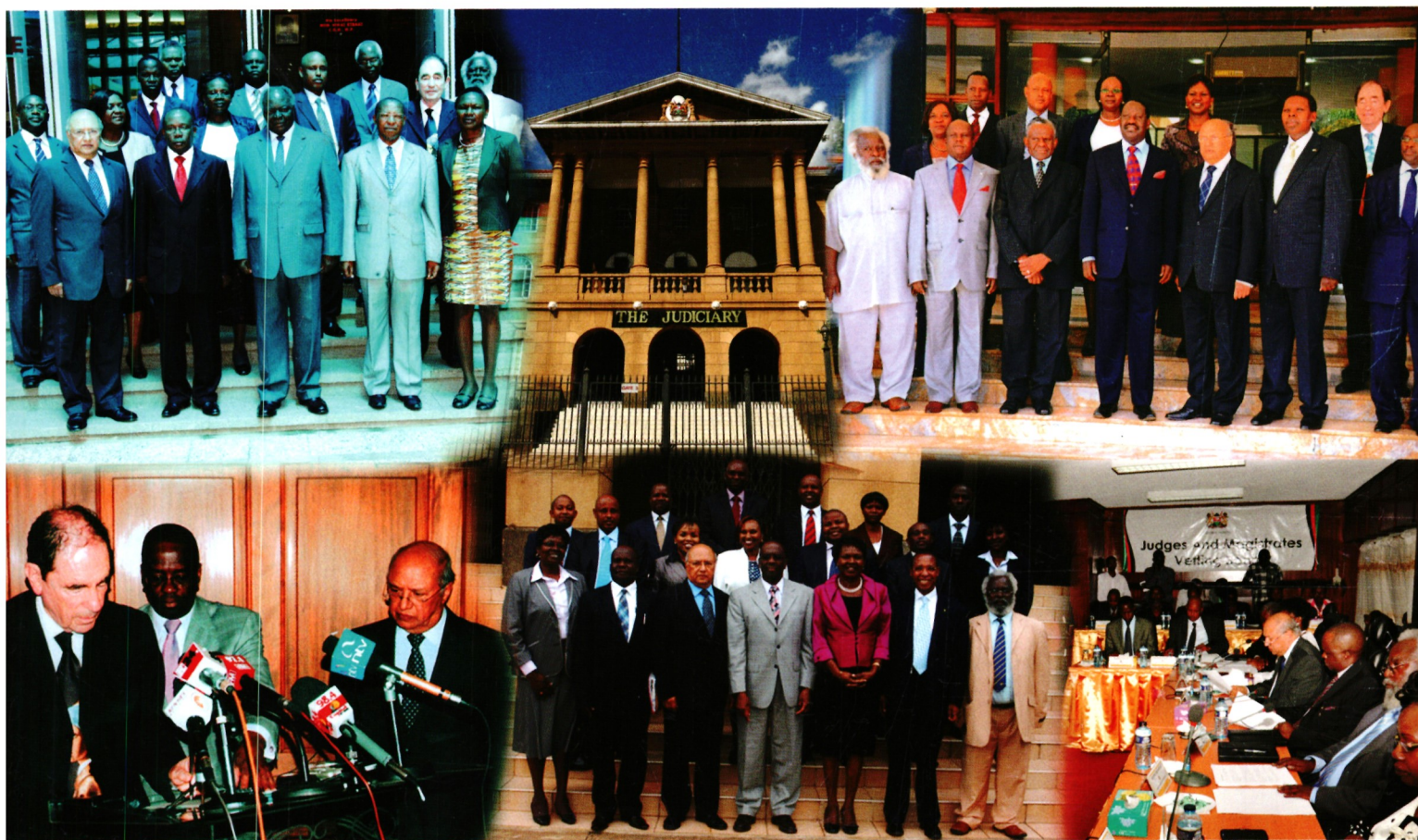




JUDGES & MAGISTRATES VETTING BOARD

RESTORING CONFIDENCE IN THE JUDICIARY



INTERIM REPORT

September 2011 – February 2013



JUDGES AND
MAGISTRATES
VETTING BOARD

Restoring Confidence in the Judiciary

INTERIM REPORT
SEPTEMBER 2011 - FEBRUARY 2013



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JUDGES AND
MAGISTRATES
VETTING BOARD

