo
- (xv) Hon. Acharo Duke Atuti
- (xvi) Hon. Imido Joe Mkutu
- (xvii) Hon. Obara Caroline Kenda
- (xviii) Hon. Angela Njeri Thuku
- (xix) Hon. Esther Kalunde Kimilu Nduva
- (xx) Hon. Joanne Namarome Wambilyanga
- (xxi) Hon. Cheruiyot Kenneth Kipkirui
- (xxii) Hon. Linus Kassin Poghon
- (xxiii) Hon. Yussuf Shikanda Abdalla
- (xxix) Hon. Brenda Naswa Kituyi
- (xxx) Hon. Harrison Musa Sajide Adika
- (xxxii) Hon. Gerald Muuo Mutiso.
- (xxxx) Hon. Brian Khaemba Mandila
- (xxxii) Hon. Ekhubi Ben Mark
- (xxxii) Hon. Kagoni Edgar Matsigulu
- (xxxiii) Hon. Washika Ronaldine Mocho
- (xxxiv) Hon. Joan Irura
- (xxxv) Hon. Pamela Achieng
- (xxxvi) Hon. Maresia Ase Opondo
- (xxxvii) Hon. Virginia Wambui
- (xxxviii) Hon. Lester Simiyu
- (xxxvix) Hon. Kuto Derrick Khaemba
- (xxxvx) Hon. O'ngondo James O'ngondo
- (xxxvxi) Hon. Nyongesa Emily Nafula

## CONCLUSION

49. The Board continues to vet the rest of the Magistrates and encourages members of the public to bring any known complaints to its attention.
50. The Board wishes to thank its stakeholders, the Judiciary, Parliamentary Committees and the media for continuing to support and assist the process.

## THE TWELFTH ANNOUNCEMENT

This chapter contains the twelfth announcement of determinations pronounced on 25th January, 2015.

### INDEX

- Introduction ..... Para 1
  - Jurisdiction of the Board ..... Para 17
  - Decisions on Review Unsuitable ..... Para 35
  - Conclusion ..... Para 57
1. Hon. Ireri Anne Ruguru
  2. Hon. Dennis Abraham Kinaro
  3. Hon. Teresa Muthoni Mwangi
  4. Hon. Michael Oduor Kizito
- **Suitable in Line with Supreme Court Decision** ..... Para 36
1. Hon. Celesa Okore Asis
  2. Hon. Joseph Riitho Ndururi
  3. Hon. Gilbert Kimutai Too
  4. Hon. Robinson Onyoni Oigara
  5. Hon. Innocent Maisiba Toyo
  6. Hon. Walter John Onchuru
  7. Hon. Isaac Karasi Orenge
  8. Hon. Douglas Musa Machage
  9. Hon. George Sagero Rachami
  10. Hon. Sogomo Gathogo
  11. Hon. Tanchu Timothy Ole Tina
  12. Hon. Ruth Bertha Maloba
  13. Hon. Phylis Lusiah Shinyada
- **Determinations** ..... Para 38
1. Hon. Nambafu Calestous Sindani
  2. Hon. Irene Marcia Kahuya
  3. Hon. Caroline Nyanchoka Kerage
  4. Hon. Anne Nyoike
  5. Hon. Mary Wanja Njagi
  6. Hon. Robinson Kebabe Ondieki

## INTRODUCTION

1. We are able today to announce a number of decisions on requests for review by Magistrates who were found by the Board unsuitable to continue and a few determinations that were pending the outcome of Supreme Court Petition No. 29 of 2014<sup>1</sup>, hereinafter referred to as the Supreme Court decision.
2. On 26th March, 2014 the Hon. Justice Ngugi declared in **Nairobi High Court Constitutional Petition No. 64 of 2014** that the Board's jurisdiction to assess the suitability of Judges and Magistrates who were in office on the date the Constitution came into effect was confined to matters that arose before the Constitution came into effect namely 27th August, 2010, hereinafter referred to as the effective date.
3. The Board decided to pause the vetting and reviews of all Judges and Magistrates who might be affected by that decision pending a final determination by the Supreme Court to whom the matter was referred by the Board. The Supreme Court rendered its decision on 19th December, 2014 and the Board duly resumed the vetting and review applications it had paused, and has proceeded in a manner consistent with the decision of the Supreme Court.
4. To enable an understanding of the impact of the decision, both in terms of the delay which it caused to the vetting process and how it has shaped the mandate of the Board and of the Judicial Service Commission (JSC), it is important to set out the brief facts beginning with the litigation filed by the Kenya Magistrates and Judges Association (KMJA).
5. On 7th February 2014, KMJA sought a declaration in the High Court<sup>2</sup> that the Board "**cannot lawfully investigate the conduct, acts, omissions and information on the part of a judicial officer arising after the 27th August 2010**". This date is generally known as the "effective date" when the Constitution came into force. The KMJA also argued that as a constitutional remedy the High Court should read words to that effect into section 18(1) of the Vetting of Judges and Magistrates Act. It sought a further declaration that any Judge or Magistrate, who had been found unsuitable in respect of his or her conduct after the effective date, be declared to have been subjected to unlawful and unfair treatment.
6. The Board vigorously opposed the application on its merits. The position of the Board was that the constitutional focus, in section 23(1) of the Sixth Schedule, was on the suitability of Judges and Magistrates "to continue to serve in accordance with the values and principles set out in Articles 10 and 159." Articles 10 and 159 respectively set out broad principles and values of national governance and judicial authority, and the key question, in the Board's view, was whether the Judge or Magistrate will be able to live up to these principles and values in future if they are permitted to remain in office.

The Vetting of Judges and Magistrates Act 2011, provides a detailed set of considerations in section 18 to give effect to this constitutional requirement. These include any pending criminal cases against the Judge or Magistrate; complaints lodged with the JSC and other bodies (some of which were only established after the effective date); and complaints which the Board receives directly from the public. The Board is also required to assess Judges and Magistrates in respect of their

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1. Judges and Magistrates Vetting Board (JMVB) vs Kenya Magistrates and Judges Association.  
 2. High Court Constitutional Petition No. 64 of 2014, KMJA vs JMVB & Anor.

“professional competence”; “written and oral communication skills”; “integrity”; “fairness”; “temperament”; “good judgment”; “legal and life experience”; and “a demonstrable commitment to public and community service”. The Act provides for Judges and Magistrates to be interviewed and the Board took the view that an interview should be a holistic assessment of all information relevant to these factors, in order to reach fully informed assessment of the judicial officer’s suitability to continue to serve and uphold constitutional values and principles going forward.

7. The position of the KMJA was that the Board could only consider information about the conduct of a Judge or Magistrate up to the effective date. The KMJA argued that this was what the constitutional requirement in section 23(1) of the Sixth Schedule, properly interpreted intended. The KMJA also observed that the Judicial Service Commission (JSC) has the ability to bring disciplinary proceedings against a Judge or Magistrate. It would be discriminatory and unfair, and in contravention of Articles 27, 47 and 50 of the Constitution, for a Judge or Magistrate who was appointed after the effective date to be subject to both vetting and the possibility of JSC disciplinary proceedings in respect of conduct after the effective date, whereas a Judge or Magistrate who was appointed under the present Constitution would only be subject to the JSC disciplinary process. The Board accepted that the JSC has a wide jurisdiction over all periods of a Judge or Magistrate’s conduct, but submitted that this did not result in discrimination against Judges and Magistrates who were appointed under the old Constitution, since that appointment system was known to be weak and pro-Executive, and the Judiciary had lost public confidence to such an extent as to require the extraordinary intervention of a vetting process which the Constitution made specifically applicable to them only.
8. The case was heard by Mumbi Ngugi J. in the High Court on 20th February 2014. In a judgment dated 26th March 2014, the Judge found in favour of the KJMA and held that the words “who were in office on the effective date” in section 23(1) of the Sixth Schedule served not only to define the group of Judges and Magistrates who were liable to be vetted, but also the period of conduct that was relevant to their “suitability to continue to serve”, which had to be before the effective date.<sup>3</sup> The Judge further opined, without expressing a final view, that it might be discrimination for judicial officers appointed before the effective date to be subject to both vetting and the JSC disciplinary process. She found that the provisions of the Act were not sufficiently clear about the period of a judicial officer’s career which the Board could consider, and accordingly read into Section 18(1) of the Act words that clearly stated that the Board could not examine conduct, acts and omissions occurring after the effective date.
9. The Board and the Attorney-General appealed the decision in the Court of Appeal. The appeal was heard by Gatembu, M’Inoti and Murgor J.J.A. on 4th June, 2014, and on 11th July, 2014 the Court delivered its judgment dismissing the appeal. While agreeing with Ngugi J that a proper interpretation of section 23(1) of the Sixth Schedule to the Constitution meant that 27th August, 2010 should be the cut-off date for the period of judicial conduct to be considered in the vetting process, the Court of Appeal also tackled the question of how to interpret section 18 of the Vetting and Judges and Magistrates Act, 2011. The Court of Appeal considered that this provision was open to an interpretation according to which this cut-off date would be applicable, and the Court then adopted this

- interpretation to ensure that the statute was consistent with its reading of the Constitution. This meant that the reading-in order granted by Ngugi J. was strictly speaking was no longer necessary. The appeal was, therefore, dismissed.
10. The Board filed a further appeal against this decision to the Supreme Court. In a majority judgment delivered on 19th December 2014, with Njoki Ndung'u J. dissenting, the Court adopted the same line of reasoning as the Court of Appeal. The majority agreed that the words "who were in office on the effective date" in section 23(1) of the Sixth Schedule not only identified the group of judicial officers that was subject to vetting, but also defined the period of judicial conduct that should be assessed. According to the Court, the logic behind the existing Judiciary being singled out in section 23(1) was that only a Judge or Magistrate who was in office on the effective date "may or may not have done something at the time he was in office before the promulgation of the *Constitution of Kenya 2010* to warrant the scrutiny of the Vetting Board". By viewing section 23(1) in this way, the Supreme Court went beyond the decision of Ngugi J. and ruled that the Board's mandate was confined not only to matters that arose before 27th August, 2010 but it also set the outer limit as the date of appointment of the respective Judge or Magistrate. The Court said, "It follows that as to the question how far back? The answer is from the date of appointment under the retired Constitution up to and until the effective date. The answer to the question how far ahead? is only as far as the effective date."
  11. None of the parties to the proceedings had argued that the Board was precluded from considering a judicial officer's conduct before he or she was appointed. This would mean, for example, that the Board cannot consider matters or allegations dating from the period when a Judge or Magistrate was in practice as an advocate, even though such matters would seem to be *prima facie* relevant to their suitability to continue to serve. At a deeper level, the Board had assumed all along that the purpose of section 23(1) of the Sixth Schedule was not confined to investigate misconduct by members of the existing Judiciary while they were serving under the former Constitution, but also to uncover any latent shortcomings of those judicial officers who were appointed by the then Judicial Service Commission. It was the general perception that the former Commission did not operate transparently. In brief, judicial officers did not undergo anything like the rigorous scrutiny that is applied by the current JSC established by the present Constitution. The Board, therefore, proceeded on the understanding that any misconduct or other information, of whatever date, would be relevant to assess the suitability of those judicial officers appointed under the old system.
  12. Part of the Supreme Court majority's reasoning in defining the period of a judicial officer's career that could be considered in the vetting process was that "the Constitution does not envisage vetting to be a continuous process".<sup>7</sup> The Supreme Court perceived certain risks arising from the fact that the Board has not yet been able to conclude the vetting of all Judges and Magistrates. Was it possible, the Court asked rhetorically, that the drafters of the Constitution, or Parliament, could have contemplated a judicial officer could be vetted for what he or she would go on to do after the effective date, or "that the Board would lie in wait and pounce later upon the said Judge or Magistrate, having not come across any past misdeeds or impropriety?"
  13. The Board wishes with utmost respect to the Supreme Court to state categorically

that these perceived risks referred to by the Supreme Court are purely hypothetical. The Board has never lain in wait for, or attempted to ambush, any judicial officer. It has conducted the entire vetting process on the basis of judicial seniority as at the effective date, beginning with those who held positions in the Court of Appeal, and progressing to the High Court and then the magistracy as at that date. The time it has taken the Board to move through these ranks is very much a consequence of the many factors that have halted or slowed down vetting, including principally several court orders staying the process for weeks at a time. The Board has kept the public informed of the reasons for these delays and does not wish to repeat its explanations here.

14. The Supreme Court decision has authoritatively determined the Board's approach with regard to all forthcoming vetting interviews, and also those determinations and reviews which the Board has kept on hold pending the outcome of this litigation. The Board is bound by the Supreme Court decision to exclude evidence of judicial misconduct in some of the matters that will be announced today, because the alleged misconduct occurred either before the judicial officer was appointed to the Bench, or after 27th August 2010, when the Constitution came into force. The result of this is that some Judges and Magistrates whom the Board previously found, or would have found, to be unsuitable, must now be permitted to continue to serve in the Judiciary.
15. The Board will forward all excluded complaints that appear to have substance to the Judicial Service Commission (JSC), in line with the Supreme Court's finding that the JSC is the body that will continue to have disciplinary jurisdiction over all periods of a judicial officer's career. Where the Board acted on information duly substantiated on matters that arose before the date of appointment of a judicial officer or after 27th August, 2010 the initial finding of unsuitability will on review be reversed and the matters before or after the period that the Board is precluded from considering, namely matters before their respective dates of appointment or after 27th August, 2010 will be referred to the JSC. Thus the officer may continue to serve in the Judiciary subject to any action that the JSC may deem fit to take in relation to the matters referred to them, or brought to their attention outside the Board process, regarding the judicial officer's conduct before his or her date of appointment or after 27th August, 2010.
16. The Board does so because it cannot in good conscience stand by and simply allow judicial officers to have a quiet return to the Bench when there are serious question marks over their suitability. It does so at the express invitation of the Supreme Court, which observed that there was "no reason **why the Board should not report an officer to the Commission, for appropriate disciplinary action**".

## JURISDICTION OF THE BOARD

17. A number of Magistrates raised the issue of jurisdiction at the review application. The Magistrates contend that the jurisdiction of the Board over any Magistrate who at the time of interview had been promoted to a Principal Magistrate or Chief Magistrate lapsed on 28th March, 2013. They rely on Section 23(3) of the Vetting of Judges and Magistrates Act Cap. 8B Laws of Kenya which provides that: "**Despite subsection (2), the Board shall conclude the process of vetting of all Judges, Chief Magistrates and Principal Magistrates not later than the 28th March, 2013 and any review of a decision shall be heard and concluded within the above specified period.**"

18. In the case of the Magistrates who were as at the effective date holding ranks lower than Chief Magistrate or Principal Magistrate and have since been promoted, it is averred that the wording of the law is clear and needs no interpretation; that the action of the Board amounts to the Board arrogating to itself non-existent jurisdiction; and urge the Board to find that it lacked jurisdiction and its proceedings are thus null and void.
19. At the outset, we observe that the Magistrate is not stopped from questioning the jurisdiction of the Board, even if the former raised the jurisdictional question only on review. The rule is settled that lack of jurisdiction over the subject matter may be raised at any stage of the proceedings. Jurisdiction over the subject matter is conferred only by the Constitution or the law. It cannot be acquired through a waiver or enlarged by the omission of the parties or conferred by the acquiescence of the court. Consequently, questions of jurisdiction are cognizable even if raised for the first time on review.
20. The Board believes that legislation should be interpreted in a purposive manner, consistent with the achievement of constitutional goals. It should be presumed that Parliament intended its laws to be efficacious in the attainment of these goals, and not to be dysfunctional, arbitrary or futile. Furthermore, it should be presumed that those tasked with implementing the law will do so in a manner that respects fundamental rights and natural justice. This presupposes embracing true principles of rule of law and moving away from the practices of rule by law, where the letter of the law was used to protect the injustices committed by the powerful rather than to promote the rights of the people.
21. The Act could not be clearer as far as the overall jurisdiction of the Board is concerned. Section 23 states:
- (1) The vetting process once commenced shall not exceed a period stated below.
- (2) The vetting process once commenced shall be concluded not later than the 31st December 2015 and any review of a decision shall be heard and concluded within the above specified period.
- This is the “timeframe” envisaged by section 23 of the Sixth Schedule of the Constitution, which lasts till 31st December 2015.
22. Section 23(3) of the Vetting of Judges and Magistrates Act Cap. 8B Laws of Kenya provides that: “Despite subsection (2), the Board shall conclude the process of vetting of all Judges, Chief Magistrates and Principal Magistrates not later than the 28th March, 2013 and any review of a decision shall be heard and concluded within the above specified period.”
23. The contention of counsel for the Magistrate is two:
- (i) That as soon as the time period of 28th March 2013 elapsed, the Board ceased to have any jurisdiction to vet Judges, Chief Magistrates and Principal Magistrates.
- (ii) That since the Magistrate was promoted after the effective date to the rank of Chief Magistrate or Principal Magistrate the Board lacked jurisdiction after 28th March 2013 to vet the suitability of the Magistrate.

The key question is whether Parliament must be taken to have intended that if the Board failed to meet these internal markers, the result would be automatic

cessation of its jurisdiction to complete processes already started but not completed, or to embark on further vetting. There are strong textual indications that point against such a drastic outcome:

24. It is clear to us that the mandate of the Board is to vet all those who were Judges and Magistrates as at the effective date. The mandate is drawn from Section 23 of the Sixth Schedule of the *Constitution of Kenya 2010*. Statute cannot take away the mandate, and internal timeframes could not have been intended to take away the constitutional mandate to vet.
25. This does not mean that the Board may disregard the statutory periods with impunity. We cannot assume that the law deliberately meant the provision “to become meaningless and to be treated as a “dead letter.”. The basic position is that the jurisdiction to vet, granted till 31st December, 2015 is not lost. As the Board has explained, although section 23(3) directed the Board to manage the process in such a way that the vetting of Judges, Chief Magistrates and Principal Magistrates should be finalised by 28th March 2013, it did not purport to curtail that jurisdiction.
26. Moreover, it should be presumed that Parliament did not intend to undermine the legislation which it enacted pursuant to its obligation under section 23(1) of the Sixth Schedule of the *Constitution of Kenya 2010*, to provide “mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date” (emphasis added) lapsed on 28th March, 2013. Parliament cannot have intended to undermine the functioning of the very instrument which it had created in compliance with its constitutional obligations. Nor could Parliament have intended the absurd result of ending up with a half-vetted judiciary, restoring half the confidence of the public. This would have been unjust to the Judges and Magistrates who happened to be at the beginning of the process, and, for that matter, to the Judges and Magistrates who would not have been reached and would not have been able to affirm to the public that they had been found to be suitable to continue to serve.
27. These purely textual considerations correspond to and reinforce a purposive interpretation that takes account of the context in which the Board was set up, the function it was meant to perform and the reason for having a global timeframe with clearly established internal time periods. The overall time period, as constitutionally required, flowed from the fact that this was a transitional measure intended to restore confidence in a key branch of government. Having a transformed judiciary in place was vital to ensuring that a mechanism existed to help secure compliance by other branches of government with their constitutional obligations. It was particularly necessary, too, to have Judges and Magistrates on the Bench in advance of the General Elections expected to be held in March 2013, so as to avoid a repeat of the tragic events that flowed from lack of confidence that the courts would be independent arbiters of challenges to the results of the 2007 election.
28. In this context, the interpolation of tight timelines was clearly intended to put pressure on the Board to do its work at full speed. There was nothing in these internal timelines, however, to suggest that failure to comply was intended automatically to abort the process mid-stream. The legislature in the Act as

initially drafted acknowledged that up to two years might be necessary for the process to be completed. This presupposed that factors could arise that would justify an extension of the overall period, which by definition would involve extending the internal time-frames respectively. Indeed, Parliament could not have intended that the Board should rush through its work, to the prejudice of the rights of each Judge or Magistrate to full and fair consideration of his or her suitability, simply to meet the set timeframes. Nor would public confidence be achieved if a sausage-machine approach was adopted.

29. As it turned out, the Board has proceeded carefully and cautiously, mindful of the guiding principles of “judicial independence, natural justice and international best practice”. The lack of established standards of international practice for vetting Judges, and the far from positive Kenyan experience, had to be borne in mind.
30. The Board is of the very clear view that the ultra-technical argument advanced on behalf of the Magistrates flies in the face of the clear language of the Act and, in addition, ignores the manifest purpose of the amendment. If accepted, in the name of upholding the rule of law, it would in fact lead to frustrating the rule of law. The effect would be to block the continued functioning of a body set up with a specific constitutional mandate to restore public confidence in the judiciary. This could not have been the intention of Parliament in fulfilling its obligations under the Constitution.
31. On the second contention, the Board notes that The Act, defines the “effective date” as the 27th August, 2010; it defines “judge or magistrate” a Judge or Magistrate to whom the Act applies in accordance with Section 3 of the Act. Section 3 of the Act provides that the Act is to establish mechanisms and procedures for the vetting of Judges and Magistrates pursuant to the requirements of Section 23 of the Sixth Schedule of the Constitution. The Sixth Schedule of the Constitution provides for vetting of all those in office on the date of promulgation of the Constitution. Section 4 of the Act provides that the Act applies only to those who were in office on the effective date.
32. The correct inference in our view, supported by the decision in Supreme Court Petition No. 29 of 2014 is that time freezes as at the effective date, a Judge or Magistrate subject to vetting is the one who was in office on the effective date, and can only be vetted for the acts or omissions as at the effective date. The actions to be considered are those committed as at the effective date, and as per the ranks that the judicial officer held as at that date, any promotions, omissions or conduct after the effective date are not material to the vetting process. The Judge or Magistrate, therefore, defined is the Judge or Magistrate at the rank they held on the effective date.
33. For these reasons, the Board does not accept the contention that it lacks jurisdiction, nor that it has lost jurisdiction to vet or review the determinations it has already made. It will, therefore, not down its tools, but carry on with the process entrusted to it by Kenyans.
34. I now announce our Determinations on the applications that we have reviewed thus far, and Magistrates interviewed based on the above considerations.

## DECISIONS ON REVIEW

35. Reviews are limited to errors apparent on the face of the record and discovery of new and important matter, and not alleged wrong or erroneous decisions which are matters for an appellate court. On that basis, the following Magistrates have failed to make out a case for review. Their applications fail, and the initial finding of unsuitability stays.

- Honourable Ileri Anne Irungu
- Honourable Dennis Abraham Kinaro
- Honourable Teresa Muthoni Mwangi
- Honourable Michael Oduor Kizito

## SUITABLE IN LINE WITH THE SUPREME COURT DECISION

36. The following Magistrates, who were initially found unsuitable, are now being declared suitable on review, on the ground that, the conduct acts and omissions considered occurred after the effective date. We wish to stress that had it not been for the finding of the Supreme Court that our mandate is limited to conduct before the effective date, these applications for review may not have succeeded. We shall forward details of the information and complaints in each respective Magistrates case to the JSC as advised by the Supreme Court.

37. The Magistrates who are found Suitable on review under this provision are:

1. Hon. Celesa Okore Asis
2. Hon. Joseph Riitho Ndururi
3. Hon. Gilbert Kimutai Too
4. Hon. Robinson Onyoni Oigara
5. Hon. Innocent Maisiba Toyo
6. Hon. Walter John Onchuru
7. Hon. Isaac Karasi Orenge
8. Hon. Douglas Musa Machage
9. Hon. George Sagero Rachami
10. Hon. Sogomo Gathogo
11. Hon. Tanchu Timothy Ole Tina
12. Hon. Ruth Bertha Maloba
13. Hon. Phylis Lusiah Shinyada

The Board having vetted the following Magistrates determine as follows:

### **HONOURABLE NAMBAFU CALESTOUS SINDANI**

39. The Board considered six complaints against the Magistrate. The first complainant alleged that in **Winam Divorce Case No. 16 of 2012**, the magistrate granted custody of children to the petitioner without hearing the application;

the magistrate declined to grant orders for stay pending appeal; the magistrate failed to make a ruling on both oral and written applications for recusal by the respondent; and the magistrate issued orders not sought by either party.<sup>3</sup>

40. The Board finds that the magistrate had knowledge on factors to be considered while hearing children's matters, however the magistrate's style of recording proceedings is sketchy. The orders granted in the application indicated that the magistrate granted prayers one and two without stating in detail what these prayers entailed. The orders issued cannot be understood without making reference to the main application. The magistrate admitted the error and stated that it was an oversight.
41. On the issue of declining to recuse himself, it was clear that the magistrate declined to recuse himself and instead ordered the advocate to seek transfer of the matter. The magistrate's approach delayed the matter, compromising the child's best interest.
42. The Board finds that the magistrate is incompetent, lacks diligence and has poor appreciation of the law and procedure. The magistrate however appeared unreceptive and unwilling to appreciate and learn from his mistakes.<sup>4</sup> The Board also notes that the magistrate acted unprofessionally when he delegated the duty of interviewing the children to his clerk.
43. The second complainant alleged that the magistrate received a bribe of Ksh. 100,000 as an inducement to acquit the accused in the matter and a further Ksh. 10,000 to release the accused on fake security which amounted to sold justice.<sup>6</sup> The magistrate in his response stated that he had put in place measures to curb corruption within the court premises and does not entertain informal communications between himself and the advocates or parties. The magistrate only took plea and allocated the file to another court and never had conduct of the matter again. The Board finds that the complaint lacks merit.
44. The third complainant alleged that the magistrate dismissed **Winam PMCC. No. 125 of 2011** on technicalities and failed to have any regard for submissions filed and the evidence tendered.
45. The magistrate admitted he had no jurisdiction to hear and determine the matter, he however did not declare his lack of jurisdiction in the matter to avoid being unfair to the applicant. The magistrate stated that dismissing the matter would have prejudiced the plaintiff as he was unrepresented. The magistrate stated that he avoided dealing with issues on which he didn't have jurisdiction such as wages. The Board finds that the magistrate misconducted himself professionally by knowingly proceeding with a matter in which he had no jurisdiction.
46. The fourth complainant alleged that in **Winam Children Case No. 12 of 2013**, the magistrate granted custody to the petitioner *ex-parte*; was hostile and biased; did not grant the complainant opportunity to make submissions; and failed to take note of a court order for *status quo* and referred to the same as a useless piece of paper. The magistrate further issued orders that the children be taken away at gun point.

3. Page 7 of the Hansard proceedings dated 11th February 2014

4. Page 22 of the Hansard proceedings dated 11th February 2014

5. Page 67 of the Hansard proceedings dated 11th February 2014

47. In response the magistrate stated that, the complainant in the matter was represented by an advocate and hence he could not have been hostile to the complainant. The magistrate explained that, he never issued orders over the phone and that the complainant's advocate once called to seek a mention date, on a day he was not sitting due to a road traffic accident he was involved in.
48. The Board took issue with the manner in which the magistrate handled his matters when absent from Court. The Board takes notice that dates are given in the registry, and all parties should ordinarily get directions from the registry or other magistrates at the station in the absence of a magistrate. The phone conversation between the magistrate and advocate would suggest favouritism, bias or partiality. The magistrate's conduct in the circumstances was unprofessional.
49. The magistrate denies issuing orders to the police to take away the children at gun point and clarifies that the order required the OCS to oversee/supervise the compliance of the court order and no involvement of firearm was ordered.
50. The fifth complainant alleged that in **WINAM SRMCR No. 328 of 2010**, the magistrate delayed the case through unwarranted adjournments and convicted on a defective charge sheet and uncorroborated evidence.<sup>5</sup> The magistrate in his response stated that he never delayed the case and that he convicted on the evidence of the minor, who was very articulate and systematic. The Board noted typographical errors in the record. The date on which plea was taken is wrongly recorded. The Board could not establish whether the error was attributable to the magistrate or the typing. The magistrate was asked to exercise more diligence in recording evidence.
51. The sixth complainant alleged that in *WINAM SRMCR No. 819 of 2012*, the magistrate constantly adjourned the matter and declined to hear the complainant's application. The complaint was not substantiated.
52. The Board examined the magistrate's past judgments and finds that his recent judgments are sketchy, inconsistent and not well reasoned. From the judgments it is clear that the magistrate does not rely on decided cases and or authorities. In response, the magistrate stated that he fails to quote authorities in his judgments because the advocates failed to provide them and or refer to them in their submissions. The magistrate has a duty to carry out his own research to enable him make well-reasoned and consistent decisions.

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6. Page 84 of the Hansard proceedings dated 11th February 2014.



*The Board and members of the Paliamentay Legal Affairs committee and the Constitutional Implementation Oversight committee during one of the consultative meetings.*

53. The Board is concerned that the magistrate's writing skills are taking a downward turn for the worse. The magistrate could not give a plausible explanation for the trend. The magistrate alluded to a heavy workload upon being elevated to head of station. The magistrate by his own admission is not able to handle the pressure of being a head of station, this impacts negatively on his organisational and administrative skills.
54. On the finances, there were unexplained deposits in the magistrate's account.

### DETERMINATION

In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18, and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE NAMBAFU CELESTOUS SINDANI is NOT SUITABLE to continue serving as a Magistrate.

The following Magistrates were found suitable:

### HONOURABLE IRENE MARCIA KAHUYA

- Hon. Caroline Nyanchoka Kerage
- Hon. Anne Nyoike
- Hon. Mary Wanja Njagi
- Hon. Robinson Kebabe

56. Each magistrate has been availed a copy of the Board's Determination and the reasons for its findings.

## CONCLUDING REMARKS

57. As from 26th January 2015, the Board shall conduct vetting outside Nairobi for the first time. In the spirit of devolution and respecting the sentiments of the 47 counties, the Board has in the first phase summoned Magistrates from the larger Western Kenya region and beyond to Kisumu. This is a pilot project and if it goes well, as we hope it will, it shall be rolled out to other regions in the country.
58. The term of the Board expires on 31st December 2015. The Board will endeavour to meet this deadline in the hope that no factors beyond its control will emerge to hinder its progress. The Board lost a total time of 9 months last year due to the pendency of Court proceedings on the extent of the mandate of the Board. That is a lot of time to make up for. The Board is however conscious that the Kenyans want the process concluded without undue delay. The Board will do its best to deliver its mandate within the statutory time frame.
59. The number of Magistrates and Kadhis yet to be vetted are 177 and these include Principal Magistrates and Chief Magistrates affected by the 28th March 2013 timeline in section 23(3) alluded to in the announcement.
60. We once again wish to thank you for your support and coverage, and we will continue to rely on your co-operation and support to keep the public informed of the status of the process.

## THE THIRTEENTH ANNOUNCEMENT

This chapter contains the thirteenth announcement of determinations pronounced on 17<sup>th</sup> March, 2015.

### INDEX

- Introduction ..... Para 1
- Main Issues Arising ..... Para 4
- Conclusion ..... Para 35

### DETERMINATIONS ON SUITABILITY

- Hon. Dolphina Atieno Alego Kayila ..... Para 11
- Hon. Beatrice Nyambune Mosiria ..... Para 24
- 1. Hon. Alice Chemosop Towett
- 2. Hon. Bethwel Kimtai Matata
- 3. Hon. Esther Boke
- 4. Hon. Amos Kiprop Mokeross
- 5. Hon. Caroline Jepyegon Kendagor
- 6. Hon. Stella Nabwire Abuya
- 7. Hon. Lilian Nafula Kiniale
- 8. Hon. Sambu Kibet
- 9. Hon. Hazel Wandere Musisi
- 10. Hon. Elizabeth Nyarangi Juma
- 11. Hon. Evans W. Muleka
- 12. Hon. Carolyne Njeri Karanja Kabucho
- 13. Hon. Angelo Kithinji Rwito
- 14. Hon. Shadrack Mwendwa Mwinzi
- 15. Hon. Samuel Wadida Jalango
- 16. Hon. Evanson Bett
- 17. Hon. Felix Mutinda Kombo
- 18. Hon. Everlyne Sylvia Achieng' Olwande
- 19. Hon. Francis Nyungu Kyambia
- 20. Hon. Albert Saitabau Lessotia
- 21. Hon. Bernard Ochieng' Ondego
- 22. Hon. Margaret Anyango Kasera
- 23. Hon. Martha Wanzila Mutuku
- 24. Hon. Abdulqadir Lorot Hussein Ramadhan
- 25. Hon. Gladys Adhiambo

26. Hon. Allan Sitati Temba
27. Hon. James Njuguna Mwaniki
28. Hon. Patrick Adol Olengo
29. Hon. Paul Mayova Mutio
30. Hon. Mildred Natecho Munyekenye
31. Hon. Evans Keago
32. Hon. Solomon Kipkirui Ngetich
33. Hon. Peter Tumbo Nditika
34. Hon. Purity Chepkorir Koskey
35. Hon. Charity Chebii Oluoch
36. Hon. Charles Mwaniki Kamau
37. Hon. Daniel Kanyinke Ole Keiwua
38. Hon. Desderian Ambiro Orimba
39. Hon. Lucy Chebet Kaittany
40. Hon. Mary Immaculate Gwaro
41. Hon. Monica Kemunto Nyarango
42. Hon. Margaret Nafula Makokha
43. Hon. Charles Soi Mutai

## INTRODUCTION

1. As you are aware the Constitution and the Vetting of Judges and Magistrates Act, 2011 require a vetting process to determine the “suitability” of all the judges and magistrates who were in office on the date of promulgation of *The Constitution of Kenya 2010*, the 27th August 2010, which is known as the “effective date”.
2. In our last announcement made on 23rd January, 2015 we highlighted the decision of the Supreme Court of Kenya in Petition No. 29 of 2014, which ruled that the mandate of the Board is limited to acts or omissions occurring from the date of a judicial officer’s appointment up to the effective date. The Board thus has restricted the vetting within these parameters. Most of the judicial officers vetted over the last six weeks were employed on 1st July 2010, thus the period under enquiry in relation to the said judicial officers suitability was limited to less than two months. However, the Board apart from assessing their suitability under section 18 of the Act, took the opportunity to discuss with them various legal principles and identify areas that will hopefully strengthen and improve their output as judicial officers. Complaints received as per the Supreme Court ruling are beyond our mandate will be forwarded to the Judicial Service Commission.
3. The Board for the first time carried out the vetting process outside Nairobi. The process in Kisumu proceeded smoothly and was successful. The benefit of vetting the judicial officers close to their stations is that they are able to resume duty immediately after the process, reducing time away from the station. The judicial officers were also happy to be vetted close to their stations.
4. The main concerns and issues arising from this phase of vetting were mainly procedural and administrative. The writing skills continue to be a concern. The judgments that were discussed were mainly those written before the effective date. Almost all judicial officers interviewed claimed that their writing has improved since 2010, we have of course no way to verify that. Of the almost fifty officers vetted, only five exhibited exemplary writing skills. We would recommend that the Judiciary comes up with a paper at its annual colloquium that discusses “Common Mistakes in Judgment Writing” which will highlight the shortcomings and act as a guide for improvement.
5. The judgments are in most cases poorly typed and contain several grammatical mistakes. This was attributed to the typists who are apparently not properly trained or skilled.
6. Most of the judicial officers in the western region have never served outside that region. Transfers are within the region. This has hampered the growth of the judicial officers who are unable to undertake any Masters studies due of lack of access; and their interactions are limited to persons of similar culture and practices which limit their exposure as judicial officers. The Judiciary may wish to consider a transfer policy that exposes the judicial officers to varied cultures, experiences and practice areas.
7. Of concern is a practice where judicial officers absent themselves from the station and do not have the courtesy to inform parties beforehand of the imminent absence of the judicial officer. This is particularly disruptive where parties travel long distances to access the courts. The judiciary has effectively adopted the “SMS” platform and should be able to use this innovation to alert parties of the imminent absence of a Judicial officer from the station. Similarly, the Judiciary should use its communication channels and give due notice to litigants when a Magistrate is indisposed or away from the station.

8. Discussions on various legal principles revealed that the judicial officers do not keep themselves updated with developments on the legal front. None of the vetted judicial officers had read and internalised the Security Amendments Act, 2014, yet it has ramifications in Criminal Cases which most of them handle on a day-to-day basis. We also found that none of them was aware of the Victims Protection Act, 2014 which affords certain protections; and restates the role of a complainant in a criminal case. It is recommended that the Judiciary makes an effort to prepare from time to time a digest of all new Laws and alert and train all judicial officers on the Laws promptly. The lack of knowledge compromises the delivery of justice. A judicial officer has the obligation to keep abreast of all developments in the legal arena.
9. Section 175 of the Criminal Procedure Code provides that a judicial officer can order an accused to compensate “a complainant” in a criminal case. It appears none of the judicial officers is aware of this provision and it is hardly used. Litigants would benefit greatly if this provision is employed, as it would do away with the need to initiate a civil proceeding.
10. Within this group there are judicial officers who have gone out of their way to ensure justice is accessed by all persons. There is one judicial officer who runs mobile court sessions in very remote locations and conducts the sessions under a tree. His commitment is commendable. Several of them have negotiated with the county governments to be granted land in which to build court houses but while we commend this, the judiciary should not leave the task of negotiating for land to the judicial officers as this can be used to compromise the integrity of an officer and the court.

## **DETERMINATIONS ON SUITABILITY**

### **HONOURABLE DOLPHINA ATIENO ALEGO KAYILA**

- UNSUITABLE
  - TEMPERAMENT
  - INCOMPETENCE
  - ISSUING TWO CONTRADICTORY ORDERS AT THE SAME TIME IN THE SAME CASE
  - USE OF ABUSIVE LANGUAGE
11. There were six complaints against the Magistrate. One complaint alleged that in [Eldoret Chief Magistrate's Civil Case No. 795 of 2004](#) the Magistrate issued an order on 4th December, 2008 in which she dismissed the suit for non-attendance and at the same time marked the matter as stood over generally and ordered the plaintiff to pay court adjournment fees. That the defendant took advantage of the order dismissing the suit to have a caution placed over the suit land lifted and promptly sold the same leaving the plaintiff's claim frustrated, and causing the plaintiff to lose her interest in family property.
  12. The complainant appeared and testified before the Board. The complainant stated that the plaintiff was her sister and she held a power of attorney to represent the sister. That she was present in court on the material date and advised the Court that her sister was unwell, and she sought an adjournment. The court, however, went ahead to make the strange dual contradictory orders both dismissing the suit and marking it as stood over generally.

13. The Magistrate in response stated that judgment in the matter was delivered on 8th July, 2011 and thus was beyond the Board's mandate; that the complainant was not a party to the suit and her claim was, therefore baseless; that she later set aside the dismissal order and reinstated the suit and entered judgment in favour of the plaintiff.
14. The Magistrate did not give a clear explanation as to why she made the two contradictory orders. The Magistrate skirted the issue and concentrated on the fact that she had later reinstated the matter and issued judgment in favour of the plaintiff. The Board finds that the main complaint is the making of two contradictory orders at the same time and the ramifications of that order. The Board has the mandate to consider the complaint as the order was made on 4th December, 2008; it has power under the Law to consider complaints from any person, one need not be party to a suit to complain.
15. The court record confirms that the Magistrate did make an order for dismissal of the suit and at the same time an order marking the suit as stood over generally. A Magistrate with her years of experience at the time (over five years), cannot be excused for making such orders which defy logic or explanation. The action could only have been intentional, purposed to create confusion to enable the defendant benefit therefrom. The complainant testified that upon the issuance of the orders the defendant promptly obtained decree indicating the suit had been dismissed, whereupon he was able to lift the caution on the suit property and sell the same.
16. The Magistrate showed no understanding of the ramifications of her action and no signs of remorse. There is a lack of awareness and understanding of the effects of her actions as a judicial officer on the citizenry. A judicial officer is expected to exercise diligence and exhibit greater competence than has been demonstrated. Her defence that she later made good the same by reinstating the suit on application and issuing judgment in favour of the plaintiff does not remedy the grave error noted; the Board clarifies that in making a finding it has limited itself to examining the conduct of the magistrate vis-à-vis the irregular contradictory orders made. The Board finds that the Magistrate acted incompetently in the matter.
17. It was also alleged that in **Eldoret Chief Magistrates Court Criminal Case No. 7019 of 2009** the Magistrate used abusive language; the case was delayed unduly; and that the Magistrate had demanded a bribe.
18. The Magistrate denied the allegations. The complainant testified and stated that the Magistrate was a person of bad temperament and was abrasive with almost everyone who appeared before her. The complainant stated that the Magistrate asked them "*munafikiri nitaweza kuwachilia?*"<sup>1</sup> These words are derogatory and demonstrate premeditation of a finding of guilt. This is unjust and compromises the accused right to a fair trial.
19. The Magistrate denied uttering the words, but having interacted with the Magistrate at the interview, and having viewed the demeanour of the complainant who testified, the Board finds that the complainant was an honest and credible witness. The said utterance is unbecoming and compromises the propriety and integrity of the Court.
20. The Board however finds that the complaints relating to bribery and delay of the case have not been sufficiently substantiated. One of the complaints against her was withdrawn; and the others were not adequately substantiated.

1 Page 47 of the Hansard dated 9<sup>th</sup> February 2015.

21. The Magistrate's writing skills are wanting, and her knowledge of substantive and procedural law is not sound.
22. The Board noted the nature of transactions in her account, especially with regard to friends depositing money into her account, raised integrity questions that do not augur well for a judicial officer.
23. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that The HONOURABLE DOLPHINA ATIENO ALEGO KAYILA is NOT SUITABLE to continue serving as a Magistrate.

### **HONOURABLE BEATRICE NYAMBUNE MISIRIA**

- UNSUITABLE
  - INCOMPETENCE
  - IMPROPRIETY
24. The Board received two complaints against the Magistrate.
  25. In the first complaint it is alleged that in **Iten Senior Principal Magistrate's Civil Case No. 3 of 2009**, the Magistrate allowed the withdrawal of the suit against the second Defendant whose motor vehicle had caused an accident and injuries sustained by the Complainant.
  26. The Board examined the Court record and finds that the complaint is not merited as no evidence was tendered to prove ownership of the vehicle by the second defendant.
  27. In the second complaint it is alleged that in **Eldoret Children's Court Case No. 29 of 2005**, the Magistrate unprocedurally reopened the case and summoned a minor to give evidence while the case was pending judgment; that the Magistrate did not give the defendant an opportunity to rebut the minor's evidence; that on 9th December, 2005 the Magistrate was found discussing the case with the plaintiff in her Chambers who thereafter bragged that the Magistrate would deliver judgment in his favour and that general and exemplary damages would be in excess of Kshs. 150,000; and that the Magistrate awarded damages in the sum of Kshs. 180,000 without any valid basis.
  28. The Magistrate in response stated that in reopening the case and summoning the minor she acted within the provisions of Section 4 of the Children Act; that she afforded the defendant who was represented by Counsel an opportunity to cross-examine the minor, but they opted not to do so.
  29. The Magistrate also stated that the defendant failed to disclose that the matter had been appealed against and despite reducing the award, the Court upheld the finding on liability.
  30. The Board examined the Court record and finds that the Magistrate's **reopening of the case was unprocedural. The Appeal Court confirms this when the Judge states as follows: "This was unprocedural, unusual and strange. Parties are bound by their pleadings and the evidence adduced in Court. It cannot be the business of the Court to reopen the case with the sole purpose of strengthening a party's case or for whatever other reason as clearly appears to have been the case here. That was wrong. And the Court did not take heed when the defence refused to participate in any further proceedings in those circumstances. And the defence may be forgiven when they allege that the trial Court was compromised although that is a matter I would hesitate to discuss at length as**

not much was done towards enforcing any rights that were seen as having been breached at the appropriate time. I will deal with it, though, when considering the quantum of damages. The reopening of the Plaintiff's case by the Court *suo moto* was definitely wrong and unprocedural and it does not seem to have been done for the sole purpose of doing justice to all parties in the case. In the premises I order struck out of record the evidence of the minor."

31. The Board also finds that the Magistrate did not cite the reasons or cases to support the award of general damages and why she awarded exemplary damages. The Appeal Court finds the same too and states as follows: "And the award of damages is an exercise of discretion which discretion must be guided by comparable awards for similar losses so as to arrive at a reasonably fair compensation. In the instant case an award of Kshs. 180,000 during 2005 for this wrong was clearly based on an error of principle and/or on extraneous matters and hence the issue of canvassing and reopening the case by the Court become relevant. Yes the child was wronged and suffered trauma psychologically and had to be transferred to a new school one year to a national examination. That was the wrong suffered by the child and it is the child who is the Plaintiff. It may well be that the father suffered loss in the transfer of his child to a new school and even if that were to be a consideration, the adequate compensation cannot rightly have been assessed at Kshs 180,000. I feel constrained to differ from the trial Court's assessment of damages. In the premises I find that the award of those damages was entirely erroneous and so inordinately high as to represent an entirely erroneous estimate. Consequently I set aside the award in general and exemplary damages of Kshs 180,000 and substitute there for an award of Kshs 40,000 as against the 1st Appellant only. The Responded shall have the costs of the suit in the lower Court and of the appeal. There will be orders accordingly." <sup>2</sup>
32. Despite the Board's overall favourable impression of the Magistrate, it cannot disregard the adverse remarks of the Judge referred to earlier, as they do seem to impute impropriety on the part of the Magistrate.
33. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE BEATRICE NYAMBUNE MOSIRIA is NOT SUITABLE to continue serving as a Magistrate.
34. The following Magistrates have been found suitable:
  1. Hon. Alice Chemosop Towett
  2. Hon. Bethwel Kintai Matata
  3. Hon. Esther Boke
  4. Hon. Amos Kiprop Mokeross
  5. Hon. Caroline Jepyegon Kendagor
  6. Hon. Stella Nabwire Abuya
  7. Hon. Lilian Nafula Kiniale
  8. Hon. Sambu Kibet
  9. Hon. Hazel Wandere Musisi
  10. Hon. Elizabeth Nyarangi Juma

2. Paragraph 9 of the Appeal Court Judgment found at Page 63 to 64 of the Response File.

11. Hon. Evans W. Muleka
12. Hon. Carolyne Njeri Karanja Kabucho
13. Hon. Angelo Kithinji Rwito
14. Hon. Shadrack Mwendwa Mwinzi
15. Hon. Samuel Wadida Jalango
16. Hon. Evanson Bett
17. Hon. Felix Mutinda Kombo
18. Hon. Everlyne Sylvia Achieng' Olwande
19. Hon. Francis Nyungu Kyambia
20. Hon. Albert Saitabau Lessotia
21. Hon. Bernard Ochieng' Ondego
22. Hon. Margaret Anyango Kasera
23. Hon. Martha Wanzila Mutuku
24. Hon. Abdulqadir Lorot Hussein Ramadhan
25. Hon. Gladys Adhiambo
26. Hon. Allan Sitati Temba
27. Hon. James Njuguna Mwaniki
28. Hon. Patrick Adol Olengo
29. Hon. Paul Mayova Mutio
30. Hon. Mildred Natecho Munyekenye
31. Hon. Evans Keago
32. Hon. Solomon Kipkirui Ngetich
33. Hon. Peter Tumbo Nditika
34. Hon. Purity Chepkorir Koskey
35. Hon. Charity Chebii Oluoch
36. Hon. Charles Mwaniki Kamau
37. Hon. Daniel Kanyinke Ole Keiwua
38. Hon. Desderian Ambiro Orimba
39. Hon. Lucy Chebet Kaittany
40. Hon. Mary Immaculate Gwaro
41. Hon. Monica Kemunto Nyarango
42. Hon. Margaret Nafula Makokha
43. Hon. Charles Soi Mutai

## **CONCLUDING REMARKS**

35. Today we commence vetting in Mombasa. We have listed a total of nineteen magistrates from the coastal region for interviews. The Board shall also undertake sensitisation and outreach programmes while here. The hearings are conducted in private in accordance with the Law.

## THE FOURTEENTH ANNOUNCEMENT

This chapter contains the fourteenth announcement of determinations pronounced on 13<sup>th</sup> May, 2015.

### INDEX

• Introduction.....	Para 1
• Main Themes .....	Para 6
• Determinations on Suitability .....	Para 9
• CONCLUSION .....	Para 53
1. Hon. Carolyne Akinyi Ocharo .....	Para 10
2. Hon. Hellen Onkwani .....	Para 13
3. Hon. Kennedy Lenkamai Kandet .....	Para 14
4. Hon. Nathan Shiundu Lutta.....	Para 16
5. Hon. Samuel Kimuya Gacheru .....	Para 19
6. Hon. Elena Gathoni Nderitu .....	Para 22
7. Hon. Elizabeth Katiwa Usui.....	Para 24
8. Hon. Joseph Maloba Were .....	Para 25
9. Hon. Letizia Muthoni Wachira .....	Para 27
10. Hon. Martha Anyona Nanzushi .....	Para 31
11. Hon. Paul Kipkosgei Rotich .....	Para 34
12. Hon. Peter Naphtaley Maina Ndwiga.....	Para 36
13. Hon. Rose Makungu Nyanunga .....	Para 40
14. Hon. Johnstone Munguti Mutuku .....	Para 42
15. Hon. Bernard Maina Ochoi.....	Para 44
16. Hon. Hezron Nyaberi Moibi.....	Para 45
17. Hon. Mildred Ada Obura .....	Para 47
18. Hon. Teresia Achieng Odera .....	Para 48
19. Hon. Willy Kipkoech Cheruiyot .....	Para 51

## INTRODUCTION

1. The Board commenced the vetting interview process on 23rd February, 2012 and has currently vetted 9 Court of Appeal Judges out of which 4 were found to be unsuitable; 44 High Court Judges out of which 13 were found unsuitable in the first instance and on review 3 were successful; 8 were still found unsuitable, and 2 have been scheduled for re-hearing, that is, Justice Nicolas Ombija and Lady Justice Abida Ali. We have also vetted 220 magistrates, 28 were found unsuitable in the first instance, and on review 13 were reversed.
2. The number of Magistrates found suitable on review is high because they benefitted from the Supreme Court decision that limited our mandate to acts and omissions occurring from the date of appointment to the 27th August, 2010, being the date of promulgation of the Constitution. Most of the Magistrates benefitting from this were appointed to the bench on 1st July, 2010. The period under review for them, is therefore, two months only. Where there are issues arising after July 2010 for which we initially found them unsuitable, we have forwarded these to the Judicial Service Commission for further action as directed in the Supreme Court decision. In total, we have interviewed 273 judicial officers, with about 15% being found unsuitable.
3. The Board is confident that even though the number of Judicial Officers found unsuitable may appear low, the process has been able to restore confidence in the Judiciary. The feedback we have from stakeholders and the public is that service delivery in the Courts has greatly improved and corruption even though not completely eradicated has reduced. The Judiciary has acted on a number of our recommendations aimed at improving service delivery, and the capacity of judicial officers, within its “Transformation Initiatives”. These are areas such as training, transfer policy, automating court systems and improved communication with court users and clients. We are certain that the vetting has had a positive impact.
4. The vetting process has also impacted positively on individuals. In instances where we have noted extreme infractions by Judicial Officers, we have brought it to the attention of the Chief Justice for redress. In one case there was an individual who was tried on trumped up charges by a Magistrate with whom he had some differences. The Magistrate presided over the hearing despite there being an obvious case of “Conflict of Interest”, and proceeded to jail the individual for 5 years for an offence which provides a maximum sentence of one year. The Chief Justice promptly ordered his release.
5. The process has also enabled parties to come face to face with the Judicial Officers and explain to them how they felt by the manner in which they or their cases were handled. The face to face interactions have had positive effects both ways. The Judicial Officer is for the first time able to introspect and understand that their every conduct in Court affects a person, and they must learn to be humane yet firm in applying the Law. The complainants are also able to understand why

certain decisions are made, and the Law is clearly explained to them. A healing process occurs in such encounters.

## MAIN THEMES

6. The main issues arising during the interviews are still largely based on competency. The Board continues to point out to the Magistrates flaws in their judgment writing skills. The Board is particularly concerned by grammatical errors which, at times, affect the whole context and tenor of the judgment. At times, there appears to be a flippant or casual attitude in the manner the judgments are written. Not much attention is paid to detail, and in some instances, the facts and legal reasoning are too sketchy to stand the test of a well-reasoned and analysed judgment. A judgment is supposed to be cogent and complete in the information it provides. Most of the judicial officers attribute the sketchiness to lack of time, and a heavy workload. The Board usually asks the judicial officer if they would be happy with a sketchy hurried medical analysis and treatment due to heavy workload and lack of time. They admit, lack of time and a heavy workload are not good reasons for doing a shoddy job and failing to uphold their oath of office. The Board hopes that the Judicial Officers, even where declared “Suitable”, shall take time to learn and endeavour to improve from the comments made and discussions had with them during the interviews.
7. The Board noted a unique system of inheritance being applied in relation to Mwea Irrigation Scheme Shares. The process ignores the provisions of the Succession Act and has adopted a home grown solution as there is no definite legislation in place. There is good reason for adopting their own agreed form of inheritance as it is not repugnant to justice, however it is necessary for guidelines to be drawn to guide the Magistrates on how to handle disputes that end up in Court.
8. The Board also noted that in instances when a Magistrate is transferred before completing a Criminal trial, the accused normally use the provisions of Section 200 of the Criminal Procedure Code to delay and frustrate the case. There are cases that have been in Court for over 10 years, because every time a Magistrate is transferred, the accused request that the hearing starts *de novo*. The witnesses have to be recalled, and usually they get frustrated and stop attending Court and eventually the accused is released for lack of evidence. This provision is mostly abused by those facing life or death sentences. A lot of complaints received are by complainants in criminal cases who blame Magistrates for such acquittals. Guidelines should be developed to stem abuse of process in this manner.

## DETERMINATIONS ON SUITABILITY

9. I now wish to announce determinations in relation to 19 Magistrates vetted in Mombasa. Two of the determinations are not ready and shall be announced in the next batch.

### **HONOURABLE CAROLYNE AKINYI OCHARO**

- SUITABLE

10. At the time of vetting the Magistrate was serving as Principal Magistrate at Makadara Law Courts Nairobi. There was one complaint against the Magistrate. The complainant, Lilian Munyiri, (on behalf of Gateway Insurance Company Limited) alleges that in **Malindi PMCC No. 127 to 149 of 2009**, Various Plaintiffs vs Nafisa A. Mohiddin and 3 others, evidence was presented to the effect that Gateway's insured's driver was not to blame for the accident but the Magistrate, in each matter, entered judgment against Gateway's insured and his driver at 100% liability even though interlocutory judgment had been entered against the owner and driver of the third party vehicle; and they did not give any evidence to exculpate themselves from blame. It was also alleged that the Magistrate failed to grant stay of execution of the judgment pending appeal, hence the complainant herein could not appeal against the judgment.
11. The Magistrate was faulted for not taking due account of the non-appearance of the 3rd and 4th defendants who were named in the suit and against whom interlocutory judgment had been entered. She admitted it was a lapse on her part. The Board notes that the complainant did not allege any impropriety on her part nor was there any allegation of any personal or improper motive.
12. The Magistrate's writing skills are average. The Magistrate needs to improve on the structure and outline of her judgments, and make more reference to relevant decided cases and the applicable law. There was nothing untoward arising from the Magistrate's financial records. The Board determines that the HONOURABLE CAROLYNE AKINYI OCHARO is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE HELLEN ONKWANI**

- SUITABLE

13. The Magistrate joined the Judiciary in July 2010 and at the time of vetting was serving as a Deputy Registrar Court of Appeal Nairobi. The Board received one complaint which refers to events occurring after the effective date and has been forwarded to the Judicial Service Commission. The Magistrate had not written any judgments within the period to which her interview was confined but discussions with her confirms that she has good knowledge of both substantive and procedural law. The Board determines that the HONOURABLE HELLEN ONKWANI is SUITABLE to continue serving as a Magistrate.