Restoring Confidence in the Judiciary

BOARD MEMBERS

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ROSELINE ODEDE (VICE CHAIRPERSON)
JUSTUS MUNYITHYA
MEULEDI ISEME
PROF. NGOTHO WA KARIUKI
ABDIRASHID ABDULLAHI
JUSTICE FREDERICK CHOMBA
CHIEF JUSTICE GEORGINA WOOD
JUSTICE ALBIE SACHS
REUBEN CHIRCHIR

EDITORIAL COMMITTEE

CHAIRPERSON
PROFESSOR NGOTHO WA KARIUKI

MEMBERS
ROSELINE ODEDE
JUSTUS MUNYITHYA
JUSTICE ALBIE SACHS
REUBEN CHIRCHIR

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ACRONYMS AND ABBREVIATIONS

CIC	Commission on the Implementation of the Constitution
CIOC	Constitutional Implementation Oversight Committee
CKRC	Constitution of Kenya Review Commission
ECK	Electoral Commission of Kenya
EDR	Electoral Dispute Resolution
ICCPR	International Convention on Civil and Political Rights
ICJ	International Commission of Jurists – Kenya
ICTJ	International Centre for Transitional Justice
IEBC	Independent Electoral and Boundaries Commission
IREC	Independent Review Commission
JMVB	Judges and Magistrates Vetting Board
KICC	Kenya International Conference Centre
KMJA	Kenya Magistrates and Judges Association
KNDR	Kenya National Dialogue and Reconciliation
LSK	Law Society of Kenya
NCIC	National Cohesion and Integration Commission
UDHR	Universal Declaration of Human Rights
ODM	Orange Democratic Movement
TJRC	Truth, Justice and Reconciliation Commission of Kenya
VJMA	Vetting of Judges and Magistrates Act 2011

ACKNOWLEDGEMENTS

We wish to commend the people of Kenya for courageously giving themselves a new Constitution in which the vetting process was anchored. We also want to acknowledge His Excellency the President, the Right Honourable Prime Minister, Commission on the Implementation of the Constitution, Legal Affairs Committee, the Ministry of Justice, National Cohesion and Constitutional Affairs, the Attorney-General, the Chief Justice, the Inspector General of Police, the Government of Ghana for allowing their Chief Justice to come and work with us, the Human Rights Commission, the Commission on Human Rights, the Law Society of Kenya, the Judicial Service Commission, the Kenya Judges and Magistrates Association, the Truth, Justice and Reconciliation Commission, the National Cohesion Commission, the Judiciary, the Prison Service, Judicial Service Commission, the then Provincial Administration, the current County Commissioners, Faith-based Organisations, civil society organisations such as Kituo Cha Sheria, the International Centre for Transitional Justice, the International Commission of Jurists (Kenya), Federation of Women Lawyers (FIDA), Muslims for Human Rights (MUHURI), Ethics and Anti-Corruption Commission and the entire Secretariat of the Judges and Magistrates Vetting Board.

We also want to thank NTV, KTN, KBC, K-24 and other media houses for live coverage of the Board's announcement of determinations.

We are especially grateful to UNDP and the Government of the Netherlands for the financial support given to the Board.

We also acknowledge the inputs of UNDP consultants Rebecca Elvin, Farnoosh Hashemian, Tara Menon and Jan Van Zyl, and last but not least Mr. Tee Ngugi who provided editorial support to the process of putting the Report together.

FOREWORD

FROM THE CHAIR OF THE BOARD



This interim Report comes out at a time when Kenya's general elections have just been concluded, and we now have a new President. We take this opportunity to offer our congratulations and good wishes to His Excellency Hon. Uhuru Kenyatta and his Deputy President Hon. William Ruto.

The Board's function is to restore public confidence in the judiciary. Our mandate is to interview all judges and magistrates, who were in office on the 'effective date' of the Constitution, namely, 27 August, 2010.