### **HON. KENNEDY LENKAMAI KANDET**

- SUITABLE

14. At the time of vetting, the Magistrate was serving as Principal Magistrate/ Registrar at The Employment and Labour Relations Court. The Board received one complaint against the Magistrate. The complainant alleged that in **Nairobi RMCC No. 12885 of 2003**, the Magistrate was biased and ignored the facts and

evidence adduced in the case. The Board examined the Court record and finds that the complaint is unmerited.

15. The Magistrate was engaged at length in discussions over various legal principles. The Board found him very impressive, he was able to clearly and competently articulate the issues under discussion, and demonstrated good knowledge of both substantive and procedural law. His judgments are well written. The summation of evidence and reference to law and jurisprudence is impressive. The Board commends him on his exemplary writing skills. The Board determines that the HONOURABLE KENNEDY LENKAMAI KANDET is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE NATHAN SHIUNDU LUTTA**

- SUITABLE
16. At the time of vetting, the Magistrate was serving as Senior Principal Magistrate, Mariakani Law Courts. The Board considered one complaint against the Magistrate. The complainant alleged that in **Eldoret Criminal Case No. 2933 of 2009** he was told by the Investigating Officer to plead guilty to the charge, and that when he wanted to change his plea from “guilty” to “not guilty” the Magistrate refused and proceeded to sentence him. The Board examined the Court record and finds the complaint unmerited.
  17. The Magistrate was very impressive, his knowledge of the Law is sound, and he confidently and competently responded to the issues raised. The Magistrate presented a well set out and detailed response. He comes across as organized and diligent. The Board commends him for the same.
  18. The Board determines that the HONOURABLE NATHAN SHIUNDU LUTTA is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE SAMWEL KIMUYA GACHERU**

- UNSUITABLE
  - LARGE UNEXPLAINED CASH DEPOSITS
  - POOR WRITING AND RESEARCH SKILLS
19. At the time of vetting, the Magistrate was serving as Principal Magistrate at Mombasa Law Courts. The Board received one complaint but did not consider it as it relates to periods after the effective date. The same shall be forwarded to the Judicial Service Commission. The Magistrate’s legal knowledge is average, and he should endeavour to widen the scope of his reading to improve and keep himself updated of legal, legislative and jurisprudential developments. The Board finds that the Magistrate possesses average writing and communication skills. The Magistrate does not adequately summarise and analyse the evidence; neither does he make sufficient reference to the applicable Law and relevant decided cases.

20. The Magistrate was asked to explain the numerous transactions of cash deposited into his account, by several different people, in different towns. He explained that most of those deposits were proceeds from the sale of milk and the Irish potato farming that he undertakes with his mother in Kinangop. The Board however questioned how the Magistrate accessed the money from his mother in view of the fact that his work station is far from Kinangop, and further in view of the fact that the bank statement reflected the cash deposits having been made at times twice or thrice in a week. The Magistrate explained that he would visit his mother in Kinangop and she would give him the cash, which he would later deposit. The Board further sought to know why the deposits were made by different persons. The Magistrate stated that he would send staff from his office to deposit the money for him. He produced an affidavit explaining the cash and cheque deposits in his account.
21. The cash is deposited more than once a week, and it is not believable that he got the money from his mother over the weekend and banked it piece meal over the week. The Board finds that the Magistrate has several unexplained cash deposits in his account. The Board determines that the HONOURABLE SAMUEL KIMUYA GACHERU is NOT SUITABLE to continue serving as a Magistrate.

### **HON. ELENA GATHONI NDERITU**

- SUITABLE
22. At the time of vetting, the Magistrate was serving as Senior Principal Magistrate at Milimani Law Courts. The Board received one complaint against the Magistrate but could not consider it as it arose after the effective date. The same will be forwarded to the Judicial Service Commission. The Magistrate was engaged at length on her knowledge of the Law, and was found to possess average knowledge of both substantive and procedural law. The Magistrate needs to improve her writing and research skills.
23. The Magistrate was able to apply Section 175 of the Criminal Procedure Code. She ordered that the complainant be refunded Kshs. 600,000, that the complainant had been defrauded of by the accused. She also ordered that the cash bail of Kshs. 200,000 posted by the accused be released to the complainant who was a very elderly lady. This is impressive as very few magistrates use this provision. The Board determines that the HONOURABLE ELENA GATHONI NDERITU is SUITABLE and may continue serving as a Magistrate.

### **HONOURABLE ELIZABETH KATIWA USUI**

- SUITABLE
24. The Magistrate at the time of vetting was serving as a Senior Principal Magistrate at Kwale Law Courts. The Board received two complaints against the Magistrate but could not consider them as they arose after the effective date. The same shall be forwarded to the Judicial Service Commission. The Magistrate is very

dedicated to improving the delivery of Justice, and has been involved in very many innovative improvements in the stations where she has served. There was nothing untoward arising from the Magistrate's financial records. The Board determines that the HONOURABLE ELIZABETH KATIWA USUI is SUITABLE and may continue serving as a Magistrate.

### **HONOURABLE JOSEPH MALOBA WERE**

- SUITABLE
25. The Magistrate was at the time of vetting serving as Principal Magistrate at Nyamira Law Courts. The complaint considered alleged that the Magistrate perpetrated a miscarriage of justice by hearing an application at 2.30 pm in the afternoon. The Magistrate responded and stated that it is a practice in the courts that all applications filed under "certificate of urgency" are heard at 2.30 pm. The Board finds that the complaint is unmerited.
  26. The Magistrate's writing skills are good and his judgments were a pleasure to read. He makes good reference to past precedents, and the Law, in his judgments. The Magistrate is well versed in Law, and competently discussed various legal principles. There was nothing untoward arising from his financial records. The Board determines that the HONOURABLE JOSEPH MALOBA WERE is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE LETIZIA MUTHONI WACHIRA**

- SUITABLE
27. The Magistrate was at the time of vetting serving as Senior Principal Magistrate at Milimani Law Courts. The Board received one complaint against the Magistrate. The complainant alleged that the Magistrate was bribed by the OCPD to ensure he was jailed in a case where he was charged with threatening and insulting the OCPD. The witness attended the proceedings and testified. The sum total of his evidence was hearsay as his alleged informants swore affidavits denying the allegations.
  28. After examining the record, listening to the Magistrate and observing the demeanour of the witness, the Board finds that he was not a credible witness, and that his evidence was hearsay and unsupported in material particulars. The complaint has not been satisfactorily proven.
  29. The Magistrate was quite impressive, her knowledge of the Law and her legal reasoning are adequate. The Magistrate has good writing skills. The Magistrate comes across as very diligent and honest.
  30. The Board determines that the HONOURABLE LETIZIA MUTHONI WACHIRA is SUITABLE and may continue serving as a Magistrate.

### **HONOURABLE MARTHA ANYONA NANZUSHI**

- SUITABLE

31. The Magistrate joined the Judiciary, in July 2010, and was at the time of vetting, serving as a Senior Resident Magistrate at Kimilili Law Courts.
32. The Board noted that on joining the Judiciary the Magistrate continued to earn an income from the State Law Office for a period of two months. The Magistrate stated that there were outstanding allowances to her from the State Law Office and she was under the impression that the money banked into her account was the allowance. The Magistrate made effort to find out whether the money was salary or allowance, and was informed that it took a while to effect stoppage of her salary and that she needs to refund the amount. The Magistrate immediately repaid all the outstanding sums and obtained a clearance letter.
33. The Board finds that she conducted herself properly in regard to the overpayments and made effort to follow up and repay the monies. The Board also notes that she has been cleared of any wrong doing by the State Law Office. The Board determines that the HONOURABLE MARTHA ANYONA NANZUSHI is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE PAUL KIPKOSGEI ROTICH**

- SUITABLE
34. At the time of vetting the Magistrate was serving as Principal Magistrate and Deputy Registrar of the Court of Appeal at Malindi Law Courts. There were no complaints against him. The Magistrate is well versed in Law and competently discussed various legal principles. The Magistrate has worked as a researcher for the Court of Appeal and has good research skills.
  35. The Magistrate is competent and well suited to serve in the Judiciary. The Board determines that the HONOURABLE PAUL KIPKOSGEI ROTICH is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE PETER NAPHTALEY MAINA NDWIGA**

- SUITABLE
36. At the time of vetting, the Magistrate was serving as Principal Magistrate at Milimani Law Courts.
  37. The Board considered two complaints against the Magistrate. In the first complaint the Magistrate was accused of unduly delaying the matter. The Magistrate in his response demonstrated that he did not cause any undue delay in the matter. He attached the proceedings that showed he took over the matter on 3rd February, 2010 and adjourned the matter two times at the behest of the prosecution, and once because counsel for the accused was unwell. The record confirms the response. The Board finds the response satisfactory.
  38. The second complaint was made by a former prosecutor at Voi Law Courts. He accused the Magistrate of corrupt practices that compromised processes at the Court. The Magistrate responded at length and attached Court proceedings and related correspondence. The Board notes that the issue had been forwarded to

the Judicial Service Commission and concluded. Looking at the documents, the Board finds that the complaint is not merited. The Prosecutor appears to have wielded a lot of power at the Court and did not like the Magistrate, who was very independent and did not stoop to the whims of the Prosecutor.

39. His knowledge of the law and legal reasoning is adequate. The Magistrate has good writing skills. The Magistrate has lots of potential for growth. The Board determines that the HONOURABLE PETER NAPHTALEY MAINA NDWIGA is SUITABLE and may continue serving as a Magistrate.

### **HONOURABLE ROSE MAKUNGU NYANUNGA**

- SUITABLE
40. At the time of vetting the Magistrate was serving as Principal Magistrate at Machakos Law Courts. The Board did not receive any complaints against the Magistrate. The Magistrate ably explained all the issues raised on her finances to the satisfaction of the Board.
41. In the interview the Magistrate came across as articulate and demonstrated good knowledge of both substantive and procedural law. The demonstrated writing was not quite up to par, but discussions with her confirms that she has good reasoning and analytical skills and can, if trained, write better judgments. The Board determines that the HONOURABLE ROSE MAKUNGU NYANUNGA is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE JOHNSTONE MUNGUTI MUTUKU**

- SUITABLE
42. At the time of vetting, the Magistrate was serving as Principal Magistrate at Lamu Law Courts.
43. The Board received one complaint against the Magistrate, but did not consider it, as it arose after the effective date. The same shall be forwarded to the Judicial Service Commission. The Magistrate said that he regularly applies the provision of Section 175 of the Criminal Procedure Code (which permits the Magistrate to order compensation for the victim of a crime) as the people using his courts are not very literate and usually do not file civil cases to secure their rights. The Board commends him for this practice. It demonstrates good judgment and a sound balance between abstract knowledge and practical reality. The Board determines that the HONOURABLE JOHNSTONE MUNGUTI MUTUKU is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE BERNARD MAINA OCHOI**

- SUITABLE
44. At the time of vetting, the Magistrate was serving as Principal Magistrate at Wang'uru Law Courts. The Board received two complaints against the Magistrate but did not consider them as they arose after the effective date. The Board

discussed various legal principles with the Magistrate. The Magistrate discussed the issues ably. The Board finds that the Magistrate has sound knowledge of both substantive and procedural law; and also has good writing skills and the Board commends him. The Board determines that the HONOURABLE BERNARD MAINA OCHOI is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE HEZRON NYABERI MOIBI**

- SUITABLE
45. The Magistrate is currently serving as Principal Magistrate at Mwingi Law Courts. There was one complaint against the Magistrate. The Complainants alleged that the Magistrate delayed their matters in **Mwingi Criminal Cases No. 749 of 2009 and 117 of 2008**. The Magistrate in his response stated that he did not preside over **Mwingi Criminal Cases No. 749 of 2009**. The Board confirmed the same from the record and the complaint was dropped. In **Case No. 117 of 2008**, the proceedings confirm that the delays were occasioned by the Complainant's advocate who continuously requested for adjournments, and that the Magistrate handled the matter after the effective date, the complaint was also dropped.
46. The Board finds that the Magistrate is well versed in Law, and has a proper appreciation of the various legal principles discussed. The Magistrate possesses good administrative and organizational skills. He has contributed to the improvement of delivery of justice in his Court Stations. He initiated a Mobile Court at Migwani, and successfully lobbied for the donation of a building to house the first court in Kyuso. The Board lauds his efforts. The Board determines that the HONOURABLE HEZRON NYABERI MOIBI is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE MILDRED ADA- OBURA**

- SUITABLE
47. At the time of vetting, the Magistrate was serving as Principal Magistrate at Kilifi Law Courts. The Board did not receive any complaints against the Magistrate. The Magistrate possesses good knowledge of both substantive and procedural Law; and has good judgment writing skills. She also has good organisational and administrative skills, and has demonstrated apt leadership as head of station by engaging all stakeholders. To promote girl-child education in Kilifi, the Magistrate donated a shield known as "*Dada Tunaweza*" to be given to the best girl's school in Kilifi region every year. This is very commendable. The Magistrate expressed herself with confidence and due deference and comes across as an honest person of high integrity. The Board determines that the HONOURABLE MILDRED ADA OBURA is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE TERESA ACHIENG' ODERA**

- SUITABLE

48. She is currently serving as Principal Magistrate at Mavoko Law Courts. The Board received two complaints against the Magistrate. The first complainant alleges that in **Kitale Criminal Case No. 658 of 2005**, the Magistrate delayed the hearing of the case for four years after the complainant had testified; that she acquitted accused persons under section 210 despite overwhelming documentary evidence; and that the delay occasioned injustice as accused persons continued using complainant's land. The Magistrate denied the allegations and referred to the Court record to demonstrate that she was not responsible for delaying the hearing. The Magistrate averred that the judgment was based on the evidence on record and blamed the prosecution for doing a shoddy job. This view was upheld by the High Court on Appeal. The Board finds that the complaint is unmerited.
49. The second complainant alleged that in **Kitale CMCC No. 428 of 2007**, the Magistrate allowed Bill of Costs to be taxed twice in the same matter and when the Complainant raised an objection to the second Bill of Costs, she became hostile and chased him out of her chambers on 20th March, 2010 and finally, she hid the court file in her chambers and the said file was only found when she was transferred from the station. The Magistrate stated she was transferred in February 2010 and therefore, could not have hidden the file in March 2010 nor been hostile to the complainant. The Magistrate further observed that 20th March 2010, was a Saturday and it is unlikely that any Court proceedings took place on the said date. The Board finds that the complaint is unmerited.
50. The Magistrate has demonstrated a good understanding of both substantive and procedural Law. She also has good organisational and administrative skills and was instrumental in setting up Mavoko Law Courts, seeing it grow from a one magistrate station to a four magistrate station, with the second highest revenue earning in the Judiciary. The Board determines that the HONOURABLE TERESA ACHIENG' ODERA is SUITABLE to continue serving as a Magistrate.

### **HONOURABLE WILLY KIPKOECH CHERUIYOT**

- SUITABLE
51. At the time of vetting he was serving as Resident Magistrate at Thika Law Courts. The Board received one complaint against the Magistrate but did not consider it as related to events occurring after the effective date. The same shall be forwarded to the Judicial Service Commission.
52. The Magistrate demonstrates that he has a good understanding of the law. The Magistrate had not written any judgments by the effective date as he joined the Judiciary in July 2010. As head of station, he has managed to streamline activities at the Court to reduce corruption and reduce incidences of delayed hearings. The Board finds that he possesses good administrative and organisational skills. The Board Determination that the HONOURABLE WILLY KIPKOECH CHERUIYOT to continue serving as a Magistrate.

## **CONCLUDING REMARKS**

53. Only one Magistrate has been found unsuitable. This confirms that the process is not intended to punish unjustly, and that it is a fair and just process that involves a holistic evaluation of the Judicial Officers capacities. The finding of “Suitability” does not mean they are perfect, it recognises the shortcomings and underscores areas for improvement. For some of the Judicial Officers, there are complaints received arising outside the effective date that may have rendered them “unsuitable”; relevant information has been forwarded to the Judicial Service Commission. The number of Magistrates who have not been vetted are 102. We shall interview 18 Magistrates while in Embu, and another 18 shall be interviewed by end of May in Nairobi and Machakos.
54. The other 66 are Judicial Officers of the rank of Principal Magistrate and above whom we could not vet in the interim due to the time restriction placed in Section 23(3) of the Vetting of Judges and Magistrates Act. The necessary amendment is being processed and hopefully we shall be able to vet that group from June this year.
55. The Board continues to vet the remaining Magistrates, and encourages members of the public to bring any known complaints to its attention.
56. The Board wishes to thank all its stakeholders, the Judiciary, Parliamentary Committees and the media for continuing to support and assist the process.

## THE FIFTEENTH ANNOUNCEMENT

This chapter contains the fifteenth announcement of determinations pronounced on 8<sup>th</sup> September, 2015.

### INDEX

- Introduction.....Para 1
- Main Issues Arising.....Para 2
- Conclusion.....Para 61
  - (i) Financial impropriety
  - (ii) Lack of candour
  - (iii) Impropriety
  - (iv) Integrity
  - (v) Incompetence
  - (vi) Lack of Diligence
- **DETERMINATIONS ON SUITABILITY**
  - 1. Hon. Ben Mwai Mararo.....Para 10
  - 2. Hon. Thomas Thyaka Nzioki .....Para 18
  - 3. Hon. Bernard James Ndeda.....Para 28
  - 4. Hon. Phillip Wambua Mutua.....Para 34
  - 5. Hon. Grace Ayuma M'mmasi .....Para 3
  - 6. Hon. Stellan Bonareri Atambo .....Para 39
  - 7. Hon. Stephen Onsiero Mogute .....Para 42
  - 8. Hon. Tito Maoga Gesora .....Para 56
  - 9. Hon. Henry Nyakweba Nyabuto
  - 10. Hon. Kiama Peter Maina
  - 11. Hon. Macharia Florence Nangari
  - 12. Hon. Kassam Juliet Atemba
  - 13. Hon. Ndururu Victor Wakhumile
  - 14. Hon. Sarapai Lyna Nafula
  - 15. Hon. Maiteri Dorcas Wangeci
  - 16. Hon. Mathias Ochieng Okuche
  - 17. Hon. Onyango Dickson Odhiambo
  - 18. Hon. Ojoo Barbara Achieng
  - 19. Hon. Karani Davis Gitonga

20. Hon. Ndegwa Susan Nyawira
21. Hon. Otieno Victor Owino
22. Hon. Kiptoon Vincent Kibichi
23. Hon. Onkoba Mogire
24. Hon. Magodi Jared Ogoti
25. Hon. Christine Mulongo Nekesa
26. Hon. Charles Ndegwa Ngure
27. Hon. Joseph Musembi Karanja
28. Hon. Thomas Muraguri Mwangi
29. Hon. Too Edward Kiprono
30. Hon. Mwangi Patrick Wambogo
31. Hon. Mwangi Anne Wanjiru
32. Hon. Akala Mary Ashiero
33. Hon. Mitullah Benjamin Atiang
34. Hon. Lilian Akumu Arika
35. Hon. Nyakundi Zacharia Joseph
36. Hon. Mwangi Agnes Wahito

## INTRODUCTION

1. The Constitution and the Vetting of Judges and Magistrates Act, 2011 require a vetting process that will determine the “suitability” of all the judges and magistrates who were in office on the date of promulgation of *The Constitution of Kenya 2010*, the 27th August 2010, which is known as the “effective date”.
2. This is the 15th Announcement of the Board. It relates to determinations in respect of 36 Magistrates vetted in the last two months. The main concerns and issues arising from this phase of vetting were mainly noted to be financial irregularities. The Board carries out a financial audit by requiring the Judicial Officers to remit bank statements and wealth declaration forms spanning three years. The documents reveal a lot when audited properly. The Judicial officers are given an opportunity to furnish any documentation or evidence (even by way of affidavit) to respond to issues arising from the provided financial records. The Board also came across issues of lack of integrity and fidelity to the office of Judicial Officer. Writing skills continue to be a problem, and we continue to point out the gaps to the Judicial Officers.
3. The Board is pleased to note that the National Assembly passed an amendment to the Vetting of Judges and Magistrates Act, 2011, enabling the vetting of Judicial Officers of the rank of Principal Magistrate and above, a process that had been interrupted for a period of close to one and a half years, to continue. The amendment was gazetted on 6th August, 2015 and we have already begun to vet the said Judicial Officers.
4. We are in the final phase of vetting. There are 71 Judicial Officers pending vetting and we have put in place measures that will see us working on overdrive ( without compromising standards) to ensure that the process is completed within the statutory period, all factors remaining standard.
5. The Board in the course of vetting has been repeatedly informed of the severe working conditions faced by Judicial Officers from the hardship areas of Moyale, Marsabit, Mandera, Turkana, Wajir and Garissa. We, therefore, decided to visit Turkana and Mandera on a fact finding mission. The Board found a very depressing environment. Being hardship areas, the regions face the usual challenges of distance, security, communication and such other factors, however over and above these, the Board found the Court house in Mandera to be in a very sad state. There is no court room and the Magistrate has to conduct proceedings in his chamber which is very tiny, poorly ventilated and furnished. There are no holding cells and prisoners line the corridors posing a security risk. The Court does not have reliable internet and the only printer has broken down. As a Board, we noticed that the working conditions of the Judicial Officers in these regions are very severe and more should be done. We note that a new Court building is under construction, but it will be a while until its completion, and something needs to be done by the Judicial Service Commission in the interim to facilitate a hygienic and comfortable work environment.

6. The Board also found that the Judicial Officers serving in those regions are disadvantaged as they cannot carry out research, they have limited access to newspapers, radio and television broadcasts. The social environment is stifling as the residents observe a self-imposed curfew after 6 pm due to insecurity.
7. Complaints from the region indicate that the Judicial staff in these courts are not properly supervised by the headquarters as they are in the periphery and there is room for a lot of malpractice and miscarriage of justice, that goes on undetected. They also complained about the distances to Courts from the various sub-counties and asked for more courts in the sub-counties. They aver that the absence of accessible courts fosters injustice as elders arbitrate and settle even very serious matters, out of court, in a casual manner. We note that the Judicial Service Commission has set up many new Courts but we still urge them to consider the plea from these marginalised zones.
8. When we visited Mandera there was no Magistrate at the station for a whole week because he had to attend a seminar elsewhere. Mandera is at the border with Somalia and poses a security risk as an entry point for undesirable elements. Security is challenged when there is no Magistrate as the Police cannot hold suspects for more than 24 hours, and when given bonds the suspects disappear into either Ethiopia or Somalia. The next nearest Court in Wajir is over 800 km away. The Judiciary should take these factors into account and ensure that the station is always manned.
9. As we continue vetting, we note the widely reported concerns of the Chief Justice that corruption is seeping back into the Judiciary. The Board wants to clarify that its role is to consider suitability from factors, issues and events arising before the promulgation of the Constitution. This was the finding of the **Supreme Court in Petition No.29 of 2013**. We cannot, therefore, deal with or comment on the corruption occurring presently. Having engaged in a lot of public outreach programme and borrowing from lessons learnt through this process, we shall at the end of the vetting process make recommendations for legislative amendments that will energise and improve the disciplinary functions of the Judicial Service Commission.

## **DETERMINATIONS ON SUITABILITY**

### **HONOURABLE BEN MWAI MARARO**

- NOT SUITABLE
- FINANCIAL IMPROPRIETY
- LACK OF CANDOUR

10. The Board received one complaint against the Magistrate. The anonymous complaint alleges that the Magistrate has sanctioned a system at the Kyuso Law Courts where the Executive Officer require parties to pay money to enable visits

- to the *locus in quo* by the Court. That the payments are not official as they are not receipted. The Board notes that the matter arises after the effective date. The same shall be forwarded to the Judicial Service Commission.
11. The Board examined the Magistrate's judgments and finds that there is very poor legal analysis and reasoning. Several flaws were noted and pointed out to the Magistrate. The issues indicate that the Magistrate does not possess adequate knowledge of substantive and procedural law.
  12. The Magistrate was questioned extensively in relation to his finances. The Board was displeased to find that the Magistrate when asked to forward wealth declaration forms for the year 2008, simply went and crossed out the dates on the form earlier presented for the year 2009 and altered it to read 2008. The Board finds such conduct improper, dishonest and totally unbecoming of a judicial officer. The Magistrate explained that the document prepared earlier erroneously stated it was for 2009 and yet it was for 2008. His explanation does not justify falsifying a document already presented, the Magistrate ought to have sworn an affidavit to explain the error, or waited until he appeared for the interview and explained the error. Altering a document and uttering it as if it were a copy of an original document made out for 2008 amounts to forgery.
  13. The Magistrate was running a Law firm before joining the Judiciary and operated a bank account in the name of B.M. Mararo & Company Advocates. The Magistrate continued to operate the said account even after joining the Judiciary and it was a very active account. The Board finds it improper for a judicial officer to operate a law firm account<sup>1</sup>.
  14. The Magistrate has several large cash deposits into his account. The Magistrate states that the same was money forwarded to him by a brother based in Nakuru who trades in cars.
  15. The Board finds that if indeed the brother is in the car trade business, he should set up proper systems for his trade that does not involve transferring money to a third party.
  16. There were other cash deposits in the Magistrate's account which he claimed were allowances paid to him by the Judiciary. He claimed that the money would be processed as cash and he would request a clerk in the finance office to bank it in his account on his behalf. The payment vouchers and the amounts banked however did not reconcile. In one instance the voucher was for Kshs.73,000 and the amount banked was Kshs. 65,600. The Magistrate claims that the shortfall was a tip for the person banking on his behalf, the explanation is not credible<sup>2</sup>.
  17. The Board finds a lot of discrepancies in the Magistrate's financial records.

## DETERMINATION

18. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board

1. Pages 36 – 39 of the Hansard dated 14<sup>th</sup> July 2015.

2. Pages 47 to 52 of the Hansard of 14<sup>th</sup> July 2015.

determines that the HONOURABLE BEN MWAI MARARO is NOT SUITABLE to continue serving as a Magistrate.

## HONOURABLE THOMAS THYAKA NZYOKI

- NOT SUITABLE

- FINANCIAL IMPROPRIETY

19. The Board received four complaints against the Magistrate. The first complaint was sent by unidentified concerned residents of Lodwar. The complaint alleges that the Magistrate was in **Lodwar Magistrate's Court Miscellaneous Application No. 14 of 2009** compromised by Senior Government officials to release for redistribution to locals, maize already declared contaminated and suitable for destruction by the Court. They also allege that the Magistrate is temperamental and does not get along with both staff at the Court and litigants, and that the Magistrate uses his kinsmanship with the Chief Justice to threaten staff.
20. The Magistrate denies allegations that he released contaminated maize for redistribution, and states that he has never handled any case for destruction of maize. That the only cases for destruction of foodstuff have related to cooking oil and 'Unimix' a special porridge mix given to refugees. The Magistrate also denied being temperamental and arrogant.
21. The issue of the Magistrate's conduct was investigated by the Board and statements recorded from Court Clerks and an Advocate. Two witnesses attended to give evidence before the Board. The main issue at the interview related to whether the Magistrate was aware of, or sanctioned a practice at Lodwar Law Courts where staff at the station including himself would improperly 'take' cash from the cash office and later repay it. The Board investigator, Chief Inspector Naliaka, travelled to Lodwar Law Courts and was able to obtain from the Court, a certified extract from a notebook, wherein there were entries with names of various staff at Lodwar Law Courts indicating such transactions.
22. The investigator also obtained a written statement from one Susan Kamollo who was working in the cash office at the material time. In her statement she states that **"I further wish to state that it was normal practice for members of staff to borrow cash on different occasions which they used to repay in time. I used to keep the records in an office note book"**<sup>3</sup> The said Susan Kamollo attending the Board as a witness, and having sworn an affidavit denying knowledge of such transactions at the request of the Magistrates Advocate, denied knowledge of any notebook in which such transactions were kept; stated the extract was unknown to her and was never created by her; and denied that the Magistrate ever took cash for his personal use from her.
23. The investigator also obtained a statement from one John Lotir who was the Executive Officer Lodwar Law Courts at the material time. In his statement he states that **"I wish to further state that there was a culture in the office where**

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3.

members of staff would borrow money from the cashier and pay later". The said John Lorit attending the Board as a witness, denied that such culture existed with his knowledge, and all borrowing was for official purposes only. That he only learnt of the culture when he returned to the station from training and reported the same.

24. The Magistrate categorically denied having ever borrowed any money for personal use, but admitted that he would sanction 'borrowing' for official purposes whenever the office was short of funds. The issue was interrogated at length during the interview. The witnesses were inconsistent and lacking in candour. They both swore affidavits at the request of the Magistrate or the Magistrate's Advocate, aimed at contradicting the statements made to the Board investigator. The issue of borrowing funds for personal use was the subject of certain disciplinary proceedings and was, therefore, known by the Magistrate and the two witnesses, feigning total ignorance of the matter, indicates dishonesty and an absence of integrity. The Magistrate on one hand states he would sanction withdrawals for official use, but fails to admit that such borrowing even for official purposes is improper and illegal. The sanctioning of such borrowing opened up the pandoras box, since the transactions were not legal, no proper accounting records were kept, however the cash officer to ensure recovery wisely kept a notebook with records, which notebook the Board investigator was able to trace from the Court itself and get certified by no less than the Principal Magistrate. The fact that the document was certified by the Principal Magistrate lends credence as to its authenticity.
25. The Magistrate raises the issue that the document does not bear his signature at any point, that the name appearing at parts is Nzioki and not Nzyoki, that at parts it refers to '*mdosi*' and he is not one as '*mdosi*' is a rich person. The Board finds that the document was an informal record kept by the cashier, as stated by her in the statement to the Board Investigator, to track the cash. The reference to Nzioki and Nzyoki is semantic, there was no one else at the station with a similar name and it is safe and proper to infer that the person referred to therein as Nzioki is one and the same person as Nzyoki. That further the reference to '*mdosi*' in Kenya usually refers to the 'boss' and indeed the Magistrate was the boss at the station. Several times the record refers to '*mdosi* Nzioki' which the Board interprets to mean 'Boss Nzyoki'.
26. The Board finds that the Magistrate lacked candour in his entire response to this issue; that the Magistrate reached out to the two witnesses as the matter was pending, to have them retract their statements and support him (this can be inferred from John Lotir's reticence in disclosing how he came to file an affidavit and Susan Kamollo's initial silence when questioned on the same), this is conduct unbecoming of a judicial officer.
27. The Board also finds that the Magistrate and staff at the Lodwar Law Courts were involved in illegally obtaining money from the cash office and converting it to their own use. The Board has adopted a zero tolerance approach to issues of

integrity and finds that the entire incident impacts negatively on the Magistrate's integrity.

## **DETERMINATION**

28. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE THOMAS THYAKA NZYOKI is NOT SUITABLE to continue serving as a Magistrate.

## **HONOURABLE BERNARD JAMES NDEDA**

- UNSUITABLE
  - IMPROPRIETY
29. The Board received one complaint against the Magistrate. The complaint was forwarded through the Commission on Administrative Justice and a complaint filed with the Board by Felista Muthoni. It alleges breach of integrity and corruption in **Gichugu Senior Resident Magistrates' Criminal Case No. 1124 of 2008, Republic vs Isaiah Samuel Gitari**. The specific allegations of breach of integrity and corruption are that; the Magistrate refused and/or declined to issue the complainant with typed court proceedings when the same had been paid for; that the Magistrate invited the complainant to her Advocate's office and told the complainant not to lodge an appeal in the case, while undertaking to release the accused whom he had sentenced to a two-year jail term in an unprocedural manner; that the Magistrate frustrated the lodging of an appeal and subsequently released the accused in an unprocedural manner due to the complainant's insistence on due process coupled with the complainant's refusal to bribe; that the Magistrate colluded with the complainant's advocate to frustrate the filing of the appeal; and the Magistrate's judgment was not fair.
30. The Magistrate denies the allegation and filed an affidavit sworn by the Advocate to support his response. The complainant appeared before the Board and gave sworn evidence. The complainant stated very clearly that upon her brother's conviction she immediately instructed the Advocate to appeal the verdict, the Advocate however did not appeal but at some point summoned her to his offices. The witness states that on arrival at the Advocate's office, she found the Magistrate seated there and they were waiting for her. That at the meeting the Advocate introduced the Magistrate as his classmate and tried to convince the complainant to stop pursuing the appeal as the Magistrate had promised to release her brother without the need of an appeal. That an appeal would jeopardise the Magistrate's job. The complainant states that she was not in agreement with the suggestion as she believed the conviction was not merited and was interested in pursuing an appeal. That a short while thereafter her brother was released and she has no knowledge of the circumstances under which he was released.

31. The complainant was questioned by the Magistrate's counsel, Assa Nyakundi, and her testimony remained unshaken. The lawyer pointed out a discrepancy as to dates and time, stating that if the meeting at the Advocate's was in March then the brother should have been released much earlier than May, the month appearing in the release order. The Magistrate's counsel also raised the issue of age difference, stating that the Advocate was much older than the Magistrate and it was not believable that they could refer to each other as classmates. Counsel stated that the meeting was a fabrication of the complainant's imagination and that the complaint was motivated by vendetta.
32. The Board has considered all the issues arising and has observed the demeanour of the witness. The Board does not give too much weight to the complaint about the delayed typed proceedings, as it is not the sole preserve of the Magistrate to issue proceedings. The Board finds that the witness is truthful and credible. There was no vendetta shown to have existed between the complainant and the Magistrate. The brother was released, she is not claiming that the Magistrate asked her for a bribe, she is just pointing out that she met the Magistrate in the lawyer's office which she finds improper.
33. The Board finds that the Magistrate's conduct was indeed improper and unbecoming of a judicial officer. A Magistrate must not be seen to be visiting the offices of Advocates who appear before him, and especially in the presence of litigants or their relatives. Such conduct offends propriety and portrays a negative outlook on his integrity and must be faulted.

## **DETERMINATION**

34. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE BERNARD JAMES NDEDA is NOT SUITABLE to continue serving as a Magistrate.

## **HONOURABLE PHILIP WAMBUA MUTUA**

- UNSUITABLE
  - FINANCIAL IMPROPRIETY
35. The Board examined the Magistrate's judgments, and finds that they contain a lot of repetitive grammatical mistakes, and are wanting in form and structure. The Magistrate needs to improve his legal research and analysis; and to make more reference to statutory law and decided cases.
  36. In discussing the Magistrate's finances, the Board noted certain questionable deposits. In July 2007, there was a cash deposit of Kshs 50,000 into the Magistrate's account. The Magistrate explained that he had been lent the money by a friend to enable him complete construction of his mother's house. The Board wondered why the Magistrate did not use the money immediately and kept in

his account and later lent part of the same money in September to a friend. The Magistrate was not able to clearly state when and how he repaid the money, he was not able to categorically state how he spent the funds on the construction and when he completed the construction. The Board notes that in March the next year over a period of months he claims to have lent out Kshs 50,000 to the same friend who lent him the same amount in the previous year. The friend has sworn an affidavit. The Board however finds that the same is not cogent and leaves many issues unexplained. The Board finds that the Magistrate is not being candid about his finances and finds that there is complicity. This has a negative impact on his integrity.

## **DETERMINATION**

37. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE PHILIP WAMBUA MUTUA is NOT SUITABLE to continue serving as a Magistrate.

### **HON. GRACE AYUMA M'MMASI**

- NOT SUITABLE
  - IMPROPRIETY
  - LACK OF CANDOUR
38. The Board notes that the Magistrate failed to disclose a complaint filed against her with the Judicial Service Commission. The promotion letter of 10th February 2012 makes reference to complaints claiming bribery against the Magistrate. The Magistrate did not disclose this in the questionnaire and when questioned about the same, stated it was an oversight. The Magistrate was not able to tell the Board much about the complaint as she claimed that she could not remember the details of the complaint. The Magistrate's inability to recall the details of a complaint that led to the deferment of her promotion for over 2 years is unbelievable. The Board finds that the Magistrate is not being candid, and that there was deliberate intent to withhold information from the Board. This impacts' negatively on the Magistrate's integrity.

## **DETERMINATION**

39. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18, and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE GRACE AYUMA M'MMASI is NOT SUITABLE to continue serving as a Magistrate.

### **HON. STELLAH BONARERI ATAMBO**

- NOT SUITABLE
- INTEGRITY

40. The Magistrate disclosed to the Board an instance where her court clerk approached her on behalf of a litigant with a pending judgment and offered her Ksh 50,000. The Magistrate states that she firmly declined the offer and let the matter rest, shortly thereafter the said court clerk was promoted to head of section. The Board finds that the Magistrate by her conduct condoned the actions of the Court Clerk; the Magistrate should have taken deterrent steps to ensure that such conduct does not recur. As it were she even passively permitted a corrupt individual to be promoted to head of section, this weakens the judicial structures and frustrates the fight against corruption.
41. The Board finds from the facts available, that the entire incident and more importantly, the manner in which the Magistrate handled it, impacts negatively on her integrity. The Board has adopted a zero tolerance approach to negative inferences on integrity.

### **DETERMINATION**

42. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18, and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE STELLAH BONARERI ATAMBO is NOT SUITABLE to continue serving as a Magistrate.

### **HON. STEPHEN ONSIERO MOGUTE**

- NOT SUITABLE
- FINANCIAL IMPROPRIETY
- INCOMPETENCE
- LACK OF DILIGENCE

43. The Board received two complaints against the Magistrate. The first complainant alleged that in **Tigania Magistrates Court Criminal Case No. 959 of 2009**, the Magistrate found the accused had a case to answer yet he acquitted them despite the fact that the accused chose to remain silent and state nothing in their defence. The complainant believes that the Magistrate must have been compromised.
44. The Magistrate denied the allegation and stated that he acquitted the accused because he realised the charge was defective only at the time of writing the judgment.
45. The second complainant alleged that in **Meru Magistrates Court Traffic Case**

- No. 4739 of 2006, the Magistrate appeared compromised, as he relied on non-existent exhibits and failed to take into account crucial evidence during the trial. The Magistrate stated that in this case too, he acquitted the accused due to a defective charge sheet.
46. The Board notes that in both cases the Magistrate points out the issue of defect in the charge at the close of the case. This is either negligence or lack of diligence. The prosecution can knowingly use this as a loophole for obtaining the acquittal of parties who have compromised them. There may also have existed collusion between the Magistrate, the accused and the prosecution. The Board is not convinced that in both instances, the Magistrate was unable to notice the defect in the charge sheet and bring it to the attention of the prosecution in good time for amendment. Having noticed the trend the Magistrate should have been more diligent and in the forefront of ensuring charge sheets are not defective before proceedings.
47. The Board finds that in both complaints, the Magistrate has failed to give a satisfactory response. The Board finds that he lacks diligence and is incompetent.
48. The Board finds that the Magistrate needs to improve his judgment writing skills. The judgments lack depth and do not adequately analyse and address all the evidence and issues arising for determination. The Magistrate must improve his research skills to enable adequate reference to Statutory Law and Case Law. The overall structure and layout of his judgments also needs improvement.
49. The Magistrate was questioned at length on his financial records. The Board was amazed that from 1st January 2007 to 13th December 2008<sup>4</sup>, the Magistrate never made a single withdrawal from his account. The Magistrate claims it is the only account he holds, and indeed his salary is credited therein. The Magistrate was asked to explain how he survived for close to two years without making any withdrawals. The Board also notes that from 3rd February 2008 to 26th May 2010, the Magistrate only made a withdrawal of Kshs 40,000 on 24th August 2009 and a withdrawal of Kshs 20,000 on 6th April 2010 making a total withdrawal of Kshs 60,000 Only in almost two and a half years<sup>5</sup>.
50. The Magistrate explained that his wife was engaged in informal trade and business and was supporting him and shouldering most of the family financial burden. The Board has examined the accounts of his spouse from 2009 to 2010 and finds that the spouse rarely maintained any savings in her account and withdrew almost all her salary as soon as it was received.
51. If indeed the spouse was involved in some well earning informal business as claimed, she would have savings in her account to support the contention. The picture painted from the spousal account is that she did not have enough money in reserve and she withdrew and used up all her earnings which amounted to about to Kshs. 15,000 a month. It is incomprehensible that the Magistrate's spouse was able to single-handedly shoulder most of the financial commitments of the family.

4. Pages 315 to 316 of the Complaints and Response File.

5. Pages 316 to 317 of the Complaints and Response File.

52. The Magistrate also alleged that he supplemented the support from his spouse with the per diems paid for official trips and from a merry-go-round group earnings<sup>6</sup>. The Board notes that per diem is not constant and cannot be factored in or budgeted as income for daily survival. The Magistrate was also unable to demonstrate how he paid his share of the merry-go-round. The Magistrate claims they were five members implying that payments to him would be every fifth month from his first receipt. The bank statements do not support this contention, the claimed deposits can be traced in August 2007 a payment of Kshs. 20,000 by Osoro<sup>7</sup>, December 2007 a payment of Kshs. 10,000 by Jenn<sup>8</sup>, and a payment in March 2008 of Kshs 10,000 by Elizabeth<sup>9</sup>. The periods in between the payments are much shorter than the expected five months. The Board does not find this explanation credible.
53. The Magistrate also alleged that around November 2007 he purchased a car but the deal went sour, and thus was refunded the purchase price Kshs 700,000 in instalments sometime in 2008 and that he never banked the money and used it for survival. This explanation does not satisfactorily address how he survived from January 2007 to February 2008 and in 2009 and 2010. The Board also finds it unbelievable that the Magistrate would allegedly receive Kshs 100,000 and just spend it without banking, considering that the money was refund for a capital investment that had gone wrong. A prudent person would re-bank the money so as to be able to recoup it all again to use on another investment. The Board also notes that the Magistrate was unable to furnish any documents as proof of either the sale or the purported refunds.
54. The Magistrate also alleged that he injected some of the money received as a refund, into the informal business run by his spouse<sup>10</sup>. The Board finds that if indeed the spouse was carrying out business to the extent of over Kshs 100,000, she would have had a bank account and her bank balances would have been higher than what has been evidenced to the Board.
55. The Board notes that the Magistrate provided Wealth Declaration Forms that did not indicate any earnings by spouse, allowances received or any other source of income.
56. The Magistrate filed further documents in support of financial records with the Board on 8th June, 2015. The same does not satisfactorily address the issues raised.

## DETERMINATION

57. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE STEPHEN ONSERIO MOGUTE is NOT SUITABLE to continue serving as a Magistrate.

6. Page 175 of the Hansard.  
 7. Page 314 of the complaints and response File.  
 8. Page 314 of the complaints and response File.  
 9. Page 315 of the complaints and response File.  
 10. Page 173 of the Hansard.

## HONOURABLE TITO MAOGA GESORA

- NOT SUITABLE
  - FINANCIAL IMPROPRIETY
1. The Board in examining the Magistrate's finances found that his financial records are not well maintained. The Board found that on joining the Judiciary, the Magistrate for a period of slightly over two years, continued to operate the accounts of Gesora T.M. & Company Advocates as sole signatory. Monies would be deposited into the account and he would withdraw and use the same, and also make payments to clients from the same account. The Magistrate also operated the same account as his personal account and at some point his salary was being deposited into the said law firm account. The Board finds this highly irregular and professionally unethical. It is a requirement that client's accounts, office accounts and personal accounts are kept separate and distinct. The Magistrate was unable to indicate or provide proof of which money was his own, and which was client's money or office money. The Magistrate ought to have delinked himself from the law firm immediately upon joining the Judiciary. His actions in maintaining the account confirm that he was still actively involved in the management of the law firm. The Board finds that his actions taint the image of propriety and falls short of requisite professional standards and conduct.
  2. The Magistrate was unable to explain several financial transactions, including large deposits and withdrawals from the said account. The Magistrate made reference to cars that he either purchased or sold, but was unable to provide Sale Agreements. The Magistrate claims to have received Kshs 90,000 as part of purchase price for a lorry he sold, but is not able to furnish any documents in support<sup>11</sup>. The Board wonders how the Magistrate could sell the lorry when it appears he never paid for it completely. Did the Magistrate have a good title to pass on? The Magistrate informed the Board that "he initiated the process of buying the vehicle and did not completely succeed in changing it to his ownership. The use of the words "initiated purchase", implies that he never quite completed the purchase. The question of interest to the Board then is whether the Magistrate actually sold a lorry, and whether the funds referred to are actually sourced from such sale? These issues have not been satisfactorily addressed by the Magistrate.
  3. The Magistrate explains a deposit of Kshs 926,030 made on 3rd September 2009 as a development refinancing loan but has no documents to support the contention. The Magistrate was also unable to explain what development he financed with the money. The Board notes that the money was withdrawn in three large sums in less than a week. The Magistrate withdrew Kshs 160,000 on 4th September 2009, Kshs 270,000 on 7th September 2009 and Kshs 350,000 on 10th September 2009. The Board urged him to try and recall, as developments are memorable milestones. The Magistrate said that, "Unfortunately because I did not keep proper records, I am not able to specifically say what I did with the

11. Pages 127 and 128 of the Hansard.

money.”<sup>12</sup> The Magistrate undertook to file an affidavit to address the issue. The affidavit filed however did not explain the same adequately.

4. The Board finds that the Magistrate had failed to adequately address issues raised regarding his finances.

## **DETERMINATION**

5. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE TITO MAOGA GESORA is NOT SUITABLE to continue serving as a Magistrate.

The following Magistrates were found Suitable:

1. Hon. Henry Nyakweba Nyabuto
2. Hon. Kiama Peter Maina
3. Hon. Macharia Florence Nangari
4. Hon. Kassam Juliet Atemba
5. Hon. Ndururu Victor Wakhumile
6. Hon. Sarapai Lyna Nafula
7. Hon. Maiteri Dorcas Wangeci
8. Hon. Mathias Ochieng Okuche
9. Hon. Onyango Dickson Odhiambo
10. Hon. Ojoo Barbara Achieng
11. Hon. Karani Davis Gitonga
12. Hon. Ndegwa Susan Nyawira
13. Hon. Otieno Victor Owino
14. Hon. Kiptoon Vincent Kibichi
15. Hon. Onkoba Mogire
16. Hon. Magodi Jared Ogoti
17. Hon. Christine Mulongo Nekesa
18. Hon. Charles Ndegwa Ngure
19. Hon. Joseph Musembi Karanja
20. Hon. Thomas Muraguri Mwangi
21. Hon. Too Edward Kiprono
22. Hon. Mwangi Patrick Wambogo
23. Hon. Mwangi Anne Wanjiru

12. Page 133 of the Hansard.

24. Hon. Akala Mary Ashiero
25. Hon. Mitullah Benjamin Atiang
26. Hon. Lilian Akumu Arika
27. Hon. Nyakundi Zacharia Joseph
28. Hon. Mwangi Agnes Wahito

### **CONCLUDING REMARKS**

63. As we convene here today, we shall vet 16 Judicial Officers over the next eight working days and that shall mark the conclusion of vetting of all Judicial Officers in the Western region. This, therefore, is the last phase of vetting by JMVB at Kisumu.

We thank you for your continued co-operation and hospitality.

## THE SIXTEENTH ANNOUNCEMENT

This chapter contains the sixteenth announcement of determinations pronounced on 8<sup>th</sup> September, 2015.

### INDEX

- Introduction .....Para 1
- Main Issues Arising .....Para 2
- Conclusion .....Para 45
  - (i) Financial impropriety
  - (ii) Incompetence
  - (iii) Poor writing skills
  - (iv) Lack of diligence
  - (v) Impropriety
  - (vi) Temperament

### DETERMINATION ON SUITABILITY

1. Hon. Teresia Njeri Ngugi .....Para 7
2. Hon. Bildad Ochieng.....Para 17
3. Hon. Lily Monica Nafula.....Para 35
4. Hon. Margaret Warigia Wachira
5. Hon. Ogola Daniel Ogembo
6. Hon. Onyando Emily Ominde
7. Hon. Jacob Ole Kipury
8. Hon. Gichohi Patricia Njeri
9. Hon. Serem Moses Koskei
10. Hon. Gitari Lucy Waruguru
11. Hon. Onginjo Adwera Anne Colleta Apondi
12. Hon. Heston Mboga Nyaga
13. Hon. Paul Chepkonga Biwott
14. Hon. John Njoroge Muniu
15. Hon. David Kipyegomen Kemei
16. Hon. Charles Lwanga Okata Obulutsa
17. Hon. Liza Lynne Wairimu Gicheha
18. Hon. Joyce Mkambe Gandani
19. Hon. Julie Oseko Ouma
20. Hon. Theresa Murugi Wairimu

21. Hon. Nthiga Lawrence Mugambi
22. Hon. Julius Ng'arng'ar Kipkosgei
23. Hon. Micheni Wendy Kagendo
24. Hon. Cherere Thripisa Wanjiku Wamae
25. Hon. Pussy Doree Nasieku Mulekyo
26. Hon. Mokaya Winfrida Boyani

## INTRODUCTION

1. The Constitution and the Vetting of Judges and Magistrates Act 2011 require a vetting process that will determine the “suitability” of all the judges and magistrates who were in office on the date of promulgation of *The Constitution of Kenya 2010*, the 27<sup>th</sup> August 2010, which is known as the “effective date”.
2. This is the 16th Announcement of the Board. It relates to determinations in respect of 26 Magistrates vetted over the last two months. The main concerns and issues arising from this phase of vetting relate to capacity, competence, attitude and integrity. The Board also came across issues of lack of integrity and fidelity to the office of a judicial officer. Writing skills continue to be a problem, and we continue to point out the gaps to the judicial officers.
3. During this session, we are carrying out the last phase of vetting. By the end of this session, which will last two weeks, all those who were serving as Judicial Officers as at the time of promulgation of the Constitution of Kenya, the 27<sup>th</sup> of August, 2010 shall have been vetted, except two Judges who have matters in Court challenging the Board’s power to carry a re-vetting process. These matters are pending in Court, and the JMVB has to respectfully await the outcome of those matters.
4. The Board shall hereafter embark on hearing and determining all pending review applications, which as at now are 15 in number.
5. The Board notes that the Vice Chair has been sued by a Judge of the High Court of Kenya in her personal capacity for defamation, for comments made on behalf of the Board in the course of her official duties. The Board would like to express its support for the Vice Chair and notify the public that it shall support and stand by the Vice Chair in the litigation process.
6. The Board’s work is progressing smoothly and we are on track to conclude the assignment by the end of March 2016. We would like to thank all stakeholders who have supported the process this far.

## DETERMINATION ON SUITABILITY

### HONOURABLE TERESIA NJERI NGUGI

- FINANCIAL IMPROPRIETY
  - INCOMPETENCE
  - POOR WRITING SKILLS
7. The Board received three complaints against the Magistrate. The complainant Paul Njoroge Ngugi alleged that the Magistrate is incompetent, lacks judgment and is not fit to be a Magistrate. The complaint relates to events occurring after the effective date and shall be forwarded to the Judicial Service Commission.

8. The second complainant Beth Mulei alleged that in **Nairobi Chief Magistrate's Court Civil Case No. 6580 of 2008**, the Magistrate delivered a ruling which went missing from the Court file, and subsequently was required to rewrite the ruling and has delayed delivery of the ruling to date.
9. The Magistrate responded and denied the allegations. The Magistrate clarified that the Chief Magistrate on 31st August, 2009 directed that she rewrite the ruling. That she was transferred to Makadara Law Courts and took the file with her, that she wrote the ruling and forwarded it to Milimani Commercial Courts for delivery in September 2009. That the ruling was delivered on her behalf in February 2010.
10. The Board notes that there was no letter by which the Magistrate forwarded the file to Milimani Law Courts, and her assertion that she forwarded the file in September 2009 is not supported. The Board also finds that the Magistrate's failure to establish how the ruling disappeared from the court file reflects negatively on her. The Magistrate should have initiated an enquiry and taken the registry staff to task. The Magistrate adopted a laid back approach, such nonchalance fosters and encourages corruption in the courts. Cases of missing files and plucking of documents from Court files was rampant and was used to corruptly compromise justice. In this instance, the affected party was denied the fruits of the missing ruling for close to one year.
11. The third complainant Linah Cheronno alleged that in **Nairobi Criminal Case No.187 of 2006** the Magistrate was compromised to acquit the accused persons despite overwhelming evidence of fraud placed before her. The Magistrate responded and stated that she considered all the facts and evidence presented and acquitted the accused on merit. The Board finds the response satisfactory.
12. The Magistrate has several cash deposits in her account. There were three deposits of Kshs 500,000 made on 21st November, 2007. The Magistrate explained that she was a member of Wendani Women Group who engaged in table banking and every November she would earn from her investment. She attached an affidavit from the treasurer of the group who stated that every November the Magistrate would earn Kshs 104,000 plus dividends, and that all payments would be made in cash. The Magistrate was a member of the group from 2004 to 2009. The Board notes that the bank statements of the Magistrate do not reflect banking of similar amounts in November of the years 2004, 2005, 2006 and 2009. The explanation is, therefore, not credible.
13. There were other cash deposits which the Magistrate explained were allowances paid to her while she served on a taskforce. The Board finds that the banking history does not match the record of activities of the taskforce as evidenced by Minutes of the taskforce.
14. The Board finds that there are several large unexplained deposits in the Magistrate's financial records.
15. The Magistrate supplied judgments which the Board examined. The Board finds that the judgments are lacking in structure and material particulars.

The judgments are poorly written and the awards are not logical, pointing to incompetence. The judgments are shallow and do not sufficiently capture the facts and evidence, the legal reasoning and analysis is hollow. None of the attached judgments make reference to precedents or authorities. The Board notes that most of the judgments were delivered in 2009, almost ten years into the Magistrate's judicial career and cannot be excused. The Magistrate claimed that she had no sufficient exposure to Civil matters, but the Board finds that this is not a justifiable reason for the shoddy work presented, the structure of judgments is the same in both Civil and Criminal cases.

## **DETERMINATION**

16. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18, and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE TERESIAH NJERI NGUGI is NOT SUITABLE to continue serving as a Magistrate.

## **HONOURABLE BILDAD OCHIENG'**

- NOT SUITABLE
  - LACK OF DILIGENCE
  - IMPROPRIETY
17. It was noted that the Magistrate had been served to appear before the Board for vetting on 8th September, 2015. The Magistrate did not turn up for vetting on the material date. The Chief Executive Officer (CEO) of the Board Mr Reuben Chirchir informed the Board that the Magistrate was served but had neither filed response nor stated that he would not be able to turn up. The CEO informed the Board that on 7th September, 2015 after several attempts he was able to find the Magistrate on phone, that he enquired from the Magistrate why he had not filed his response and the Magistrate stated that he was still trying to trace some Court files and was in Makindu. That at that point he informed the Magistrate that he was expected for vetting the next day 8th September, 2015.
  18. As at the time that the Chief Executive Officer was addressing the Board, he had not received any notice from the Magistrate that he was not able to make it to the vetting, however soon after the Board received an email sent to the general email box of the Board, and not the address that the Board had used to communicate with the Magistrate earlier.
  19. The Magistrate was asked to explain the reason for his non-attendance on the 8th September, 2015. He stated that he was trying to trace a Court file and had travelled to Makindu on 7th September, 2015. That it was a mistake and an oversight on his part to fail to request for rescheduling of his interview in good time; and to fail to instruct an agent to appear on his behalf at the scheduled hearing to request an adjournment.