The Report covers the first phase of the process which involved judges of the Appeals Court and the High Court. The Board interviewed 53 judges, including three who now serve on the Supreme Court. It was by no means an easy task, as this Report indicates. We had virtually no precedent to guide us. Board members come from different parts of Kenya – three are lawyers and three non-lawyers, and we have had three Commonwealth judges on the Board. We struggled in the absence of proper financial arrangements and appropriate premises. The project has also been intellectually challenging.

The Board has now begun the second and final phase of its work, which is the vetting of magistrates, and has until the end of 2013 to complete its task. This phase presents its own challenge, since the Board must investigate complaints against and consider information received on magistrates throughout Kenya, some who serve in the most remote and rural parts of the country. The Board is confident that the vetting process it has developed will enable it to meet this challenge.

I am grateful for the dedication and hard work of the Secretariat of the Board, including assisting counsel, researchers, and support staff, who make it possible for the Board to fulfill its important responsibility to the Kenyan people.

I thank the Editorial Committee for the work they have done in preparing this Report. The Report will go to various interested parties including the Judiciary, the Government and Parliament. It will also be distributed to the media and the general public.

The Board has functioned in a manner that was both fair and resolute. My hope is that the way the Board has set about its work, and the determinations we have made have contributed towards restoring public confidence in the judiciary.

Sharad Rao,
CHAIR, JMVB



FOREWORD

FROM THE SECRETARY/CHIEF EXECUTIVE OFFICER

The main objective of publishing this Report is to provide information generally to the public and other stakeholders who may wish to gain an insight into the vetting process in Kenya. The vetting process is 'of its own kind', and as such pioneered a course in Africa. As a result, the work of the Board has generated both local and international interest. It outlines the reasons why the people of Kenya decided to vet all judges and magistrates; how the Board was established and operationalised; and gives a summary of the decisions with respect to judges of the Court of Appeal and the High Court.

The Report brings out the processes, procedures and tools used by the Board in the course of the vetting exercise. The Report also highlights various cross-cutting issues which have not been directly addressed in other reports.

The Report is deliberately short and concise to ensure a wide readership, however the Secretariat holds more detailed information. The Board will release subsequent reports containing further information from time to time, as the work of vetting continues.

The Report has been released at an appropriate time - to mark the Board's completion of the vetting of Court of Appeal and High Court Judges. The Board has now embarked on vetting the magistrates. Producing this Report afforded the Board an opportunity to reflect on challenges and lessons learned to date, which will also inform the vetting of magistrates. The Report was drafted at a time of transition, when the terms of some of the Commonwealth judges serving on the Board were coming to an end. We have managed to capture their contributions and experiences gained during their time in Kenya. The challenge is for all of us to respond to the achievements, lessons and difficulties outlined in this document.

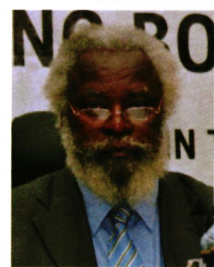
We are confident that the information presented in this volume will assist all stakeholders. The influence of the Report may also extend to those jurisdictions intending to design and implement a similar mechanism.

Reuben K. Chirchir

SECRETARY & CHIEF EXECUTIVE OFFICER

FOREWORD

FROM THE CHAIR OF THE EDITORIAL COMMITTEE



The Board decided to write an interim Report after finishing phase one(1) of the vetting process which concentrated on Judges of both the Court of Appeal and the High Court.

This Report, therefore, deals with the work of the Board up to and including the vetting of the judges. This was done between February 23, 2012 and February 2013.

To complete this task the Board appointed an Editorial Committee comprising of Justice Albie Sachs, Vice Chair of the Board Mrs. Roselyne Odede, Justus Munyithya, and myself as the Chair. The Chief Executive Officer, Mr. Reuben Chirchir, was also part of the team.

I would like to take this opportunity to thank this team for working tirelessly to produce this Report at such a short notice.

The Editorial Committee would also like to extend sincere thanks to the external editors of the Report, Tee Ngugi and Gad Awuonda, who operated with professionalism and skill under time pressure.

The Committee is immensely grateful for the information and analysis provided by Board researchers Edward Chemei, Winny Jeptum, Jacqueliyn Katee, Alex Kiiru, Irene Kiwool, Isaac Mbela, Winny Ruto and Bakari Sadik.

The Committee also wishes to acknowledge the secretarial and administrative support provided by Grace Owour, Alice Kisumba, Faith Sialai and Jane Wanjiru.

We would also like to recognise the invaluable assistance provided by UNDP consultants Rebecca Elvin, Farnoosh Hashemian, Tara Menon and Jan Van Zyl Smit in putting the Report together.

The Editorial Committee is grateful to Board members, assisting counsel, researchers, legal assistants and members of the Secretariat who have facilitated the work of the Judges and Magistrates Vetting Board since it was established.

Last but not least, the Committee also recognises the Finance Department, Human Resource Department, and IT Department, that provided back-up support required to complete the Report.

The Report emerges from the work of many individuals who make up the Judges and Magistrates Vetting Board. But it represents one further step on the journey to transform the judiciary and end impunity. In this sense, the Report is by and for the people of Kenya.

Professor Ngotho wa Kariuki

BOARD MEMBER AND CHAIR OF THE EDITORIAL COMMITTEE

BOARD MEMBERS



Mr Sharad S. 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.

Ms Roseline Odede: Vice-Chairperson

Roseline Odede is an Advocate of the High Court of Kenya with over twenty years experience in private practice and strategic leadership in various professional organisations. She has been a council member of the Law Society of Kenya, the East Africa Law Society and the Commonwealth Lawyers Association. 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. Roseline is a founding member and Chair of the Eldoret Hospice Board, a charitable organisation. She is also the 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. She is also a trained mediator.



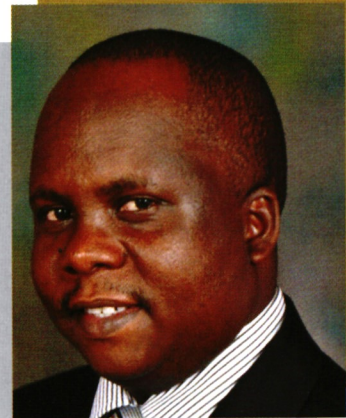
Mr Abdirashid Abdullahi: Member



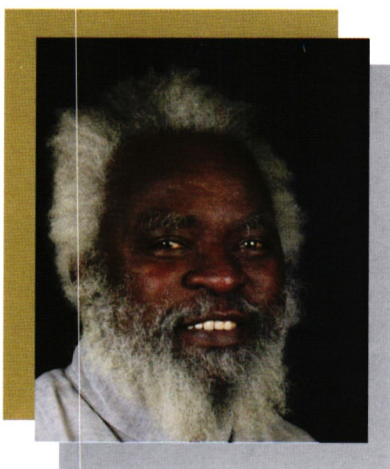
Abdirashid Abullahi Hussein is a conflict resolution practitioner with more than 15 years of experience working in conflict and hostile environments in the Greater Horn of Africa. He has experience in designing and implementing long-term developmental as well as short-term emergency humanitarian projects 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 coordinator 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. Justus is also a member of the National NGO Regulatory Committee. He is currently studying towards an LLM at the University of Nairobi.



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 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 Buea. 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.



Ms Meuledi Iseme: Member

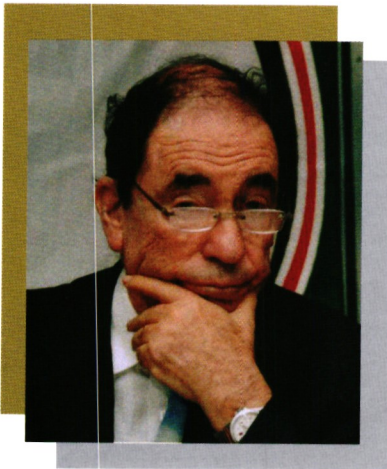
Mrs Meuledi Mabruki Iseme has had a distinguished career in public and private service spanning over 30 years, with several years of experience at senior management level. She holds a Master's degree in Business Administration (Finance Major) and Bachelor of Commerce degree (Accounting Option) both from the University of Nairobi. Prior to being appointed a member of the Judges & 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.