20. When asked what he would do in his Court where parties fail to turn up, he said he would dismiss the case. The Board finds the Magistrate's conduct highly disrespectful and unbecoming of a Judicial Officer. It also indicates a lack of diligence which is incompatible with the conduct expected of a Chief Magistrate.
21. The Board received three complaints against the Magistrate. In the first complaint Stephen Kyalo Mbuthi alleges that in **Makindu Principal Magistrate's Criminal Case No. 561 of 2003**, the Magistrate delivered an unfair judgment and spoke in vernacular (Dholuo) while conversing with the accused person's advocate to the disadvantage of the complainant.
22. The Magistrate in response states that he took over the matter as a part-heard on the 9th of February 2007. In making his finding, he was guided by the evidence presented including a Crop Assessment Report and the issues raised at the trial; and his judgment was an impartial, objective and well-reasoned.
23. On the second limb raised by the complainant, the Magistrate acknowledged that the accused persons were represented by one Mr. Ogude who was a Luo by tribe, he however denies speaking in vernacular. The Board did not make any adverse finding.
24. In the second complaint, Uvito Kiia Kituu alleges that in **Makindu Principal Magistrate's Criminal Case No. 25 of 2006**, the Magistrate did not give him a fair trial; declined to disqualify himself from the case; demanded a bribe through a clerk by the name Mr Mulwa; and failed to facilitate refund of the cash bail deposited.
25. In response, the Magistrate states that the complainant was accorded fair trial, and he never made any application for the recusal of the Magistrate at any stage of the trial. The Magistrate denies demanding a bribe. He produced a letter written by the complainant on 27th October, 2010 in which the complainant does not level any accusations against the Magistrate and absolves him of any blame.
26. The Board finds his response satisfactory and does not make any adverse finding.
27. In the third complaint Eric Okeyo Odindo alleges that in **Tamu Resident Magistrate's Civil Case Miscellaneous Application No. 1 of 2001**, the Magistrate harassed a sick old man by ordering his arrest and committal to civil jail; and requiring the Land Registrar to transfer his property to the other party whilst the case was still pending in Court.
28. The Magistrate denies the allegations, and states that the matter was in Court for the surrender of the original title deed and discharge of charge as the transfer had already been signed and executed. The old man had proved to be evasive and had failed to comply with Court Orders. The Magistrate states that after giving him sufficient time to comply with the Court orders, he eventually committed him to Civil Jail in accordance with the provisions of the Civil Procedure Rules.
29. The Board finds the explanation satisfactory. No adverse finding is made against him.

30. The Board discussed several legal principles and issues with the Magistrate. The Board finds that he has adequate knowledge of both substantive and procedural law.
31. The Board examined the judgments provided by the Magistrate. The Magistrate is encouraged to incorporate Statutory and Case Law in his judgments to reinforce his findings and decisions.
32. The Magistrate disclosed to the Board an instance where a court clerk approached him on behalf of a litigant with a pending judgment and requested him to assist the litigant as they were related. The Magistrate states that he firmly declined the offer and let the matter rest. The Board finds that the Magistrate by his conduct condoned the actions of the Court Clerk; the Magistrate should have taken deterrent steps to ensure that such conduct does not recur.
33. The Board finds from the facts available that the entire incident and more importantly, the manner in which the Magistrate handled it impacts negatively on his integrity. The Board has adopted a zero tolerance approach to negative inferences on integrity.

## **DETERMINATION**

34. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE BILDAD OCHIENG' is NOT SUITABLE to continue serving as a Magistrate.

## **HON. LILY MONICA NAFULA**

- NOT SUITABLE
  - TEMPERAMENT
  - IMPROPRIETY
  - INCOMPETENCE
35. The Board received two complaints against the Magistrate. The first complaint arose after the effective date and will be forwarded to the Judicial Service Commission.
  36. The second complaint was made by Benjamin Juma Nyayiemi who alleges that the Magistrate maliciously convicted him for contempt so as to defeat justice. The said conviction was revised by the High Court in **Kisii High Court Criminal Revision No. 25 of 2010**.
  37. In response, the Magistrate stated that the complainant was abrasive and abusive, and on several occasions verbally insulted the prosecutor, the accused person and the Magistrate. Attempts to calm him down and have him respect the Court went unheeded. The Magistrate then proposed to adjourn the matter but the complainant refused to leave the witness box. The Magistrate attached the Court proceedings and an affidavit signed by the Prosecutor.

38. The Board notes that the record did not clearly capture the behaviour of the complainant and in that regard are not complete. The failure to properly capture the proceedings is a total injustice to the parties. The courts in Kenya are courts of record, and a Magistrate is under duty to ensure that proceedings are properly and clearly captured.
39. The Board concurs that the sentence meted was too harsh in the circumstance. The High Court found that, the best the Magistrate would have done in the circumstance was to confine the complainant until the Court rises. The Magistrate concedes that the sentence was excessive, but does not give any satisfactory explanation to justify her decision to lock up the complainant for a period of fourteen days.
40. The Board also finds the letter written by the Magistrate to the Chief Justice very curt and brash, indicating that the Magistrate has a harsh temperament.
41. The Magistrate stated at the vetting interview that she did not agree with the findings of the High Court. She stated that the procedure she adopted was correct and that the High Court reached its decision because the record did not capture the entire proceedings and conduct of the complainant.
42. The Board is baffled by the attitude of the Magistrate towards the finding of the High Court. Judgments and rulings of the High Court are by law binding on the lower courts, and for the Magistrate while concurring that her record was incomplete, to brazenly state that she does not concur with the finding of the High Court Judge is unorthodox.

## **DETERMINATION**

43. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE LILY MONICA NAFULA is NOT SUITABLE to continue serving as a Magistrate.

The following Magistrates were found Suitable:

1. Hon. Margaret Warigia Wachira
2. Hon. Ogola Daniel Ogembo
3. Hon. Onyando Emily Ominde
4. Hon. Jacob Ole Kipury
5. Hon. Gichohi Patricia Njeri
6. Hon. Serem Moses Koskei
7. Hon. Gitari Lucy Waruguru
8. Hon. Onginjo Adwera Anne Colleta Apondi
9. Hon. Heston Mboga Nyaga

10. Hon. Paul Chepkonga Biwott
11. Hon. John Njoroge Muniu
12. Hon. David Kipyegomen Kemei
13. Hon. Charles Lwanga Okata Obulutsa
14. Hon. Liza Lynne Wairimu Gicheha
15. Hon. Joyce Mkambe Gandani
16. Hon. Julie Oseko Ouma
17. Hon. Theresa Murugi Wairimu
18. Hon. Nthiga Lawrence Mugambi
19. Hon. Julius Ng'arng'ar Kipkosgei
20. Hon. Micheni Wendy Kagendo
21. Hon. Cherere Thrispisa Wanjiku Wamae
22. Hon. Pussy Doree Nasieku Mulekyo
23. Hon. Mokaya Winfrida Boyani

## **CONCLUSION**

We thank you for your continued co-operation and hospitality.

## THE SEVENTEENTH ANNOUNCEMENT

This chapter contains the Seventeenth announcement of determinations pronounced on 14<sup>th</sup> of January, 2016.

### INDEX

- Introduction ..... Para 1
- Main Issues Arising ..... Para 11
- Conclusion ..... Para 98
  - (i) Competency
  - (ii) Financial Impropriety.

### DETERMINATION OF SUITABILITY

1. Hon. Timothy Odiwuor Okello..... Para 13
2. Hon. William Kipkemei Chepseba..... Para 29
3. Hon. Jacinta Kwena Dibondo..... Para 49
4. Hon. Samuel Mokua Mogaka ..... Para 69
5. Hon. Roselyn Akinyi Oganyo ..... Para 75
6. Hon. Nyagah Jessi Njagi ..... Para 79
7. Hon. Lucy Kathure Mutai ..... Para 83
8. Hon. Teresia Mumbua Matheka ..... Para 87
9. Hon. Lady Justice Abida Ali Aroni
10. Hon. Samuel Mungai Mochu
11. Hon. Odour Godfrey Hillary
12. Hon. Otieno Rose Adhiambo
13. Hon. Mwangi Karimi Mwangi
14. Hon. Lucy Njora Muthoni
15. Hon. Beatrice Kimemia Muthoni
16. Hon. Peter Mulwa Mutua
17. Hon. Ochenja Daniel Mudanyi
18. Hon Judith Namisoho Wanjala
19. Hon. Mbugua Lucy Ngima
20. Hon. Peter Gesora Ngare
21. Hon. Bidali Kennedy Agufa
22. Hon. Kibiru Alfred Gethi
23. Hon. Njagi Nicholas Njeru

24. Hon. Andayi Francis Weche
25. Hon. Enock Cheronu Chirchir
26. Hon. Siundu Samuel Soita
27. Hon. Cosmas Maundu Mutungwa
28. Hon. Evans Makori Kiago
29. Hon. John Onyiego Nyabuto
30. Hon. Mbungi Stephen Nzisi
31. Hon. Alex Ithuku Kimanzi
32. Hon. Rachel Ngetich Biomndo
33. Hon. Judith Ragot Elizabeth
34. Hon. Dominica Nyambu Wakesho
35. Hon. Simon Rutto Rotich
36. Hon. Maxwell Gicheru Ndwiga
37. Hon. Julius Mukut Nang'ea

## INTRODUCTION

1. The Board is charged with the task of vetting those Judges or Magistrates who were serving as Judges and Magistrates as at 27th August, 2010, the date the Constitution was promulgated.
2. The Board began vetting interviews on 23rd February, 2011, and by December 2012, it had vetted all Judges, who were subject to vetting. Before it could embark on vetting the Magistrates, the Parliament by an amendment introduced purported to vest the vetting of Magistrates with Judicial Service Commission in effect removing it from the Judges and Magistrates vetting Board. This was strongly opposed by the stakeholders and public at large.
3. By an amendment made on 14th December, 2012 Parliament restored the Vetting of Magistrates to the Vetting Board and with a view to expedite the process provided that the Board could invite members of the Judicial Service Commission to join a panel as and when deemed necessary. It also introduced a new time frame, which require all Judicial officers of the rank of Principal Magistrate and above be vetted on or before 28th March, 2013. The purpose of this provision was to conclude the vetting of all judicial officers in that category so that they could election petitions arising from the then forthcoming elections. However, the Board was not able to meet this deadline due to factors beyond its control and the vetting of the Magistrates in that category, had to be paused.
4. As at June 2015, the Board had vetted almost all Magistrates of the rank of Senior Resident Magistrate and below. The term of the Board was set to end on 31st December, 2015. Yet the amendment removing the internal timeframe affecting the Principal Magistrates and above had not been effected. The Board approached the Legal Committee of the National Assembly chaired by Hon. Samuel Chepkonga. The National Assembly acted promptly and effected the necessary amendment which came into effect on 31st July, 2015. The amendment provided as follows:
  - (i) The Vetting of Judges and Magistrates Act is amended by deleting Section 23(3) and substituting therefore the following new subsection;
  - (3) Where the time prescribed in this Section lapses when the Board has commenced hearing of a matter, but it has not made a determination under Section 21, the time shall be deemed to have been extended until such determination is made, and shall not exceed three months from 31<sup>st</sup> December, 2015.
5. Thus the amendment provides a three month window i.e up to, 31st March, 2016 to conclude any determinations which had commenced but not concluded as at 31st December, 2015.
6. The Board has since worked tirelessly and has completed vetting all Judicial officers except one that of Hon. Justice Ombija. A marathon effort and I wish to record my personal appreciation to the members of the Board for the effort, same to have achieved.

7. In our last announcement, we had said that the initial Determination of Unsuitability in relation to Justice Ombija had been set aside by the Board and the Board had directed a fresh hearing in respect of the Judge. The Judge filed a petition challenging the proposed fresh vetting and sought a declaration that the Court declare him suitable to continue to serve. The High Court rightly in our view held that it had no jurisdiction to entertain the petition in light of the ruling of the Supreme Court in Petition 13A, 14 and 15 of 2013 and dismissed the petition.
8. The Judge appealed to the Court of Appeal. The Court of Appeal ruled that the High Court had jurisdiction to determine the matter. Further, it was of the view that the issues raised did not touch on the process of removal of a judge which the Supreme Court had in its ruling referred to was not subject to the supervisory jurisdiction of the Court. The Court went ahead to declare the proposed fresh vetting illegal and invalid, and declared the Judge suitable.
9. The Board is strongly of the view that the Court of Appeal erred, and the Board intends to appeal to the Supreme Court to set aside that ruling and has filed a Notice of Appeal to the Supreme Court. We shall update you of the outcome once the appeal is heard. The Board hopes that the appeal will be heard before the Board's term expires and is able to act in compliance of however the Supreme Court decides.

## **DETERMINATIONS**

10. Following are the determinations in relation to 36 Magistrates, and one Judge who was vetted afresh. Corruption is a vice that is hard to weed out, but the Board has adopted a broad approach, including lifestyle audits to infer financial corruption. To completely weed out corruption, it requires sustained pressure and a societal mindset change. It is a process.
11. Competency of the Judicial Officers continues to be a concern, there is need for the Judiciary to collaborate with universities to create a structured Continuing Education programme to improve competency and capacity.



*The Board Chairman, Mr. Sharad Rao flanked by Board members during one of the announcements of determination of vetted judicial officers. The board regularly released determinations of vetted Judicial Officers to the public.*

12. Engagement with stakeholders indicates that the vetting process has been instrumental in creating change in the Judiciary and making Judicial Officers accountable. The recommendation is that, a permanent independent Judicial Complaints Authority be set up.

### **HONOURABLE TIMOTHY ODIWUOL OKELLO**

- IMPROPRIETY
  - LACK OF INTEGRITY AND DILIGENCE
  - INCOMPETENCE
  - FINANCIAL IMPROPRIETY
13. The Board received three complaints against the Magistrate. The first complaint arose after the effective date and will be forwarded to the Judicial Service Commission. The second complainant alleged that in **Bomet Senior Resident Magistrate's Civil Cases No. 13 of 2008 and 165 of 2008**, the Magistrate irregularly ordered the release of money deposited by the complainant as security pending appeal, whilst the appeal was still pending; that the High Court Judge subsequently ordered that the Magistrate be investigated for complicity in the matter.
  14. One witness testified at the interview. The witness stated that he was a clerk at the law firm handling the matter. That the matter had in the first instance proceeded *ex-parte*, and when they applied to have the *ex-parte* judgment set

- aside, the Magistrate declined. The Magistrate then ordered that they deposit the decretal sum in Court within seven days. That on the seventh day, he went to the Court registry to deposit the cheque and file a formal application for stay pending appeal. The Court file was missing from the registry. The witness was then requested by the Executive Officer to wait till 2 pm.
15. The witness states that the Magistrate walked into the registry in the afternoon, holding the missing Court file. That the Magistrate directed him to hand over the cheque and the application, and he complied. The Magistrate then retreated to chambers with the file and his documents.
  16. The witness states that it was important that they obtained a date for the hearing of the application, so after sometime, he went to the Magistrate's chamber to seek directions. The witness states that he was shocked to find the plaintiff's advocate in chambers with the Magistrate.
  17. The witness further states that, the application for stay pending appeal was heard expeditiously and dismissed. That the speed at which the application was heard and dismissed was not usual. The Magistrate went ahead and *suo moto* without any application being made, ordered release of the decretal sum. That the decretal sum deposited was processed for release and payment within a day of the ruling. Once again the speed and efficiency with which the payment was processed was unusual.
  18. They appealed the dismissal and release of funds to the High Court, where it was ordered that the money should be redeposited back in court. They were astonished to find that the money had been cashed and released to the plaintiff and was unrecoverable. The High Court also ordered that the Magistrate be investigated for complicity in the matter.
  19. The witness evidence was unshaken despite rigorous cross-examination. The Magistrate denies the allegations. The Court record however lends credence to the witness evidence. The Board was able to examine both the lower court and high court records. The High Court was aghast at the Magistrate's conduct and ordered that he be investigated. The Board finds that the witness is honest and credible.
  20. The Board notes that it is unethical and improper for the Magistrate to hold onto a court file that has no pending ruling or judgment. The Magistrate by his conduct demonstrated that he had an interest in the matter, and was partial in favour of the plaintiff. Documents to be filed in Court are to be filed in the registry and the Magistrate should have allowed the registry staff to carry out their duties as required. The Magistrate abused his authority. The file should have been in the registry.
  21. The unusual speed at which the documents were processed, points towards a pre-planned outcome. The Magistrate appears to have been working with the plaintiff's advocate to frustrate the defendant in the matter. The matter proceeded *ex-parte*, and attempts by the defendant to get a judicious process were craftily defeated. The presence of the plaintiff's advocate in the Magistrate's

- chamber when the cheque was delivered, reinforces the belief that the Magistrate was complicit in the matter.
22. The Board finds that the Magistrate failed to conduct himself with propriety, and that his conduct points to a lack of integrity, and complicity in denying parties justice.
  23. The third complainant alleged that in **Bomet Criminal Case No. 265 of 2008**, the Magistrate was biased and converted a mention to a full hearing, and dismissed a very serious criminal.
  24. The Board examined the Court file, the accused were facing a charge of arson and malicious damage to property. The house of the complainant, a victim of domestic violence, had been burnt down. The matter was fresh, had not been listed for hearing prior, and the 1st accused was not in Court. The Magistrate's conduct of the matter is wanting in all respects. In a matter when the accused is missing, the Court must issue a warrant for his arrest, unless proper reason is tendered for his absence. The case cannot proceed until the presence of the 1st accused is explained and dispensed with. In this instance, the Court turned a blind eye to the absence of the 1st accused, insisted that the matter proceeds to hearing yet the case was set for mention, and acquitted the accused for want of evidence.
  25. The Magistrate was unable to give any satisfactory reason for insisting that the matter proceeds to hearing whilst it was listed for mention. The Board notes that the prosecution, usually do not summon witnesses on a date fixed for mention of criminal cases. That, the Magistrate went ahead and acquitted the accused is very curious. The Magistrate was unable to explain the urgency, and rational for his extreme action. The Magistrate states that he later disciplined the prosecutor. This does not absolve the Magistrate who has the sole responsibility for matters in his Court.
  26. The Board finds that the Magistrate grossly misconducted himself, acted inappropriately, and seems to have been compromised in the matter. The Magistrate is incompetent; biased; lacks diligence and integrity. His conduct in the matter cannot be justified or excused.
  27. The Magistrate has problems managing his finances. As a judicial officer, he issued a cheque that was dishonoured due to lack of funds. The Magistrate also had rent arrears upon winding up his law firm, and paid the same after joining the Judiciary. This kind of disorganisation is worrying of a person who holds judicial office. He is expected to maintain propriety by paying all his debts in time. A Judicial Officer, who cannot manage his finances, is easily compromised. The Magistrate displayed a lack of awareness of how and why, such conduct is unbecoming of a person of his stature.

## **DETERMINATION**

28. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections

13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE TIMOTHY ODIWUOR OKELLO is NOT SUITABLE to continue serving as a Magistrate.

### HONOURABLE WILLIAM KIPKEMEI CHEPSEBA

- IMPROPRIETY
  - INCOMPETENCE
  - FINANCIAL IMPROPRIETY
29. The Board received three complaints against the Magistrate. The second complainant alleged that in **Siaya Principal Magistrates Court Miscellaneous Application No.1 of 2008**, the Magistrate struck out his application unfairly. The complainant had filed an application challenging election results, the respondents advocates raised preliminary objection claiming the format used was improper, and unknown to law, and that the entire application should be struck out. The Magistrate upheld the objection and struck out the application.
  30. In response, the Magistrate states that his hands were tied by the Law which was couched in mandatory language, and he relied on authorities cited by the respondents' advocates. The Board examined the proceedings and ruling. The ruling is very sketchy and does not properly set out the rationale for the decision. The authorities relied on at the time of writing the judgment were very old decisions dating back to 1998 and 2000. In his response to the Board, he cites a case which was not relied on in the ruling.
  31. The Civil Procedure Act was amended on 23rd, July 2009 introducing sections 1A and 1B. It provides that the overriding objective of the Act, is "to facilitate a just, expeditious, proportionate and affordable resolution of civil disputes." It requires Courts in exercising its powers; or in interpreting any provisions, to give effect to the overriding objective. The Courts are to handle all matters presented before it to achieve; a just determination of proceedings; the timely disposal of proceedings before it at a cost affordable by the respective parties; efficient use of the available judicial and administrative resources and the use of suitable technology.
  32. The amendments settled the long-running contest in Kenyan jurisprudence between form and substance. It favours substance over form. This position has been espoused in Case law in **Chemwolo vs Kubende**<sup>1</sup> where the Court of Appeal held that the primary concern of the Court is to do justice; and in **Githere vs Kimungu**<sup>1</sup>, where Justice Hancox stated that "**the relation of the rules of practice to the administration of Justice is intended to be that of a handmaiden rather than a mistress, and the Court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case.**"
  33. The Court of Appeal gave the amendments its seal of approval in the case of

1. 1976-1985, EA 101.

Kimani v Kenya Anti-Corruption Commission<sup>2</sup> where the respondent had applied to have the proceedings struck out on a technicality. The Court found that striking out the proceedings would lead to costs of litigation, as well as waste a lot of judicial time. The Court found that the approach it must take is not to automatically strike out the appeal, but to examine whether striking out is in line with the overriding objective. In this case, the Court declined to strike out the appeal, and allowed the appellant to amend his pleadings.

34. As stated by us in the past, over reliance on technicalities has been used to deny litigants justice over time. It is a practice to be abhorred. We find that the Magistrate had more regard for form over substance, resulting in the miscarriage of justice.
35. The third complainant alleged that in **Kapenguria Traffic Case No. 62 of 2005**, the Magistrate had integrity issues. The complaint is supported by a memorandum which at page 5 thereof (Page 26 of the complaint file) sets out the complaint. It claims that the Magistrate is a “Judicial merchant” running Kapenguria Law Courts as “Chepseba’s Supermarket of Injustices, looting bloody money with impunity”. It requests that we read the Court file and prosecution witness statements. The proceedings are attached at pages 51 to 79 of the Complaints file, and were served on the Magistrate together with the quoted memorandum. We wish to clarify that the Board confines itself to **traffic case No. 62 of 2005** only, and has disregarded the other issues raised in the memorandum, as the Magistrate was not required to respond to them in the notice served.
36. The accused in the case had been charged with three counts. Count 1 was causing death by dangerous driving, Count 2 was driving a car without a valid driving licence; Count 3 was driving a Government Car without authority. Eight witnesses testified. The case was closed when the Magistrate refused to grant the prosecution an adjournment to enable the pathologist attend. The Magistrate later found that the prosecution had not established a *prima facie* case, and acquitted the accused.
37. The Magistrate in response at the hearing stated “**My response is that I took over this case after the complainant had testified, and after all witnesses testified. I wrote a ruling and acquitted the accused under Section 210 of the Criminal Procedure Code. The basis of the ruling was that the cause of death was not established since they did not call the doctor or produce any post-mortem. That was one of the reasons**”<sup>3</sup>
38. The other reasons can be found in the ruling at Page 35 of the Response file, and as summarised on Page 9 of the response file. It states there was no clear evidence that the accused was driving, and the evidence was contradictory as the work ticket stated it was the official driver (PW2) who was driving. He also states that there was no evidence to prove that death was caused by the motor vehicle being driven recklessly or dangerously.
39. The Magistrate further states that no integrity issues could arise since the Magistrate took over the matter when it had already been partly prosecuted; that

2. 2010 eKLR.

3. Page 30 of 77 of the Hansard proceedings

- issues of his integrity were not raised during the trial; and that he conducted the matter in a fair and open manner.
40. The Board has looked at both the complaint and the response, and studied the attached documents and proceedings. The Magistrate's conduct and manner raise issues of integrity. His ruling is not supported by the facts. The standard of what amounts to a *prima facie* case has been well set out in the case of *Bhatt vs Republic*<sup>4</sup> where it was stated that, "a *prima facie* case is one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. At this stage, the court is not required to decide finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, that final determination can only properly be made when the case for the defence has been heard."
  41. In this case, the Court's first finding is that there is no clear evidence that the accused was driving the car. This is a very curious finding. Four of the prosecution witnesses, PW2, PW4, PW5 and PW6, all state that they saw the accused drive the car, and that the driver was seated at the back alone. The Court states that this evidence contradicts the work ticket. The Court should have taken judicial notice that it is common practice that the work ticket is filled at the point of departure, and the name of the official driver is inserted, it is not actual proof and confirmation of who was driving. In any event, it cannot override corroborated eye evidence as to who was actually driving. The official driver, PW2, states that the accused, his boss, decided to drive the car, this is not unusual, and a driver cannot overrule his senior.
  42. The Court also finds that there was no evidence to show that the death was caused by the accident, as the pathologist did not testify; and the post mortem report was not produced. He also states there was no evidence of careless or dangerous driving.
  43. The official driver who was in the car and the police officer who visited the scene and took measurements both blame the accused for the accident. This is sufficient evidence of dangerous driving.
  44. In several cases across the Commonwealth, it has been held that the absence of production of a post mortem report is not fatal. In instances where there can be no other probable cause of death, the court can rely on circumstantial evidence to make a finding. In this case, it was in evidence that the deceased was a passenger in the vehicle, she had sat at the front, the vehicle rolled, and the deceased was injured and subsequently died. There was no evidence that the deceased was unwell prior to the accident, and there was evidence that she had ably performed her duties on the material date. The Magistrate should have had regard to such factors before rushing to acquit on a technicality that is not fatal.
  45. The Board also takes issue with the Magistrate's failure to grant the prosecution an opportunity to avail the pathologist, or get another doctor to produce the report on her behalf. The Magistrate should have taken judicial notice of the fact that the doctor was not resident in Kapenguria, that the prosecution had made efforts to avail her but she claimed she was busy and requested for a date in July, that the absence of the pathologist could not be blamed on either the

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4. 1957 EA 332

prosecution or the deceased family. The accused was out on bond and the balance of justice would have favoured a position that allows a true determination of the issues. The Magistrate should have exercised his discretion in favour of a fair dispensation of justice. His conduct raises suspicion as to his integrity.

46. The ruling does not make any mention of whether the third count was sufficiently proven or not, and whether there was any evidence that he drove the car without authority. The ruling is rushed, void of reference to the law or guiding jurisprudence. The Magistrate appeared to have been keen to acquit the accused. The ruling does not reveal a judicial mindset, it leads to the conclusion that the officer is either very incompetent or that he was compromised in the matter. The Board finds that the Magistrate misconducted himself in this matter.
47. In relation to his finances, the Magistrate was asked to explain various deposits in his account, and was given an opportunity to furnish further evidence. The Magistrate filed a supplementary response received on 24th September, 2015. The Magistrate attributes a lot of the cash as arising from farming activities, however the same are not supported by relevant documents. If one is in the business of selling milk, there would be a dairy license, or some sort of payment proforma. To sell charcoal a license is needed, the same could have been documented. The explanations provided are not satisfactory as they are not substantiated.

## DETERMINATION

48. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE WILLIAM KIPKEMEI CHEPSEBA is NOT SUITABLE to continue serving as a Magistrate.

## HONOURABLE JACINTA KWENA DIBONDO

- IMPROPRIETY
  - FINANCIAL PROBITY
49. In the first complaint, it alleged that in **Kericho High Court Civil Case No. 39 of 2008**, the Magistrate was corrupt and that she did receive a bribe of Kenya Shillings Seventy Thousand (70,000/-) to grant an order of stay of execution in the matter.
50. The Magistrate denied the allegation on bribery but admitted granting the order of stay, and claimed she had power to do so, under the provisions of Order 21 of the Civil Procedure Rules. The matter at hand was a 'Distress for Rent' action; there was no decree for execution; and thus the provisions of Order 21 of the Civil Procedure Rules do not apply. The Magistrate after lengthy questioning admitted that she had no power to grant the orders. The Magistrate was unable to give any reasonable justification for acting *ultra-vires* her powers.
51. The Board finds that the response is not satisfactory. The Magistrate admits she had no power to entertain the application for stay, following distress for rent. The

- Magistrate's action had a grave effect as the orders were granted *ex-parte*, and were final in nature. She did not provide for an inter-parties hearing.
52. In the second complaint, it is alleged that, in **Kericho Principal Magistrate's Court Civil Case No. 117 of 2009**, the Magistrate was incompetent and lacked integrity; that she issued orders injuncting a Court of Appeal decision and that she sold justice to the highest bidder.
  53. The Magistrate in response denied the allegations. The Magistrate stated that, the Advocate who appeared to argue the application did not disclose that the matter had been argued and determined by the higher courts.
  54. The Board finds that the Magistrate was not forthright in her response, as the record<sup>5</sup> confirms that the Advocate in his submissions made reference to the High Court matter.
  55. The third complaint alleges that in **Kericho High Court Succession Cause No. 12 of 1986**, the Magistrate lifted a caution that had been ordered by the High Court and ensured that the file disappeared.
  56. The Magistrate denies the allegation and states that she never handled Succession matters while at Kericho Law Courts.
  57. The Board perused the Court file and finds that the Magistrate indeed lifted the caution placed against the suit property in an *ex-parte* application<sup>6</sup>. The Magistrate did not give audience to all the parties. This is a grave omission. The Magistrate is also not candid with the Board as she initially states that she never handled any Succession matters, which is factually incorrect.
  58. The fourth Complaint alleges that in Children Cases, the Magistrate was corrupt, and received bribes of between Kshs 4000 and Kshs 5000 to vary orders in the absence of other parties. The complaint documented **Kericho Children's Case No. 9 of 2006**, in which the Magistrate, by letter dated 13th January, 2010 allegedly varied the maintenance from Kenya Shillings Four Thousand to Kenya Shillings Five Thousand.
  59. The Magistrate explained that her role in the matter was merely administrative. She signed a letter requesting payments and followed what had been previously requested for. The Board finds that the Magistrate should have exercised more diligence, and ensured that the contents of the letter were supported by a Court Order.
  60. The fifth complaint alleges that in **Kericho Criminal Case No. 1084 of 2007**, the Magistrate was corrupt; that she received money from the complainant's client who was the accused; and as a result the complainant withdrew from the case.
  61. The Magistrate denies being bribed and annexed an affidavit signed by the accused stating that she did not bribe the Magistrate.
  62. The Board, without making any negative inference, finds it curious that the Magistrate was able to trace the accused eight years later.
  63. In the sixth complaint, it is alleged that, in **Kericho Chief Magistrate's Court Criminal Case No. 1715 of 2009 and Criminal Case No. 2810 of 2010**, the Magistrate was involved in a syndicate with CID officers; and received financial benefit through the courts to compromise the cases.

5. Page 1, Volume 5

6. Page 37, Volume 3 of the record.

64. The Magistrate denies the allegations and states she was not involved in any corrupt deals. The Board questioned the Magistrate on the reason why she refused to grant the Prosecution an adjournment, yet she had been informed that the expected witness was a document examiner.
65. The Board notes that Kenya has very few document examiners and that they are in high demand to testify in all the Courts in Kenya. On the material day, the Magistrate was informed in the morning that the document examiner was held up in Naivasha Law Courts, but it was hoped he would be in Kericho in the afternoon. The Magistrate was not able to properly justify her refusal to grant an adjournment in the matter. The Board finds that the Magistrate should have taken judicial notice of the difficulties faced by the prosecution in procuring the attendance of the document examiner. Her approach lends credence to allegations that she had been compromised.
66. The Magistrate had several unexplained deposits in her accounts. The Magistrate explained that deposits amounting to over Kenya Shillings One Million made from 2007 to 2009, were proceeds from the sale of land in Bumala. The sales are not documented and the income is not declared. The Board finds the explanation unsatisfactory.
67. There were also several other deposits made from 2007 to 2008, which the Magistrate explains were proceeds from the sale of tea leaves and other farm produce. The Magistrate was unable to provide satisfactory proof of such transactional income.

## **DETERMINATION**

68. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE JACINTA DIBONDO KWENA is NOT SUITABLE to continue serving as a Magistrate.

## **HONOURABLE SAMUEL MOKUA MOGAKA**

### **• FINANCIAL IMPROPRIETY**

69. The Magistrate operated two bank accounts, Co-operative Bank of Kenya and Equity Bank Kenya. The Magistrate stated he had no rental or business income.<sup>7</sup> The Panel noted that the Equity account which was not his salary account had numerous cash deposits, on diverse dates from January 2008 to 2009 from various parts of the country such as Embu, Thika, Kitengela ranging from Kshs 75,000 to nominal amounts. For instance, in November 2009 there were cash deposits totaling to Kshs 150,000. Even though the Magistrate supplied the Board with affidavits from his mother stating that she would occasionally give him money, the same could not be verified as there was no supporting documentation.

7. Page 13 of the Hansard dated 21<sup>st</sup> September 2015.

70. When further pressed about the deposits, the Magistrate stated that “man is a social animal by nature and necessity. At times when I had money, give to friends which they could refund also and I cannot exactly remember 10 or 20 thousand. I cannot remember at times”<sup>8</sup>. He also stated “that I could bank some of the money at Kisii Co-operative Bank and Equity branches or elsewhere enroute to my work station.”<sup>9</sup>
71. The Magistrate’s Co-operative Bank account which was his salary account was in some instances overdrawn, and he was asked how he was financing his day-to-day needs during such periods. The Magistrate responded that he would get support from his parents.<sup>10</sup> For a judicial officer to operate an account that is overdrawn, raises issues of propriety and integrity.
72. The Magistrate also stated that he also got financial support from his spouse. The documented material indicates that the wife took a loan of Kshs 200,000 at one point and gave it to the Magistrate, however she was receiving a net salary averaging Kshs 10,000 to a maximum Kshs 12,000 and could not logically offer him constant support as claimed<sup>11</sup>.
73. The Board having examined the Magistrate’s financial statements, records and documentation, and having listened to the explanations tendered, find that the explanations are not credible. The Board is not satisfied by the explanations tendered. Several inconsistencies and improbabilities arise.

## DETERMINATION

74. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE SAMUEL MOKUA MOGAKA is NOT SUITABLE to continue serving as a Magistrate’s.

## HONOURABLE ROSELYN AKINYI OGANYO

- LACK OF CANDOUR
  - LACK OF INTEGRITY
75. In this instance, the Board took issue with the Magistrate’s failure to indicate in the self-evaluation questionnaire, JMVB 5, that there had been complaints against her regarding the same matter, and that she had been required to respond to the same by the Registrar of the High Court. The Magistrate states that, she never notified the Board of the said complaint as she did not consider the Office of the Chief Justice a professional or public body. She is recorded as saying “...when I was served to file a response and with the complaint, I have indicated that I recall this complaint and it was directed to the Chief Justice and in my view I thought the Chief Justice was not a Professional Public body.”<sup>12</sup>

8. Page 15 of the Hansard dated 21<sup>st</sup> September 2015.

9. Page 16 of the Hansard dated 21<sup>st</sup> September 2015.

10. Page 13 of the Hansard dated 21<sup>st</sup> September 2015 and Pg. 167 Hansard dated 16<sup>th</sup> September 2015.

11. Page 17, 20, 21, 22 Hansard dated 21<sup>st</sup> September 2015.

12. See page 29 of Hansard transcripts.

76. The Magistrate's response is wanting. Her failure to indicate that there had been a complaint against her is not properly explained. To state that the office of the Chief Justice is not a public body, makes us question her competence and legal knowledge. The Board finds that the Magistrate is not being candid and that there was deliberate intent to withhold information from the Board. This conduct cannot be excused. The Magistrate lacks candour, and is of doubtful integrity.
77. There was nothing untoward arising from the Magistrates financial records.

## **DETERMINATION**

78. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE ROSELYN AKINYI OGANYO is NOT SUITABLE to continue serving as a Magistrate.

## **HONOURABLE NYAGAH JESSI NJAGI**

- FINANCIAL IMPROPRIETY
79. In this case the Board notes that the Magistrate has large unexplained bank deposits in his accounts. His explanations are contradictory and unsupported. The Magistrate laboured to explain that the money is deposited into his account by his wife who runs a clothing business.
80. The Magistrate was granted two weeks to provide better explanation and financial records. The documents supplied do not satisfy the issues raised. The Magistrate did not evidence any tax returns filed by his wife in relation to the alleged business, nor did he furnish any official documents to support the existence of the alleged business.
81. The Board finds that the financial transactions of the Magistrate are questionable and have not been explained satisfactorily.

## **DETERMINATION**

82. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18, and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE JESSIE NYAGA NJAGI is NOT SUITABLE to continue serving as a Magistrate.

## **HONOURABLE LUCY KATHURE MUTAI**

- INCOMPETENCE
- FINANCIAL IMPROPRIETY

83. The Board questioned her primarily on her failure to rule on an application for bail for four days in respect of a party who had appeared before her court under warrant of arrest. The Magistrate did not give any satisfactory response, but regretted the event and apologised. The Board finds her conduct deplorable and discourteous to parties. The party arrived in court late with his advocate and found his bond cancelled and a warrant issued. They tried to address court on the same day but the Magistrate refused to grant them audience till four days later. Also of concern was the way the Magistrate kept another party waiting till 5.30 pm while she was away attending to another errand.
84. Also of concern was her failure to provide further and better particulars of certain transaction in her bank accounts that were queried. The Magistrate stated that some of the money was child support deposited by her estranged husband, others were refunds of monies she had lent out and she also had received proceeds from tree and tea farming.
85. The Magistrate filed documents to support her contentions, however the Board finds that the documents do not satisfactorily explain the source of funds. The large deposits remain unexplained to the satisfaction of the Board.

## DETERMINATION

86. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18, and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE LUCY KATHURE MUTAI is NOT SUITABLE to continue serving as a Magistrate.

## HONOURABLE TERESIA MUMBUA MATHEKA

- INCOMPETENCE
87. The Board served two complaints upon the Magistrate and required her to respond. The first complaint stated that in **Nyahururu Chief Magistrates Criminal Case No. 3143 of 2006**, the Magistrate convicted him before hearing his case. The Complainant also alleged that the Magistrate disregarded the rights of the accused since he had opted to have his case start *de novo* as opposed to the co-accused. He also alleges that the magistrate was biased. The Magistrate in this case continued the case against the other accused and separated the complainant's case to *start de novo*. The Magistrate heard both cases. It would appear that on conclusion of the case that was continued, the Magistrate sentenced all accused including the complainant whose case was still pending. The complainant appeared at the interview and explained his complaint.
88. The Magistrate in response stated that in the typed judgment it is written as follows: "I find the charges count 1, 2, 3, 4, 5, 6, proved against each of the accused and same for accused 4 which case will start a fresh-convict each accordingly". The Magistrate explains that the word recorded as "same" must have been "save", and was a typographical error. The judgment according to the Magistrate should have applied to all the accused save the complainant herein.
89. The Magistrate should not have sat to determine the case involving the fourth accused after convicting the first three, for similar facts incidents. The Magistrate had already determined the credibility of witnesses in the case, and made a

finding. In such circumstances, she is not able to reach an unbiased decision in the second case involving the complainant. The reason provided by the Magistrate claiming that she was the only Magistrate and thus just had to hear the matter does not hold sway, as she could have transferred the matter to a neighbouring Court. The Board faults the Magistrate.

90. The Board also notes that the Magistrate convicted the complainant in a case in which he was not an accused. The Magistrate's explanation that the reference to "same" was a typographical error is not convincing. The fourth accused had been dropped from the proceedings and no reference should have been made to him at all. The conviction still stands to date. The Board finds that the Magistrate misconducted herself and acted incompetently. Her actions have caused a grave injustice to the complainant.

## **DETERMINATION**

91. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18 and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE TERESIA MUMBUA MATHEKA is NOT SUITABLE to continue serving as a Magistrate.
92. The following Judge and Magistrates were found Suitable:
1. Lady Justice Abida Ali Aroni
  2. Hon. Samuel Mungai Mochu
  3. Hon. Odour Godfrey Hillary
  4. Hon. Otieno Rose Adhiambo
  5. Hon. Mwangi Karimi Mwangi
  6. Hon. Lucy Njora Muthoni
  7. Hon. Beatrice Kimemia Muthoni
  8. Hon. Peter Mulwa Mutua
  9. Hon. Ochenja Daniel Mudanyi
  10. Hon Judith Namisocho Wanjala
  11. Hon. Mbugua Lucy Ngima
  12. Hon. Peter Gesora Ngare
  13. Hon. Bidali Kennedy Agufa
  14. Hon. Kibiru Alfred Gethi
  15. Hon. Njagi Nicholas Njeru
  16. Hon. Andayi Francis Weche
  17. Hon. Enock Cheronno Chirchir
  18. Hon. Siundu Samuel Soita
  19. Hon. Cosmas Maundu Mutungwa
  20. Hon. Evans Makori Kiago

21. Hon. John Onyiego Nyabuto
22. Hon. Mbungi Stephen Nzisi
23. Hon. Alex Ithuku Kimanzi
24. Hon. Rachel Ngetich Biomndo
25. Hon. Judith Ragot Elizabeth
26. Hon. Dominica Nyambu Wakesho
27. Hon. Simon Rutto Rotich
28. Hon. Maxwell Gicheru Ndwiga
29. Hon. Julius Mukut Nang'ea

## CONCLUSION

93. As stated earlier the Board is winding down its activities. The Board will produce over the next three months, publications detailing its work. The publications shall be useful for documenting the process, and aid future similar endeavours. Vetting of judicial officers is a unique process, and the process undertaken by the Board is the first of its kind in the Commonwealth. The process has reinforced into Kenyan thinking the idea of accountability and lifestyle audits.
94. The Board shall also be compiling its final report, which shall include recommendations and in that, the Board shall engage all stakeholders. However, I should mention that various stakeholders have recommended that the structure that the Board has so laboriously established should not be dismantled, especially so as his Excellency the president has expressed the wish that various bodies such as Immigration, Kenya Revenue Authority and others should undergo forensic and lifestyle vetting. The structure that we have built up can usefully compliment that process.
95. It has also been suggested that the Judicial Service Commission and or Parliament should consider setting up an independent complaints commission that could deal with complaints against all Judges and Magistrates including those already vetted and those appointed after the effective date and are not subject to vetting. This is particularly important in light of the Hounourable Chief Justice's latest concerns about corruption and his specific reference to corruption in Judiciary.
96. We thank you once again for your support. The Media have been a supportive stakeholder and have provided effective coverage of the process at every stage. We are grateful. We also wish to thank all other stakeholders, the Attorney General, Parliament, the Chief Justice and the Judiciary for their co-operation and support.

## **THE EIGHTEENTH ANNOUNCEMENT**

This chapter contains the eighteenth announcement of determinations pronounced on 17th March 2016.

### **INDEX**

- Introduction .....Para 1

### **DETERMINATION ON SUITABILITY**

- Justice Nicholas Owano Randa Ombija ..... Para 6
- Conclusion ..... Para 22

## INTRODUCTION

1. The Board usually commences the interview by requiring the Judge to respond to specific complaints where applicable as provided in the Notice to file response. Thereafter, the Board proceeds with questions that ensures that all the relevant considerations are covered.<sup>1</sup>
2. In conducting the interview the Board relies on the following documentation:
  - (i) The questionnaire;<sup>2</sup>
  - (ii) The wealth declaration;
  - (iii) Complaints if any;
  - (iv) Response filed by the Judge;
  - (v) Transcripts of interviews conducted with the Judge by the Judicial Service Commission for the positions in the Judiciary where applicable; and
  - (vi) Any material available on the past work record of the Judge including Rulings made and Judgments delivered.
3. At the end of the interview, the Judge and Counsel where present are usually given an opportunity to make final remarks. They are also given an express opportunity to state whether the Judge had any objection to the procedure that had been followed.
4. In this instance the Judge did not present himself for an interview nor did he file a response.
5. The complaint and other information filed in support of the complaints and the transcript of the hearing, therefore, constitute the record of proceedings, and the Board's assessment of his suitability has been determined on the basis of the complaints received and the material before the Board in support of it.

## JUSTICE NICHOLAS OWANO RANDA OMBIJA

6. To recap, the Judge did not appear before the Panel of the Board to be interviewed. At the first hearing of 19<sup>th</sup> November, 2015 he was represented by counsel Francis Wasuna who sought an adjournment. At the second hearing held on 15<sup>th</sup> March, 2016 he was represented by Counsel Rogers Sagana.
7. The Board received five complaints against the Judge as follows:
  - (a) A complaint which alleges that in **Kitale High Court Civil Case No 12 of 2004**, David Sang Kipsoi and Anor vs John Kosgei, the Judge while handling the dispute did not bother to address the corruption menace in allotment of land in the settlement scheme. That the defendant being the settlement officer and having no genuine allotment letter colluded and got a renumbering letter in August 2000 to claim the land allocated earlier to the plaintiff. Further that the case was heard and judgment delivered in their absence.
  - (b) A complaint that in Kitale High Court, Criminal Case the Judge committed a girl to Shikhusa Borstal an institution which is for boys only and was without a probation report or the Children officers' report among other allegations as stipulated in the Notice to file response.
  - (c) Several complaints from the Law Society of Kenya, Kitale Chapter on his conduct while a Resident Judge at Kitale High Court.

1. See paras 3 to 7 above.

2. Form J.M.V.B 5.

- (d) Complaint from the Law Society of Kenya in respect to **Kakamega HCCC No. 34 of 1999**, Law Society of Kenya vs Commissioner of Lands, Lima Limited and Uasin Gishu Land Registrar alleging that the Judge erroneously held that the society lacks *locus standi* to file the suit
  - (e) Complaint by a female Advocate that the Judge harassed the Complainant, issues which impute improper conduct and conflict of interest on the part of the Judge.
  - (f) Complaint by an Advocate in **Milimani HCCC No. 3666 of 2001, Trust Bank Ltd vs Midco International(K) Ltd and 4 others** where it was alleged the Judge failed to disclose a prior Advocate – Client relationship in another matter concerning Trust Bank.
8. The Judge was served with Notice to file response, and immediately filed a petition<sup>3</sup> in the High Court, challenging the power of the Board to invite him for a fresh vetting session, and seeking an injunction. The High Court dismissed the petition on 3<sup>rd</sup> November, 2015 on the ground that it had no jurisdiction.
  9. The Judge was served with Notice to Appear for interview on 19<sup>th</sup> November, 2015. The Judge did not appear but was represented by Counsel Francis Wasuna who sought an adjournment on grounds that the Judge was indisposed. The adjournment was granted, and as the Judge had not filed a response, Counsel was requested to file the response by 23<sup>rd</sup> November 2015.
  10. No response was filed by the appointed date. The Judge however moved the Court of Appeal<sup>4</sup> to set aside the decision of the High Court, find that the Board has no power to vet him afresh, and to declare him suitable. The Court of Appeal in a decision rendered on 14<sup>th</sup> December, 2015, set aside the finding of the High Court, and proceeded to declare the Judge “suitable” to continue to serve.
  11. The Board appealed against the decision to the Court of Appeal. The Supreme Court in a decision rendered on 7<sup>th</sup> March, 2016, allowed the petition on the following terms:
    - (a) The process of vetting by the Petitioner had commenced before 31<sup>st</sup> December 2015. The Petitioner shall proceed with the process of hearing, and shall conclude the vetting of the Respondent without any further delay.
    - (b) To accord the Respondent full opportunity to partake of his rights to a fair hearing, as well as his right of review, the vetting shall proceed on a day to day basis, until concluded by 31<sup>st</sup> March 2016, in accordance with the law.
    - (c) As established in the precedence of this Court, the vetting process shall be limited to matters arising up to 27<sup>th</sup> August 2010.
    - (d) As the Petitioner had annulled its decision of 21<sup>st</sup> December 2012 and the proceeding leading thereto, the Parties legally revert to the position prevailing as at 30<sup>th</sup> July 2012.
    - (e) The Parties shall bear their respective costs, in respect of the appeal herein.
  12. Pursuant to the Supreme Court decision the Judge was invited to appear for interview on 15<sup>th</sup> March, 2015. On the interview date the Judge through his counsel Rogers Sagana filed response five minutes before the interview was scheduled to begin, and did not appear. His Counsel Rogers Sagana appeared on his behalf and informed the Board that the Judge did not wish to be subjected to vetting and had voluntarily retired in accordance with the provisions of Section

3. Nairobi High Court Constitutional Petition Number 406 of 2015

4. Nairobi Court of Appeal, Civil Appeal Number 281 of 2015

24(1)(b), (2) and (3) of the Vetting of Judges and Magistrates Act, Cap 7B Laws of Kenya.

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

“Pursuant to the provisions of section 24(1) (b), (2) and (3) of the Vetting of Judges and Magistrates Act No. 2 of 2011 I hereby elect not to be subjected to the vetting process and instead leave the Judicial Service voluntarily.”
14. Counsel sought to withdraw the response filed that morning, on the ground that it had been overtaken by events, as the Judge had voluntarily retired before the vetting.
15. The Board is of the view that the Judge’s decision not to subject himself to fresh vetting and to opt instead to retire pursuant to Section 24 (1) (b), (2) and (3) of the Judges and Magistrates Vetting Act 2011 relied upon by the Judge does not enable the Board to exempt the Judge from being vetted.
 

Section 24 provides as follows;

  24. (1) A Judge or Magistrate shall, within three months of the commencement of this Act, elect—
    - (a) whether to be subjected to the vetting process; or
    - (b) to leave the judicial service voluntarily.
  - (2) A Judge or Magistrate who elects to leave the judicial service voluntarily or is found unsuitable after vetting shall be entitled to terminal benefits for early retirement.
  - (3) For the avoidance of doubt, a Judge or Magistrate who voluntarily leaves service or is found unsuitable after vetting shall be deemed qualified for early retirement.
16. In the Board’s view, the option of retirement afforded to a Judge who did not wish to be vetted had to be exercised within 3 months of the commencement of the Act. The date of commencement of the Act was 19<sup>th</sup> May 2011. As such the option to retire for a Judge who did not wish to be vetted was available only for 3 months from the commencement of the Act. That being so that option is not now available to the Judge.
17. The Board also notes that the letter had not been delivered to it prior to the vetting interview, and had not been delivered to the Judicial Service Commission or the Chief Justice either. The proper procedure in the event of seeking early retirement is to notify his employer the Judicial Service Commission and not the Judges and Magistrates Vetting Board. The documented letter is, therefore, not an effective or valid letter of resignation.
18. The Judge elected not to attend the vetting interview. The Vetting of Judges and Magistrates (Procedure) Regulations 2011<sup>5</sup> provides that the Board may proceed to determine any vetting proceedings in the absence of the Judge or Magistrate if it considers it appropriate and in the interests of justice to do so.<sup>6</sup>
19. The Board took into account the time constraints, and the fact that the Judge had been accorded sufficient opportunity to be present and to participate at the interview, but voluntarily absented himself. The Board therefore proceeded to consider the complaints and the supporting material before it filed. The Board

5. Regulation 23

6. See also the determination in respect of Hon Margaret Gitonga Rintari.

dropped complaint number 1 as it did not form part of the complaints that were served upon the Judge in 2012.

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

## **DETERMINATION**

21. In terms of section 23(1) of the Sixth Schedule to the Constitution and sections 13, 18, and 21 of the Vetting of Judges and Magistrates Act No. 2 of 2011, the Board determines that the HONOURABLE NICHOLAS RANDA OWANO OMBIJA is NOT SUITABLE to continue serving as a Judge. The Judge has a right to apply for review of the said determination within 7 Days of the date of this determination.

## **CONCLUSION**

22. As stated earlier the Board is winding down its activities. We shall be making an announcement in relation to the remaining reviews in due course. The Board will produce over the remaining period, publications detailing its work. The publications shall be useful for documenting the process, and aid future similar endeavors.
23. The Board is also compiling its final report, which shall include recommendations and in that, the Board shall engage all stakeholders.
24. We thank you once again for your support. The Media have been a supportive stakeholder and have provided effective coverage of the process at every stage. We are grateful. We also wish to thank all other stakeholders, the Attorney General, Parliament, the Chief Justice and the Judiciary for their co-operation and support.

## THE NINETEENTH ANNOUNCEMENT

This chapter contains the Nineteenth announcement of determinations pronounced on 31<sup>st</sup> of March, 2016.

### INDEX

- Introduction..... Para 1
  - Determination of Suitability
  - Conclusion Remarks ..... Para 124
  - Suitable ..... Para 14
1. Hon. Justice Grace Nzioka Lidembu
  2. Hon. Mogute Stephen Onsiero
  3. Hon. Kayila Dolphina Alego
  4. Hon. Oganyo Roselyne Akinyi
  5. Hon. Samuel Mokuia Mogaka
  6. Hon. Sindani Calestous Nambafu
  7. Hon. Thomas Thyaka Nzioki
  8. Hon. Mutua Philip Wambua
  9. Hon. Atambo Stella Bonareri
  10. Hon. Tito Maoga Gesora
  11. Hon. Mutai Lucy Kathure
  12. Hon. Teresia Mumbua Matheka
  13. Hon. Jesse Njagi Nyaga
  14. Hon. Ben Mwai Mararo
  15. Hon. Mutoka Rosemelle Anyango
  16. Hon. Mmasi Grace Ayuma
  17. Hon. William Chepseba Kipkemei
  18. Hon. Bildad Ochieng'
  19. Hon. Beatrice Mosiria Nyambune
  20. Hon. Lily Nafula Monica

**NOT SUITABLE**

1. Hon. Teresiah Njeri Ngugi..... Para 17
2. Hon. Timothy Odiwuor Okello ..... Para 34
3. Hon. Wilson Kaberia Nkunja ..... Para 46
4. Hon. Ezra Odondi Awino ..... Para 55
5. Hon. Samwel Kimuya Gacheru..... Para 63
6. Hon. Bernard James Ndeda ..... Para 74
7. Hon. Wilkinson Nyaga Njage..... Para 95
8. Hon. Jacinta Kwena Dibondo ..... Para 106

## WELCOME AND INTRODUCTIONS

- Media Houses represented here today,
- Journalists, Ladies and Gentlemen

Good morning and welcome to this session. The Board will today make its nineteenth and final announcement on determinations of vetting of Judges and Magistrates. Before I do this, I would like to introduce the members of the Board present here today:

- Roseline Odede (*Vice Chair*)
- Justus Munyithya
- Prof Ngotho wa Kariuki
- Abdirashid Abdulahi
- Hon Lady Justice Alice Mpagi-Bahigeine
- Meuledi Iseme
- Reuben Chirchir (*Secretary and CEO*)

Justice Barnabas Samatta and Justice Joseph De Silva are unable to attend and have sent their apologies.