Chief Justice Georgina Wood: Member

The Honourable Lady Chief Justice Mrs. Georgina Theodora Wood is the first woman to head the judiciary in Ghana. She has served in the judiciary for nearly forty years. Chief Justice Wood is a judicial reformer committed to improving access to justice and enhancing public trust and confidence in the court system. Chief Justice Wood was a member of the task force that designed the Ghanaian court-connected ADR programme. She also co-authored the practice manual on the Gambian ADR court-connected programme and has also been a judicial educator in ADR for the Bench, the Bar and court officials in Gambia. Chief Justice Wood serves on a number of national and international bodies. In October 2009, she was a member of the special team that went to Kenya to assess the legal aftermath of the post-election crisis in that country. Chief Justice Wood received an honorary award from the

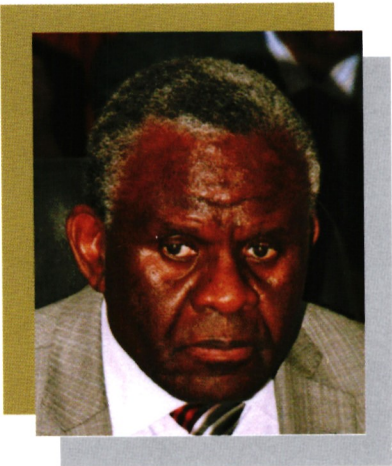


University of Ghana at its 40th anniversary celebration in 1999 and received an honorary Doctor of Laws Degree, LLD, (Honoriis Causa) from the same university in 2008. Her contribution to national development earned her the highest national honour, the Order of the Star of Ghana in 2007. She is a recipient of a Trumpet Award (international category). In April 2011, she was honoured with a 2011 Peace Award from the Centre for African Peace and Conflict Resolution and Pan African Studies of the California State University, Sacramento.



Justice Albie Sachs: Member

Justice Albie Sachs is a retired judge of the Constitutional Court of South Africa. He was appointed to the court by Nelson Mandela in 1994 and retired in October 2009. Justice Sachs is recognised for the development of the differentiation between constitutional rights in three different degrees or generations of rights. In 1991, he won the Alan Paton Award for his book *Soft Vengeance of a Freedom Fighter*. The book chronicles his response to the 1988 car bombing. A revised, updated and expanded edition was released in October 2011. He is also the author of *Justice in South Africa* (1974), *The Jail Diary of Albie Sachs* (1966), *Sexism and the Law* (1979), and *The Free Diary of Albie Sachs* (2004). His most recent book, *The Strange Alchemy of Life and Law* (2009), also won the Alan Paton Award. In 2006 his alma mater, the University of Cape Town, awarded him an honorary Doctorate in Law. On 8 July, 2008, Justice Sachs was awarded an honorary Doctor of Laws (LLD) degree by the University of Ulster in recognition of his contribution to human rights and justice globally. In 2009, he received the Lincoln Medal and the Academy of Achievement Golden Plate Award. In all, Justice Sachs has 14 honorary degrees across four continents. He was arrested and placed in solitary confinement for his work in the freedom movement. He went into exile in England and then Mozambique. In 1988, in Maputo, Mozambique, he lost an arm and his sight in one eye when a bomb was placed in his car by South African security agents. After the bombing, he devoted himself to the preparations for a new democratic constitution for South Africa.