1. This, I said, is the 19<sup>th</sup> Announcement of the Board. It marks the last of the decisions of the Board and relates to decisions on all the applications for review heard late 2015 and early 2016.
2. The Board was required to vet all judges and magistrates by 31<sup>st</sup> March, 2016. This we have managed despite several challenges and have vetted all the judges and magistrates who were in office on 27<sup>th</sup> August, 2010 and were required to go through the process. The only outstanding issue relates to Justice Ombija who was determined unsuitable, but has moved to the Court to quash the said finding. The matter was heard yesterday and the Court will announce its finding on 19<sup>th</sup> April, 2016. If the orders sought are granted, a fresh vetting or review may be necessary. The Board is, therefore, grateful to the National Assembly for extending the vetting period by three months to cater for any such eventuality.
3. The vetting has on the whole been successful and has succeeded in fulfilling its mandate and the objectives for which it was set up. The purpose and objective of vetting was to restore confidence in the Judiciary, and to a great extent this has been achieved. However recent reports in the press and media and the publicly expressed concerns of the Hon. The Chief Justice that corruption has crept back in the judiciary has dented the confidence that seemed to have been restored.
4. Vetting was relegated to consider only complaints arising from the date of appointment to 27<sup>th</sup> August, 2010. This limitation led to the declaration as “suitable” of several judicial officers who had credible current complaints. The Board has forwarded current complaints relating to several Magistrates over the last two years to the Judicial Service Commission, and to date there has been no feedback, and all the stated judicial officers are still serving in the Judiciary. Some of the judicial officers had been declared unsuitable by the Board, but had to be declared suitable on review in line with the Supreme Court decision in Petition number 29 of 2014.
5. The Board strenuously challenged the intention to limit its mandate to the period stated, and raised the red flag, pointing out that it would be absurd to declare a judicial officer suitable, even knowing that he had misconducted himself and continues to engage in improper conduct in periods after 27<sup>th</sup> August, 2010.
6. We have conducted stakeholder engagement, and received very positive feedback on the effect of vetting. Indeed most stakeholders have expressed that vetting should be a continuous process. Similar sentiments were expressed recently in Parliament. The systems in place are not sufficient to adequately deal with the discipline of judicial officers and staff. There is need for the setting up of a swift, transparent and efficient system. There have been calls for an independent mechanism anchored within the Judicial Service Commission and we shall be making recommendations in that regard.
7. The three months extension proposed by Parliament is vitally important. The period shall be used effectively in archiving of information generated during the vetting process; and for researching and compiling our final report, which shall document the process, contain a roadmap for critical reforms in the judiciary, and recommendations that shall hopefully assist in eliminating the ills including corruption that presently afflicts the judiciary. Suggestions received so far include a recommendation that all judicial staff be vetted and an independent mechanism to deal with complaints against all judicial officers, and other justice sector players.
8. Our attention has been drawn to a report appearing in one of the newspapers on Saturday where a magistrate has reportedly stated that he/she intends to bribe

the Board to influence a finding of suitability. The allegation is totally unfounded and we are taking steps to identify the source of that report and take necessary steps against whoever is responsible for that mischievous and highly damaging statement. The Board is confident that none of its decisions has been compromised by corruption or indeed any outside influence as repeatedly stated.

9. We shall now deal with our specific announcements:

## **DECISIONS ON REVIEW**

10. Applications for review are governed by section 22(1) of the Act, which provides:
 

A judge or magistrate who has undergone the vetting process and is dissatisfied with the determination of the Board may request for a review by a different panel to be constituted by the Chairperson of the Board. New panels were created for each judicial officer as required.
11. The Act grants the Board limited power to review its own determinations. Section 22(2) provides that:
 

The Board shall not grant a request for review under this Section unless the request is based:

  - (a) On the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the Judge or Magistrate as at the time the determination or finding sought to be reviewed was made, provided that such lack of knowledge on the part of the Judge or Magistrate was not due to lack of diligence; or
  - (b) On some mistake or error apparent on the face of the record.
12. The two conditions are gateways to review. However the Board has stated that because the Board has the first and last word in relation to the suitability of a judge or magistrate it will take a more flexible view in deciding whether an application for review satisfies the set conditions. And in regard to new evidence, the Board has held that it will admit the “new evidence” if it is so significant that it would warrant reversal of a finding of unsuitability. The Board thus is unduly technical or demanding in respect of the requirement for due diligence or prior knowledge.
13. With regard to “mistake or error apparent on the face of the record”, the Board has held that errors of law and fact not requiring extraneous evidence, or elaborate argument qualify as grounds for review. The submissions may raise issues of both substantive and procedural law.
14. The following decisions are based on those considerations and a number of reviews have been allowed on that consideration and a majority are based on new evidence presented to the Board at the stage of the review application. Accordingly the determination of “unsuitability” are set aside and replaced with that of “suitable to continue to serve” in regard to the following officers:
  - (i) Hon. Justice Grace Nzioka Lidembu
  - (ii) Hon. Mogute Stephen Onsiero
  - (iii) Hon. Kayila Dolphina Alego
  - (iv) Hon. Oganyo Roselyne Akinyi
  - (v) Hon. Samuel Mokua Mogaka

- (vi) Hon. Sindani Calestous Nambafu
  - (vii) Hon. Thomas Thyaka Nzioki
  - (viii) Hon. Mutua Philip Wambua
  - (ix) Hon. Atambo Stella Bonareri
  - (x) Hon. Tito Maoga Gesora
  - (xi) Hon. Mutai Lucy Kathure
  - (xii) Hon. Teresia Mumbua Matheka
  - (xiii) Hon. Jesse Njagi Nyaga
  - (xiv) Hon. Ben Mwai Mararo
  - (xv) Hon. Mutoka Rosemelle Anyango
  - (xvi) Hon. Mmasi Grace Ayuma
  - (xvii) Hon. William Chepseba Kipkemei
  - (xviii) Hon. Bildad Ochieng'
  - (xix) Hon. Beatrice Mosiria Nyambune
  - (xx) Hon. Lily Nafula Monica
15. The main grounds for review were:
- (i) Jurisdiction as defined in Supreme Court Petition Number 29 of 2014. In some instances the Board had considered matters that arose after 27th August 2010 in reaching a finding of “unsuitable”. The said matters shall be referred to the Judicial Service Commission.
  - (ii) New evidence In these matters the judicial officers produced letters, financial documents, and court records that they had not supplied earlier. These documents were able to shed light on certain issues that had prior led to a finding of “unsuitable”.
16. The following judicial officers have failed to establish grounds for review that meet the statutory provisions as liberally interpreted by the Board, and the determinations of unsuitability are upheld.

### **HONOURABLE TERESIAH NGUGI NJERI**

17. In this application for review, Counsel for the Magistrate made submissions pertaining to both criteria set out in section 22(2) of the Vetting of Judges and Magistrates Act.
18. The first finding was that the Magistrate had taken a “laid back approach” to establishing how a copy of a ruling delivered by her had disappeared from a court file. On 31 August 2009, the Chief Magistrate of Nairobi directed that she rewrite the ruling. The Magistrate wrote a replacement ruling, which she said she forwarded to Milimani Commercial Courts for delivery in September 2009, having herself been transferred to Makadara Law Courts. The said ruling was delivered on her behalf in February 2010. The Board found (a) that there was “no letter by which the Magistrate forwarded the file to Milimani Law Courts, and her assertion that she forwarded the file in September 2009 is not supported”, and observed (b) that the Magistrate “should have initiated an enquiry and taken the registry staff to task”. It was from these two specific findings (a) and (b) that

the Board reached the conclusion that the Magistrate had been laid back in her approach.

19. The Magistrate argued that the Board had erred in law by transforming a complaint about failure to deliver a ruling, which was in fact delivered orally in April 2009 and again when the rewritten ruling was delivered in February 2010, into one about failing to initiate an investigation into the disappearance of the said ruling from the court file.
20. Regarding the specific finding (a) that there was no letter by which the Magistrate forwarded the rewritten ruling to Milimani Law Courts in September 2009, the Magistrate made the point that such a letter would not remain in her possession after she had sent it. Her counsel argued that the Board had committed an error of law by overlooking additional evidence tendered to the Board during the vetting process (and repeated as Annexure TNN2 to the Affidavit in Support of the Grounds of Review<sup>1</sup> which indicated that the ruling was listed for delivery in Milimani on 24 September 2009, thereby indicating that the Magistrate had taken action. The Magistrate had requested time at her vetting interview to supply additional documents that would address the actions she took to forward the ruling, and she met the deadline of seven days for doing so.<sup>2</sup> It was, therefore, an error of law for the Board not to have referred to this document in reaching the specific finding (b) above, to the effect that “her assertion that she forwarded the file in September 2009 is not supported”.
21. Regarding (b), the specific finding that the Magistrate should have investigated the registry and established how her ruling disappeared, the Board erred in law and fact when it failed to inquire whether the Magistrate had the supervisory role and power to that effect. The Board failed to realize that as Principal Magistrate the Magistrate had a duty to supervise the Court Clerks who are assigned to her but not the movement and handling of files, an exclusive duty of the head of station. The Board erred in failing to take into account the fact that the Magistrate indicated that she inquired from the Court clerk and her initial investigation indicated that the clerk sent the file to the registry and at that point the ruling was still in the file. The Magistrate tendered further affidavits from the Chief Magistrate and others, by way of new evidence in this review application, to show that she had taken prompt action and done all that was within her powers.<sup>3</sup>
22. On this basis, it was submitted that the Board should not have concluded that she had adopted “a laid back approach”. The Magistrate may well be correct in her challenge to the factual findings above. However, the delay in delivery of the rewritten ruling remains rather long and the Magistrate ought to bear responsibility.
23. The second finding of the Board concerned the Magistrate’s finances. The Board made three specific findings:
  - (i) The Magistrate received three cash deposits of KSh 50,000 on 21<sup>st</sup> November 2007, and her explanation that these were earnings from her investment in the Wendani Women Group was “not credible”, as such dividends are paid annually but the Magistrate’s accounts do not disclose similar deposits for other years;
  - (ii) The Magistrate received certain amounts which she claimed were cash

1. Discussed in the Review Hansard pgs 13-17.

2. Vetting interview on 14<sup>th</sup> September 2015, document supplied by 21<sup>st</sup> September 2015 as stipulated by the Board.

3. Discussed in the Review Hansard pgs 24-29.

allowances paid to her while serving on a taskforce, but the banking history did not match the activities of the taskforce.

- (iii) There were “several large unexplained deposits in the Magistrate’s financial records”.
24. The Magistrate submitted that the Board erred by making improper determination on the accounts, Bank statements and financial records and transactions involving mistakes and errors apparent on the face of the record of the said determination. The Board failed to apply reasonable common and human standards as to her financial propriety in that it is humanly impossible to recall details of dealings due to lapse of time and human capacity or incapacity to keep memory.
25. Specifically, with regard to (i), the Magistrate tendered new evidence by way of affidavit to confirm her membership of the women’s group.<sup>4</sup> She submitted that the Board made a finding with regard to the years 2004-6, even though she was not required to produce financial records for those years. The Board observes that this was evidence that she herself had adduced and as such she cannot complain in regard to it. The Magistrate further explained that in years where no large amount was received in her bank account, she received the cash and immediately spent it, for example, on a family holiday. There was no amount received in 2009 because the group was disintegrating by then. She made that point during her vetting interview, and the Board does not dispute that finding as it does not constitute a blatant error on the face of it.
26. With regard to (ii), the Magistrate tendered new evidence regarding her membership of the task force on ex-offenders. She also submitted that when the Board based its finding of a mismatch between the payments and her task force activities on the minutes of the task force, the Board did not have a sufficiently complete set of minutes available to it – potentially an error of law. She had herself tendered those minutes, but only to prove her membership of the task force.<sup>5</sup> She now tendered additional minutes and letters from the Home Affairs Ministry as new evidence, but had been unable to obtain payment vouchers, despite her correspondence with the Ministry.
27. With regard to (iii), the Magistrate argued that the Board erred in law by disregarding her explanation for the large deposits, which she had said in the Vetting Interview came from her spouse.<sup>6</sup> She sought to introduce new evidence in the form of additional bank statements, arguing that she did not ask for time to submit these after the Vetting Interview because she thought that her spousal support explanation would be accepted. Also, her husband’s bank statements were not readily available at the time, even with due diligence, because he was an advocate and his partnership was in the process of being dissolved. The Board was not persuaded by this submission.
28. The third finding of the Board that supported its conclusion of unsuitability concerned the judgments which the Magistrate had submitted to the Board, it stated as follows:

The Board finds that the judgments are lacking in structure and material particulars. The judgments are poorly written and the awards point to incompetence. The judgments do not sufficiently capture the facts and evidence, the legal reasoning and analysis is hollow. None of the attached judgments make reference to precedents or authorities. The Board notes that most of the

4. Review Hansard Pages 30-31.

5. Review Hansard Page 45.

6. Review Hansard Pages 50-51.

judgments were delivered in 2009, almost ten years into the Magistrates judicial career and cannot be excused. The Magistrate claimed that she had no sufficient exposure to Civil matters, but the Board finds that this is not a justifiable reason for the shoddy work presented, the structure of judgments is the same in both Civil and Criminal Cases.

29. The Magistrate submitted that the Board failed to realise that writing skills vary from one Magistrate to another and that the operational environment plays a very critical role in the depth and standards of a judgment. The Board failed to appreciate the environment in which the Magistrate was operating in while writing these judgments. While in Nairobi Law Courts and Makadara which at these times were essentially the busiest stations in the Country, she would on average handle 40 files every day.
30. The Magistrate submitted further that the Board erred in relying on only three of her judgments to make a finding that they are wanting in form and in structure. This is not proper statistical finding and an audit of her writing. The Board should have based the decision on the content and weighty issues in the ruling and judgment rather than form and structure which is not integral and did not prejudice any party. Moreover the Board has a duty to do justice to make a current finding that her Judgment were wanting to the ideal yet the sample judgments and ruling are in the past, specifically that her current position of Senior principal Magistrate and that she has now attended severally trainings and improved on her skills. Further that the Board failed to recognize the three judgments she presented and two which had gone on appeal and her decisions were upheld confirming that they substantially upheld the principles of Law. The Board failed to consider that she had not attended any formal training in terms of writing judgments and rulings and that the same can be improved upon after attending training.
31. The Magistrate filed a few of her recent judgments for the Board's analysis and for the Board to confirm whether they are structurally correct and have necessary statutory provision and case law. Her counsel submitted that in other cases where competence was the only issue, the Board had recommended training.
32. The Magistrate's submissions regarding the quality of her work are not convincing. She had the opportunity to choose which three judgments to submit, and these had numerous defects as identified in the Board's determination. For an experienced Magistrate, this standard of writing is inexcusable. Her attempt to submit further judgments at the Review stage does not satisfy the test of new matter that could not have been discovered with due diligence.

## **DETERMINATION**

33. The Board therefore finds that the Magistrate has failed to establish she has grounds for review that meet the statutory provisions as liberally interpreted by the Board, and upholds the initial determination of unsuitability dated 12th October, 2015. Accordingly, the HONOURABLE TERESIA NJERI NGUGI is NOT SUITABLE to continue in service.

## **HONOURABLE TIMOTHY ODIWUOR OKELLO**

34. In this application for review, Counsel for the Magistrate made submissions pertaining to both criteria set out in section 22(2) of the Vetting of Judges and Magistrates Act.

35. The Magistrate submitted that there were errors on the face of the record and relied on 16 grounds and that he has been unfairly condemned as the grounds of review. He filed an affidavit in support of the Review application on 8th February 2016.
36. The Magistrate in his affidavit annexed affidavits of Jeremiah A. Omai an Accountant in the Judiciary and Bernard Oyugi Ombui an Advocate and a senior partner in the law firm of E.M. Juma & Ombui Advocates. However, no formal application was made at the hearing of the Review application to have the said affidavits admitted as new evidence.
37. The Magistrate in an affidavit sworn on 2nd February 2016 in support of the review summarised his grounds of review as below.
38. That the Board called a witness but failed to inform the Magistrate in advance that they intended to call the witness. No statement or affidavit was availed to the Magistrate to enable him to respond substantively thereto. The Magistrate argues he was denied his constitutional right to prepare any defence and to avail evidence to rebut the witness' testimony. The Board later relied heavily on the testimony of the said witness to find him unsuitable. However at the hearing of the Review application this point was not argued.
39. In relation to **Bomet Senior Resident Magistrate's Civil Cases No. 13 of 2008 and 165 of 2008**, the Magistrate argues there are factual errors in respect of the dates when the Magistrate ordered the release of the money; when the Clerk went to Court; and further by the Board stating that the witness was reliable when there were many glaring discrepancies in his testimony. The Magistrate has introduced the affidavit of Bernard Oyugi Ombui the Plaintiff's advocate who was alleged to have been at Bomet Law Court on 18/2/2008. The Magistrate further contested the finding in the determination that Judge Ang'awa directed that he be investigated.

However at Page 96 of the Hansard the Counsel for the Magistrate stated as follows:

**"On a light note you will recall- if Ang'awa sets aside any decision that you have made as a Magistrate, even for an Advocate which she has done to me several times and many other advocates that is why we used to complain a lot. She would order that you be investigated for whatever reason. So it is not uncommon for this decision. I have come here I think this is the third time I am having a Magistrate where there is that allegation. Whereas we do not have that record here but it is common for Justice Ang'awa then to say the advocate be investigated and the Magistrate be investigated in the stations she served without imputing anything to Her Ladyship as she then was."**

In the circumstance, neither the Magistrate nor his Counsel can be said to have refuted the finding. The Court record confirms that the Judge did indeed order an investigation into how the funds were released within 24 hours. The Board finds that the Magistrate has not established any error on the face of the record.

40. In **the matter of Bomet Senior Resident Magistrate's Criminal Case No 265 of 2008**, the Magistrate argues that the Board erred when it found that the Magistrate converted a mention date into a hearing when the Court proceedings do not support the said finding.

At *Para 45* of the determination it is stated that;

“The Board examined the Court file, the accused were facing a charge of arson and malicious damage to property. The house of the complainant a victim of domestic violence had been burnt down. The matter was fresh, had not been listed for hearing prior, and the 1<sup>st</sup> accused was not in Court. The magistrate’s conduct on the matter is wanting in all respects. In a matter when the accused is missing, the Court must issue a warrant for his arrest, unless proper reason is tendered for his absence. The case cannot proceed until the presence of the 1<sup>st</sup> accused, insisted that the matter proceed to hearing yet the case was set for mention, and acquitted the accused for want of evidence.”

It is submitted on this that the Board erred when it stated that the case involving parental neglect was dismissed when the record shows that the case had been withdrawn on 24th June 2008. A case of malicious damage to property was fixed for hearing on 22nd July 2008 and was not for mention. The date had been given as a hearing date in the presence of the Prosecutor and the accused persons hence the case was not dismissed at a mention stage.

41. The Court record confirms that the matter was indeed fixed for mention and not hearing on the said date, and that the Magistrate dismissed the case for want of prosecution despite the fact that one of the accused was not in Court. The Board also did not state that the parental neglect case was the one before Court, it stated that a case was one of arson, and the victim was a prior victim of domestic violence. Counsel’s submissions on the matter are misleading.
42. In regard to the dishonoured cheque drawn by the Magistrate, the Board on review finds no evidence to support that the same was dishonoured for lack of funds. Also as for the finding on the issue of rent arrears the Magistrate has submitted that it was because of a dispute on the rent claimed and in any event would on the face of it appear to be outside the Board’s jurisdiction.
43. The other grounds raised issues on facts such as Board’s finding on the disciplining of the Prosecutor by the Magistrate, poor research skills and his inability to manage his finances. The Board finds that a positive finding on the same would not affect the finding of unsuitability based on the grounds canvassed and discussed *supra*.
44. The Magistrate has failed to make out a case for review. The application accordingly fails. The determination of unsuitability stands.

## **DETERMINATION**

45. The Board, therefore, finds that the Magistrate has failed to establish he has grounds for review that meet the statutory provisions as liberally interpreted by the Board, and upholds the initial determination of unsuitability dated 13th January, 2016. Accordingly, the HONOURABLE TIMOTHY ODIWUOR OKELLO is NOT SUITABLE to continue in service.

## **HONOURABLE WILSON NKUNJA KABERIA**

46. In this application for review, Counsel for the Magistrate made submissions pertaining to both criteria set out in section 22(2) of the Vetting of Judges and Magistrates Act.
47. The principal submission was in regard to the process followed by the Board. The Magistrate made two arguments (i) alleging apparent bias; that the Panel proceeded, without starting afresh after a member of the previous Panel recused

himself after allegations of bias were raised against him. The Magistrate relied on the decision on the Review application and determination of **Justice Abida Ali Aroni, Justice Mohamed Ibrahim and Justice Nicholas Ombija** as reference on how the Board has always dealt with proceedings where the issue of Bias on the part of a member of a Panel is raised.

48. The Board notes that although the member recused himself, he did not admit the allegation of bias. The issue was raised at the resumed vetting, and a ruling made. The ruling stated that there was no need for a fresh start and relied on an authority **ASM Shipping Ltd vs Bruce Harris (2007) High Court of England and Wales Case No 1514(Comm) at 44** in which one of three arbitrators had become tainted. The High Court of England and Wales in that case posed the question of whether the arbitrator would have “contaminated” his fellow arbitrators, and concluded that in the circumstances no contamination had occurred.
49. The ruling highlighted the difference between the previous Board determinations in which the vetting interviews had been concluded and Determinations reached with the participation of the member in respect of whom apparent bias was later alleged. There was no other way to cure the appearance of bias than to start afresh with a fresh panel, whereas here it was sufficient to substitute the Chair of the panel. It is clear from the record that after the ruling both the Magistrate and Counsel concurred and were ready to proceed.<sup>7</sup>
50. The Board concurs with the ruling and notes that the other matters referred to had already been concluded. In the present matter, by contrast, the matter was part-heard and the member withdrew before deliberations on the suitability of the Magistrate had commenced. This is an important distinction as it is through deliberations that members of a panel have the opportunity to persuade one another. The remaining Panel members had recessed to deliberate on whether his apparent bias had contaminated the other Panel members, applying the approach in the **ASM Shipping** case, and rightly concluded that it did not. In the circumstances this ground fails.
51. The Magistrate made a second and distinct submission regarding apparent bias on the part of another panel Member. This was grounded on a question asked regarding a property belonging to the Magistrate. The member is quoted as asking: “**You purchased it or was it given to you also?**”<sup>8</sup> The Board appreciates the concern that “*also*” suggested that the Magistrate had been given other properties, yet there was no such evidence. However, it is of the view that a reasonable observer would understand this simply as misspeaking and not as an indication of a considered view on the part of member.
52. The Review Panel, therefore, finds that there was no apparent bias and hence no error of law as regards the process.
53. The other matters argued do not persuade the Board as warranting interference with the overall finding of unsuitability.

## **DETERMINATION**

54. The Board, therefore, finds that the Magistrate has failed to establish he has grounds for review that meet the statutory provisions as liberally interpreted by the Board, and upholds the initial determination of unsuitability dated 1st March, 2013. Accordingly, the HONOURABLE WILSON NKUNJA KABERIA is NOT SUITABLE to continue in service.

7. Page 11 of 221 of the Hansard proceedings of 16th September, 2013.

8. Hansard of 16th September 2013, Page 68 of 221, discussed on review at Review Hansard Pages 22-31.

**HONOURABLE EZRA ODONDI AWINO**

55. In this application for review, Counsel for the Magistrate made submissions pertaining to both criteria set out in section 22(2) of the Vetting of Judges and Magistrates Act. He put forward the following grounds:
- (a) Mistake or error apparent on the face of the record:
    - (i) Malice.
    - (ii) Credibility of the complaint and the Magistrate.
    - (iii) Unexplained wealth.
    - (iv) Failure to be sensitive to Socio-economic environment in which the Judiciary operates.  
(*Dr. Gesami's case*)
  - (b) There is a discovery of new and important matter which was not within the knowledge of the applicant at the time of the proceeding;  
On the complaint by Oscar Owako the applicant with help of the Kenya Police has managed to obtain a statement of account of the complainant account No. CAS 1-3-005276 at NIC Bank Prudential House, Wabera Street on the 27th March 2013.
56. The Board had examined four complaints against the Magistrate. It had accepted the Magistrate's explanations in regard to the 1st and 2nd complaints. The third complaint had four limbs. The Board was satisfied with the explanations in regard to the 1st and 2nd limbs of that complaint. As regards the other two limbs forming part of the 3rd complaint, the Board found the issues complained about were drawn to the attention of the Magistrate but he disregarded them. Further the Board found that the Magistrate was wrong to proceed in the matter complained about.
57. However it was the fourth limb of the 3rd complaint that concerned the Board most. It was an allegation that the Magistrate had demanded a bribe of Kenya Shillings Thirty Thousand, (Kshs 30,000) from the complainant. The complainant was a mechanic who claimed that the Magistrate was a customer of his and a drinking companion. The Board concluded that a number of questions arose from the Magistrate's version of the events. Nevertheless there was no independent substantiation that a bribe was demanded or paid. The vividness of the complainants' account of the events, the Board said, established a probability of the veracity of the complaint. The Board said that it did not totally disregard the complainant's allegations and has regard to it and attaches due weight in light of the other complaints in assessing the suitability of the Magistrate.
58. It would seem that the other complaint that the Board had in mind was the 4th complaint where it was alleged that the Magistrate had demanded a bribe of Kenya Shillings One Hundred Thousand (Kshs 100,000) from the complainant and that the Magistrate had received it through the then Kadhi Kisumu High Court. This finding was attacked on Review principally on the ground that the Magistrate when asked if he knew the Kadhi thought that the question related to the Chief Kadhi, and there was no Chief Kadhi in Kisumu as such. The Board is not impressed by that argument. The Magistrate sought to introduce a bank confirmation that the account which related to two post-dated cheques that the complainant had produced to back up his complaint had been closed on 11th November 2010.
59. The Board is inclined to allow the introduction of the new evidence on the basis that this new evidence was not available to the Magistrate at the time and even

with due diligence could not for the reasons that he gave have been able to produce it. However the said evidence does not in the Boards view detract from the Boards principal finding. In the circumstance the Boards finding in regard to the allegation of a bribe having been paid was that a strong case had been made out that the Magistrate had received two cash payments of Kenya Shillings Fifty Thousand (Kshs 50,000) each in the manner described by the complainant. The Boards' finding was that the Magistrate had refused to accept a cheque and had asked for cash.

60. A further complaint was a report received from the Ethics and Anti-Corruption Board which complained that the Magistrate had in unclear circumstances found that the accused persons in a criminal case in which a member of parliament had been charged with fraudulent acquisition of public property, false accounting and abuse of office, had no case to answer. The Magistrate sought to challenge that finding inter alia on the basis that '**... In the court of public opinion the people of West Mugirango went to the polls on 4/3/2013 and overwhelmingly re-elected the said accused...**' That this consequently was a case of malice. The Magistrate's challenge of the Board's finding did not fall within the criteria of a blatant error. In any event the Board's finding on the fourth limb above is by itself sufficient to sustain a finding of unsuitability.
61. In the circumstance the Board having carefully considered the ably argued application on behalf of the Magistrate does not find that a case has been made out to find that there was a blatant error on the part of the Board in its Determination of 1st March 2013. The application fails and the Determination that the Magistrate is Unsuitable to continue is sustained.

## **DETERMINATION**

62. The Board, therefore, finds that the Magistrate has failed to establish he has grounds for review that meet the statutory provisions as liberally interpreted by the Board, and upholds the initial determination of unsuitability dated 1st March, 2013. Accordingly, the HONOURABLE EZRA ODONDI AWINO is NOT SUITABLE to continue in service.

## **HONOURABLE SAMWEL K. GACHERU**

63. In this application for review, Counsel for the Magistrate made submissions pertaining to both criteria set out in section 22(2) of the Vetting of Judges and Magistrates Act.
64. In arguing errors apparent on the face of the record, it is averred that the Board erred by stating in paragraph 19 of its determination that the Board members actively participated in questioning the Magistrate and the Complainant, yet the complainant never appeared during the interview. The Board notes that Paragraph 19 refers to the format of all interviews, and is not specific to the Magistrate. The findings of the Board are contained in paragraphs 32 to 38 of the determination. We find that there is no error in paragraph 19, and that its inclusion in the determination did not adversely affect the Magistrate.
65. Counsel also submitted that the Board erred by stating in the announcement that it would refer the complaint received to the Judicial Service Commission for consideration, since it arose after the effective date. It was argued that during the hearing the Magistrate was given an option to address the said complaint even though it arose after the effective date, and that he was assured that if his

response was satisfactory, then the complaint would not be forwarded to the Judicial Service Commission.

66. The Magistrate addressed the said complaint, and upon conclusion, a member of the panel stated, "...so it is really in your interest to have answered it because otherwise we are left in limbo so that the matter would go to JSC but on the explanation that you have given us, I do not think that it is warranted that we send it to the JSC." They aver that the statement was an assurance that the matter would not be referred to the Judicial Service Commission, and that by announcing that the matter would be sent to the Judicial Service Commission, the Magistrate is exposed to double jeopardy.
67. The statement attributed to a member of the panel, was not definitive or conclusive, it merely contained an opinion of a member of that panel who used the words "*I think*", and further at the end of the interview the Magistrate was informed that the panel makes a recommendation to the Board and the final decision is made by the entire Board. The statement by the member being an opinion is not binding on the Board. The Board finds that the Magistrate will not suffer double jeopardy as the Board did not make any finding on the complaint as seen in paragraph 33 of the determination, and the Supreme Court Judgment in Petition 29 of 2014 requires the Board to remit all complaints arising after 27th August 2016 to the Judicial Service Commission.
68. The main ground argued by Counsel for the Magistrate, was that there was a grave error apparent on the face of the record. That the Board erred in finding that the Magistrate had several unexplained deposits in his account. That it was a procedural error to have dismissed the contents of his affidavits explaining the source of funds and the stated deposits without according him an opportunity to explain them. That making a negative finding without according him an opportunity to be heard upon the said affidavit is a clear violation of the Article 50 of the *Constitution of Kenya 2010* that envisages a fair hearing for every citizen and compliance with the rules of natural justice.
69. The Magistrate argued that he gave an elaborate explanation as to the source of the funds in the stated affidavits. The milk proceeds were always declared in his annual wealth declarations returns; he attached licenses issued for his retail business; he explained his relations with the persons who did the banking on his behalf; and he stated it was an error to find that he made several deposits in a week claiming it was from his mother in the village.
70. The Magistrate admitted that he has poor accounting skills and mixed his business and salary funds, but averred that doing so does not amount to corruption. All the monies are from fair sources and honestly obtained, he is not living beyond his means; and there have been no complaints of corruption.
71. The Magistrate did file an affidavit in which he outlined and explained the source of his funds, complete with supporting evidence, which included business licenses and confirmation of milk sales. The failure to summon the Magistrate to elaborate on the affidavit before making a negative inference upon it does not amount to a violation of the Magistrates constitutional rights to a fair hearing. The affidavit was self-explanatory and no further explanation was necessary, and due regard was given to it before a finding was reached.
72. The Magistrate has not furnished any new evidence that would warrant reviewing the determination of unsuitability. The Board examined the affidavit and found that it does not adequately explain the deposits. At the review the Magistrate just

elaborated upon the same evidence that was available to the Board at the time of making the determination.

## DETERMINATION

73. The Board, therefore, finds that the Magistrate has failed to establish he has grounds for review that meet the statutory provisions as liberally interpreted by the Board, and upholds the initial determination of unsuitability dated 12th May, 2015. Accordingly, the HONOURABLE SAMWEL K. GACHERU is NOT SUITABLE to continue in service.

## HONOURABLE BERNARD JAMES NDEDA

74. In this application for review, Counsel for the Magistrate made submissions pertaining to both criteria set out in section 22(2) of the Vetting of Judges and Magistrates Act.
75. It was argued that the Board erred in law and in fact in making a finding that the Magistrate was not suitable to continue serving. It is averred that there is an error apparent on the face of the record, as the Board failed to place any weight on the affidavit evidence of one Kenneth Githinji Advocate, and by finding that the complainant was a credible witness.
76. It is settled law that only a trier of fact can make any findings of fact unless there is an agreement on facts, or an admission. A trier may associate different weights to individual parts of the evidence, but when considering testimony evidence, its value comes down to four factors. Perception, memory, narration and sincerity. Evaluating evidence involves an assessment of a witness' credibility and reliability. These are distinct concepts referring to the witness' veracity and accuracy. Evaluating credibility is not a scientific process and so there are no hard and fast rules to apply. Tribunals are hesitant to devalue testimony based on minor or "perceived inconsistencies".
77. It has been held, and is now accepted Law that where a trial court that has had the opportunity of observing a witness, finds that a witness is truthful and credible, such finding is a finding of fact, and an appellate Court cannot interfere with it unless justifiable cause is shown. The findings of a trial Court based on the credibility of a witness cannot be interfered with.<sup>9</sup>
78. Counsel then argues what may arguably be a justifiable ground. It is argued as a second point, that there is discovery of a new and important matter which was not within the knowledge of the Magistrate at the time of the interview. The Magistrate introduces an affidavit by the complainant's brother where he avers that **"That I wish to state that my sister is actually suffering from mental disorders and usually undergoes treatment. She has a record of mental issues and even strips her clothes in public."**<sup>10</sup>
79. The Magistrate also documented a letter dated 13th November, 2015, purportedly emanating from the office of the Medical Superintendent Kerugoya County Hospital, which stated as follows:

9. Oyier vs Republic, 1985 KLR 353, and applied in Daniel Odhiambo Koyo vs Republic, (2011) eKLR.

10. Paragraph 13 of affidavit by Isaiah Samwel Gitari deposed on 23<sup>rd</sup> October 2015. Page 28 of the Record titled "Affidavit in support of grounds for review & submissions on review"

**“TO WHOM IT MAY CONCERN****Dear Sir/Madam****RE: F\*\*\*\*\* M\*\*\*\*\***

This is to confirm that the above named is our client and has been attending clinic in this facility for a long duration due to mental illness.

Yours faithfully

**S.M. NGIGI****For: MEDICAL SUPERINTENDENT****KERUGOYA COUNTY HOSPITAL.”**

80. The Board was concerned by the authenticity of the said letter, as the proper identity of the author was not stated, and it seemed to reveal protected confidential information. The Board commissioned an investigation after the interview. The Board investigator met the Acting Medical Superintendent who in turn wrote a letter as follows:

**“Chief Executive Officer****Judges and Magistrates Vetting Board,****Dear Sir,****RE: LETTER ON F\*\*\*\*\* M\*\*\*\*\* DATED 13/11/2015****CONF/JMVB/VP/VOL.III/217**

We are not able to verify the authenticity of the above quoted letter.

The two (2) names are not appearing in our departmental records for the period between January 2014 and January this year (2016).

Please note we do not release patient’s information to a third party unless authorised to do so through a Court Order.

Thank you.

Yours faithfully,

**Dr. Muthee A.****Ag. Medical Superintendent****KERUGOYA COUNTY HOSPITAL.”**

81. We have set out the contents of the two letters in full, because our finding turns on the same. The Magistrate was notified of the letter from the Acting Superintendent, and was given an opportunity to respond. He filed an affidavit dated 23rd February, 2016, and I quote parts below:

“That upon my lawyer writing this letter, since it was urgent he handed it over to me and told me to either hand deliver it or send a runner to Kerugoya Hospital where the Medical Superintendent is based I then told him that infact I had information that Mr. Stephen Ngigi who had been in charge of Kianyaga Sub District Hospital during the period for which we were seeking for the medical records of Mrs Felista Muthoni had been transferred to Kerugoya County Hospital where the Medical Superintendent is based.

That Mr. Stephen Ngigi is a person who is well known to me as he used to come to court regularly to give evidence on medical issues and produce medical reports/

P3 forms on behalf of litigants in Gichugu where he was in charge of Kianyaga Sub County Hospital.

THAT I sought for Mr. Stephen Ngigi contact found it and called him explained to him my predicaments and told him that I will send via courier services a letter to the Medical Superintendent and that I need a response urgently.

THAT the following day Mr. Stephen Ngigi called and told me that my letter had been received, he had discussed it with the new Medical Superintendent and the new superintendent had authorized him to respond to it since he was privy to the issues, Mr. Stephen Ngigi then send the response letter dated 13<sup>th</sup> November, 2015.”

82. The Board will usually not permit as new, evidence that is extensive and requires further investigation and probe, however the Board is also aware of the effects of being declared unsuitable, and does not unduly rely on technism to lock out evidence.
83. At the further hearing the Magistrate sought to explain that the letter by Mr. Ngigi was valid and had been authorised by the Medical Superintendent. The Medical Superintendent denies this, and the Magistrate was granted a second hearing to try and reconcile and explain the two vastly contradictory letters. The Magistrate has failed to do so.
84. The letter by Mr. S.M.Ngigi does not give a detailed report on the nature and effect of the purported mental illness. It also does not state the period of illness, and whether it was constant or periodic, and what the triggers are. The brother's averments are unsupported and qualify as hearsay, and in any event he too, does not give details of the nature of illness alluded to.
85. In light of the rebuttal by the Medical Superintendent, the Board finds that the allegations of medical illness have not been proven. The complainant attended the interview and gave testimony, was vigorously cross examined by Magistrate's lawyer, and none of the people present doubted her sanity. The finding of credibility of the complainant cannot, therefore, be interfered with.
86. Counsel avers that there is an error apparent on the face of the record, where the Board finds that after finding the accused guilty and convicting him, the Magistrate went ahead and discharged the accused on both counts. The Magistrate avers that the typed proceedings omitted a crucial full stop, between the fine on the first limb, and the sentence discharging the accused on the second limb. A look at the hand written record does not support the contention. There is no full stop. The Board also notes that the Magistrate's hand writing is almost illegible.<sup>11</sup>
87. It was argued that there is an error on the face of the record. That the complainant alleged that the Magistrate unprocedurally had the accused released from prison. He sought to introduce new evidence from Kerugoya GK Prison, where it is confirmed that a person purporting to be the complainants' father is the one who presented the release order to the prison. The issue raised does not affect the finding of suitability as the Board did not make any finding on it in the determination.
88. Counsel also argued that there is an error on the face of the record; that the Board made a determination that interaction between members of the bench and the bar is unethical. The Magistrate cited Value 4 of the Bangalore principals which deals with propriety and improper conduct. The final submission was

11. Pages 28A and 29 of the Complaint and Vetting Questionnaire.

that interaction between the bench and the bar is not prohibited the same is encouraged within the parameters of integrity and propriety.

89. The Board did not prohibit interaction between the bar and the bench, indeed the Board has been praising Court Users Committees and Bar Bench Committees which include members of the bar. The Board pointed out that improper contact and interaction with lawyers offends propriety. Counsel for the Magistrate conceded, and stated that “**The only thing is it should not be done in circumstances as was pointed out in the Determination.**”<sup>12</sup>
90. The Magistrate argued that there were errors on the face of the record regarding his competency and appreciation of the law. That in relation to proceedings of *voire dire* there was no need to make reference to the same in the judgment; that in relation to corroboration of a minors evidence, the rule does not apply where the minor is not the complainant; and that in relation to the definition of land, the Magistrate was right to hold that crops do not form part of the land.
91. The Board examined the record and the determination and do not find any errors. In relation to *voire dire* he was advised that it is good practice to make reference to it in the judgment, as a judgment has to be cogent and complete. As regards land law, his finding was not challenged, but it was observed and a finding was made that he did not fully grasp the land law legal principals, and was unable to ably discuss the same at the interview.
92. On the finding that the Magistrate has poor writing and oral skills, it was submitted that that was an error on the face of the record as the Board did not consider his current writing skills. The Board decided to put aside technism and looked at the recent decisions at the interview and before making the determination. The review panel also looked at the post 2010 judgments and finds that there is no significant improvement, the judgments relating to the election petitions are long because of the vast number of witnesses, but they lack in structure and legal analysis. There is no justification for varying the earlier finding on his writing and oral skills.
93. The Magistrate has not ably challenged the finding that the Magistrate did attend a meeting in the lawyer’s office. It is admitted that such conduct is improper and offends propriety.

## **DETERMINATION**

94. To establish the grounds submitted on by counsel for the Magistrate would require extraneous evidence and elaborate arguments. They are neither alleged errors of law or of fact. The Magistrate fails to establish he has grounds for review that meet the statutory provisions as liberally interpreted by the Board. The Magistrate has failed to make out a case for review. The application accordingly fails. The determination of unsuitability stands.

## **HONOURABLE WILKINSON NYAGA NJAGE**

95. In this application for review, Counsel for the Magistrate made submissions pertaining to both criteria set out in section 22(2) of the Vetting of Judges and Magistrates Act.

12. Page 15 of 36 of the Hansard proceedings of 19<sup>th</sup> January, 2016.

96. The Main ground for finding the Magistrate unsuitable was his conduct in relation to **Kerugoya Criminal Case Number 903 of 2002**.
97. It is submitted that the Board erred in stating that the Magistrate had sentenced the complainant to serve three years in prison, yet he had only served 17 months. The Board finds it is to be noted that if a citizen has to spend even a day in jail due to an illegal order, it is a violation of his human rights and it is a very serious matter. Therefore, this mistake that the Magistrate is complaining of is not a matter that goes to the root of the finding against him.
98. Counsel for the Magistrate submits that the Board erred in finding that the Honourable Magistrate refused to disqualify himself upon application by the complainant yet there was no evidence of the same recorded in the court records. That there was no other Magistrate in the station willing to hear the matter and the complainant was represented by an advocate.
99. The Board on consideration of the facts in totality finds that after having financial dealings with the complainant, the Magistrate even without any application should have disqualified himself on his own motion. We hold that for that reason this submission fails.
100. Counsel also submits that the Board erred in finding that the Magistrate ought to have corrected the error as soon as he noticed it. It is contended that once a Magistrate delivers a sentence, he becomes *functus officio* and cannot sit upon the matter again.
101. The Board admits that indeed the Magistrate cannot review his sentence and is indeed *functus officio* thereafter. The Board however notes that the Magistrate admitted that he realised his error in 2003, and took no steps to bring it to the attention of the High Court Judge for correction. The issue was not canvassed on appeal, and thus the irregular sentence was upheld. The Board faults the Magistrate for failing to take action towards a correction of the error. This ground of review fails.
102. It is submitted that the Board erred in finding that the Magistrate handled the case whilst having a dispute with the accused. It is stated that the dispute between the Magistrate and the accused arose in 1999 long before the case was filed in 2002. The Board has perused the record and finds that the dispute between the two raged on till 2001.
103. The Board finds that the Magistrate has failed to establish errors on the face of the record, that would warrant the setting aside of the finding of unsuitability. The record confirms that the Magistrate had prior financial dealings with the accused and they fell out; that the Magistrate did not even on his own motion disqualify from the matter; and that the Magistrate handed down an excessive sentence; had constructive knowledge of the sentence, and took no steps to bring it to the attention of the Judge for correction.
104. The Magistrate's misconduct, impacts on the image of the judiciary; and its effect on the affected party, make it weighty enough to sustain a determination of unsuitability, despite the fact that it is a single incident.

## **DETERMINATION**

105. The Board, therefore, finds that the Magistrate has failed to establish he has grounds for review that meet the statutory provisions as liberally interpreted by the Board, and upholds the initial determination of unsuitability dated 1<sup>st</sup>

March, 2013. Accordingly, the HONOURABLE WILKINSON NYAGA NJAGI is **NOT SUITABLE** to continue in service.

### HONOURABLE JACINTA KWENA DIBONDO

106. In this application for review, Counsel for the Magistrate made submissions pertaining to both criteria set out in section 22(2) of the Vetting of Judges and Magistrates Act.
107. As a preliminary issue, Counsel for the Magistrate submitted that there was an error apparent on the face of the record, as the Board had failed to consider the bad blood that existed between the Magistrate and the complainant, an advocate; and also that the complainant was not a party in any of the matters and, therefore, the complaints should not have been entertained. The advocate had forwarded several complaints against the Magistrate.
108. The Board has studied the record, and notes that in determining her suitability, it took into account the fact that all the complaints were from one source, however the pertinent material and evidence were documented in Court records which were not created by bad blood. The Board finds that evidence of bad blood between the complainant and the Magistrate is of no effect, and that there is no error apparent on the face of the record.
109. The Board also notes that the Vetting of Judges and Magistrates Act permits the Board to consider complaints from any person or organisation, one need not be a party to a particular case. The grounds raised, therefore, fail to meet the threshold of errors apparent on the face of the record.
110. It is submitted that the Board erred in finding that in **Kericho High Court Civil Case No. 39 of 2008**, the Magistrate gave final orders. It is submitted that she only issued interim orders, and that there was no evidence of bribery.
111. The Court record confirms that the orders were granted *ex-parte*, and were final in nature. The Board did not making any finding on the bribery allegation. There is no error apparent on the face of the record. This ground fails.
112. It is also submitted that there is an error apparent on the face of the record, as the Board failed to acknowledge that in **Kericho Principal Magistrate's Court Civil Case No. 117 of 2009**, the Magistrate had applied herself to the facts and principles lawfully, and acted soberly and diligently in granting a "temporary injunction". It is further submitted that the advocate did not bring to the Magistrate's notice, that this matter had earlier been concluded at the Court of Appeal.
113. The Board finds that there is no error apparent on the face of the record; it is clear from the Court record that the advocate appearing in the matter notified her of the existence of the High Court proceedings. This ground fails.
114. Counsel submits that in **Kericho High Court Succession Cause No. 12 of 1986**, the Board erred in finding that the Magistrate indeed lifted the caution placed against the suit property, in an *ex-parte* application<sup>13</sup>, and that the Magistrate was not candid with the Board, as she initially stated that she never handled any Succession matters, which is factually incorrect.
115. The Board finds that there is no error apparent on the face of the record, as the finding is supported by the Court record, and the interview proceedings.
116. In regard to the fourth complaint, where it was alleged that the Magistrate was corrupt as she unilaterally altered the child maintenance award in **Kericho Children's Case No. 9 of 2006**, it is submitted that the Board erred by failing to

13. Page 37, Volume 3 of the record.

- take into account that the Magistrate's role was purely administrative.
117. The Board notes that in its finding it urged the Magistrate to be more diligent in future when dealing with such cases, and did not make a negative inference. There is, therefore, no error apparent on the face of the record. This ground fails.
  118. In respect of the fifth complaint, Counsel submitted that the Board erred in finding against the Magistrate without granting her an opportunity to peruse the Court file. The Board notes that all the Court proceedings obtained by the Board were furnished to the Magistrate, and she had ample opportunity to peruse the same, as the matter was adjourned to enable her prepare adequately. This ground fails, as no error has been demonstrated.
  119. Counsel submits that the Board erred in finding that the Magistrate failed to disclose a complaint made against her. It is argued that the complaint arose in 1998 before she joined the bench. The Board notes that the submission is misleading. The Magistrate did not in her initial questionnaire<sup>14</sup> reveal that there had been a complaint made against her to the Judicial Service Commission by her head of station. The Magistrate stated that was an oversight. This ground fails.
  120. It is submitted that the Board erred in finding that the Magistrate has poor writing skills. The Board looks at the layout, structure, legal analysis and reasoning, and whether the same are supported by sufficient reference to decided cases and authorities. No material has been placed before the Board to negate the earlier finding of poor writing skills. This ground fails.
  121. Finally it is argued that, Board erred in finding that the Magistrate did not satisfactorily explain her finances. The Board is willing to give her the benefit and would like to encourage her to improve her financial record keeping.
  122. The Magistrate has failed to establish sufficient ground for the setting aside of the determination of unsuitability. The review application fails.

## **DETERMINATION**

123. The Board, therefore, finds that the Magistrate has failed to establish she has grounds for review that meet the statutory provisions as liberally interpreted by the Board, and upholds the initial determination of unsuitability dated 14<sup>th</sup> January, 2016. Accordingly, the HONOURABLE JACINTA KWENA DIBONDO is NOT SUITABLE to continue in service.

## **CONCLUDING REMARKS**

124. The Board appreciate the support received from all the stakeholders. We are particularly grateful for the support given to the vetting process by the National Assembly. We thank the Justice and Legal Affairs Committee, Constitution Implementation Oversight Committee of Parliament for constantly engaging with us and encouraging us in the process of implementation of our mandate.
125. We also thank the other stakeholders, especially the public, the Judicial Service Commission and all Section 18 stakeholders. We appreciate the support you have accorded the Board, and wish to assure you that every complaint received was considered, tested against our mandate, and investigated where it merited being taken up. The fight to restore confidence in the Judiciary is a joint effort, and everyone must participate. As the vetting process draws to a close, let the fight

not slacken. We encourage members of the public and clients of the Judiciary to continue their vigilance, and engage the office of the Ombudsman, the Judicial Service Commission and the Media to continue to highlight the positive and negative aspects in the judiciary. Corruption is a vice that has permeated several facets of our society, it cannot be eradicated overnight, it needs concerted efforts and must be continually checked.

126. Parliament has extended the term of the Board for a period of three months. During this time, we shall be drafting the final report, archiving all the materials and information as required by law, and also concluding pending cases in court. Although the remaining assignment is enormous, we shall conclude within the provided timeframe.
127. As we draft our final report, we shall be seeking feedback from all the stakeholders including Court users, on the current state of the judiciary, and suggested recommendations for the roadmap to complete judicial reform. We believe that this process has opened and domesticated vetting as a new aspect in public governance. We encourage all to the gains realised and take time to read our reports which will be launched in due course.
128. It has been a strenuous process; however, it was an honour for us to participate in this ground breaking historical process in Kenyan history. The members of this Board are grateful to His Excellency the President for giving us the opportunity to handle this unique process and to bring it to fruition. I am pleased to inform all the Kenyan people the vetting process has been successfully concluded. We look forward to presenting the final report to Parliament, Judiciary and His Excellency the President.



*Judges and Magistrates Vetting Board members from left: The CEO and Secretary, Mr. R. Chirchir, Board Members; Mr. A. Abdullahi, Rtd D. Chief Lady Justice, A. Mpagi Bahigeine, Mr. J. Munyithya, Rtd. Chief Justice. B. Samatta, Board Chairman, Mr. S. Rao, Vice Chair, Ms. R. Odede, Mrs. M. Iseme, Rtd Chief Justice. A. De Silva and far right is Prof. Ngotho Wa Kariuki.*



*Board Member, Abdirashid Abdullahi stresses a point during one of the Media and Civil Society Organizations trainings. Whenever vetting was stopped due to litigation, the Board utilized the time to carry out public and stakeholders sensitization to explain to them the nature and effects of the legal challenges facing the process.*



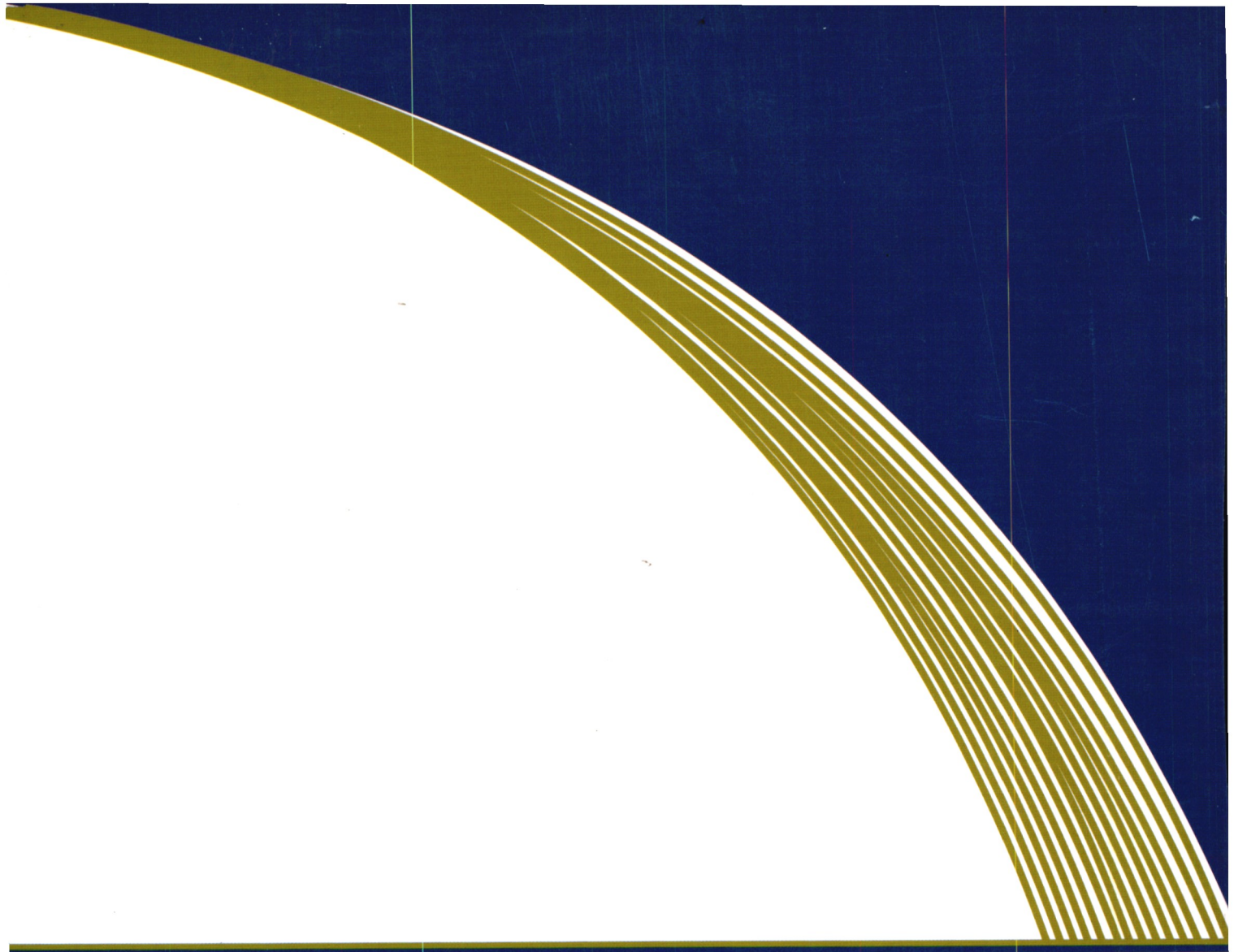
*The Attorney General, Prof. Githu Muigai, poses for a photo with the pupils and teachers of the Thika School for the Blind during the launch of the JMV B Braille and Audio Reports. The AG's office has given its full support to the Board.*



*Chairman of the Board Mr. S. Rao, in the middle followed on his right by Board Members; Mr. J. Munyithya, Mrs. M. Iseme, Rtd. Deputy Chief Lady Justice. A. Mpagi Bahigeine and the CEO. Mr. R. Chirichir in this group photo taken with the staff and students of the University of Nairobi, School of Law, Kisumu Campus. The Board delivered many lectures on the vetting process and legal challenges facing the exercise in many universities and campuses around the country.*



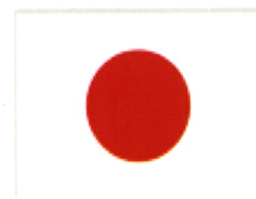
*A member of the public gives his views during a public sensitization exercise. The stakeholders in the vetting process were very concerned with the litigation challenges that were facing the process. However, the most of the public did not fully appreciate the nature and effects of the litigation challenges faced by the Board.*



*The Board was Supported by:*



Government of Kenya



Government of Japan