Justice Frederick Mwela Chomba: Member

Justice Chomba was called to the English Bar in London in December, 1965 and is a member of the Honourable Society of the Inner Temple. Having qualified as such one year after Zambia's Independence, he was one of the first three Zambians called upon to take up appointment as magistrates to replace the British magistrates who were leaving the country. He served through the magisterial ranks up to the position of Senior Resident Magistrate, Class I, which was then the highest. He thereafter served briefly as an Acting Registrar of the High Court of Zambia. In February 1970, he was appointed a Puisne Judge, a position he occupied until early 1974 when he was transferred to establish the Commission for Investigations as an Ombudsman. After setting up and serving on this body for just over three years, he was appointed a judge of the Supreme Court. During government reshuffles in 1978, he was appointed Minister of Legal Affairs and Attorney-General. This meant he had to be nominated as a Member of Parliament. In 1980, he assumed the portfolio of Minister of Home Affairs, but in 1987 he moved back to become Minister of Legal Affairs and Attorney-General, a position he held until 1991. In 1993, he was recruited by the Gambian government through the Commonwealth Secretariat and appointed as a Court of Appeal judge. In 1995 he became President of the Gambia Court of Appeal and served as such until 1999. Upon his return to Zambia in 1999, he was appointed Director of the Zambia Institute of Legal Education, where law graduates trained to become advocates. He served as such until 2005. He has also served as a visiting Supreme Court judge in Namibia, at first briefly in 1992, and thereafter from 2001 to 2010. Justice Chomba is a certified arbitrator and a member of the Zambia Association of Arbitrators. He is married and has children.

Mr. Reuben Chirchir: Board Secretary and Chief Executive Officer



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.

EXECUTIVE SUMMARY

A key demand during the clamour for a new democratic and constitutional dispensation in Kenya was reform of the judiciary. The public not only viewed the judiciary with mistrust and cynicism, but also identified it as an impediment to the project of political, social and economic transformation. Therefore, judicial reform was anchored in Kenya's new Constitution, which was voted for at a referendum on 4 August, 2010, and came into effect on 27 August, 2010. Chapter 10 of the Constitution, entitled 'Judiciary', contains a large number of provisions intended to create a judiciary that would enjoy the confidence of the public. As such, the Sixth Schedule to the Constitution provides in Article 23 for Parliament to enact legislation establishing mechanisms and procedures for vetting the suitability of all judges and magistrates in office on the 27 August, 2010. On 21 March, 2011, the Vetting of Judges and Magistrates Act, 2011 was assented to by the President (see Annexure A). Coming into effect on 22 March, 2011, the Act establishes an independent Board known as the Judges and Magistrates Vetting Board whose function was "to vet judges and magistrates in accordance with the provisions of the Constitution and this Act."

The Board, consisting of nine members, draws from different professional and jurisdictional backgrounds. Six members are Kenyan (three lawyers and three non-lawyers), while three members are eminent judges from the Commonwealth. The Board has a secretariat headed by a CEO.

The Board was aware that if its vetting process was seen to be flawed, public confidence would not be restored. Therefore, its procedures and values had to meet thresholds anticipated by the Constitution and the Act, as well as the requirements of natural justice. In its vetting exercise, the Board was required to take account of professional competence, written and oral communication skills, integrity, fairness, temperament, good judgment, legal and life experience and demonstrable commitment to public and community service. Pursuant to this, the Board devised a *modus operandi* that sought to give a fair hearing to the judicial officers undergoing vetting while at the same time allowing for public participation.

In keeping with the requirement for participation and transparency, the Board undertook public sensitisation in various parts of the country, informing members of the public about its mandate, the role of the public, and discussing the relationship between the vetting process and reforming the judiciary on the one hand, and the role a reformed judiciary was expected to play in the new democratic and constitutional order on the other.

While vetting has been carried out in some post-conflict countries, the Kenyan model had unique features. The vetting process in Kenya required that all serving judicial officers prior to 27 August, 2010 had to be vetted with regard to their **suitability** to continue serving in the judiciary. Thus the Kenyan model, being “one of its kind”, had to deal with unique problems. For purposes of vetting, it suspended the security of tenure for the judges.

Preparations for vetting started in September 2011. The interviewing of judges began on 23 February, 2012. To date, the Board has completed the vetting of Court of Appeal judges and judges of the High Court which included three who were promoted to the Supreme Court. Four judges of the Court of Appeal and eleven judges of the High Court were found unsuitable to serve on the Bench. Among those vetted, a number had already been promoted by the newly-established Judicial Service Commission.

The Board received many complaints of corruption. However, it was difficult to substantiate these accusations without evidence. The Board was aware that members of the public claiming corruption on the Bench were hesitant to incriminate themselves because of the reciprocal nature of corruption and bribery.

Judges could choose to have their hearings either in private or in public. The Board’s decisions were made publicly, with both the media and members of the public in attendance. The Board also has a website where all its determinations, as well as other relevant information, are posted. This is available at www.jmvp.or.ke.

The Board, in addition to considering the intellectual capacity of the judge, his or her knowledge of the law, quality of legal judgment, competence, diligence and ability to work well with others, organisational and administrative skills, sample rulings and judgments, had to rate other less straight-forward qualities and elements. The vetting process, therefore, encompassed a wide range of criteria and methods. The rules and regulations developed by the Board ensured that vetting proceeded within the parameters set by the Constitution and the Act. However, there remained the difficulty of balancing confidentiality requirements, on the one hand, and ensuring transparency and public participation on the other.

As it has progressed, the vetting process has encountered a number of challenges, ranging from financial and administrative matters at the beginning, to unrealistic timeframes set by the Act. However, more challenging have been numerous court challenges to the Board's jurisdiction. While much of this litigation has been dismissed by the courts, it succeeded in delaying the process. But the relentless focus by the Board members on their ultimate objective to restore public confidence in the judiciary gave them the mental fortitude to face and overcome these challenges.

A number of lessons that could enrich future vetting exercises can be drawn from the Board's unique experience:

- Time frames should be realistic, taking into account the nature of the work. The Board's work was paused in order to ask Parliament for extensions;
- Commonwealth judges add to the integrity of the process, however, processes for their appointment and replacement should be simplified;
- An exercise that goes to the heart of State formation should be well resourced and adequately housed, without being so extravagant as to offend public sensibility.

Kenya, like South Africa, Ghana, Tanzania and Zambia, among other countries, has chosen constitutionalism and democracy as the building blocks of its nationhood. The people of Kenya had to make a painful choice in instituting a judicial vetting process. Yet, as is true for the individual, beginning anew demands breaking with the past. As Kenya embarks on the last phase of the judicial vetting process, the country can be proud of having taken the first steps towards a national renaissance.

This report explains the setting up of the Board, the problems and challenges encountered, the methodology used, the lessons learned and the way forward. Finally, it provides a statistical overview of the vetting process. This is an interim report and only covers the vetting of the judges of the Court of Appeal and the High Court. The Board has now embarked on the vetting of magistrates.

CHAPTER ONE

BACKGROUND OF JUDICIAL VETTING IN KENYA

- ❑ *Historical, Constitutional Socio-Political Background*
- ❑ *The Kenyan Model of Vetting*
- ❑ *Vetting in other Jurisdictions*
- ❑ *Constitutional and Statutory Framework for the Vetting Process*
- ❑ *Mandate*
- ❑ *Structure*
- ❑ *Process*
- ❑ *Composition of the Board*
- ❑ *Secretariat*

1.0 Historical, Constitutional and Socio-Political Background

On 4 August, 2010, the people of Kenya voted at a national referendum to approve a new Constitution. The referendum was the culmination of a two-decade search for a new constitutional dispensation anchored firmly in the sovereignty of the people of Kenya.¹ The new Constitution came into force upon its promulgation on 27 August, 2010.²

In the period during which the agitation for a new constitution took place, the Kenyan judiciary had come under sustained criticism for its perceived failure to uphold the rule of law. The reports of various bodies, official and non-official, among them committees comprising judicial officers, highlighted the public perception of the judiciary as a corrupt institution. For instance, the Constitution of Kenya Review Commission in its report titled, *“The People’s Choice: The Report of*

the Constitution of Kenya Review Commission” noted with regard to the judiciary that, *“The judiciary rivals politicians and the police for the most criticised sector of Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the most worrying. For lawyers, there is concern about competence and lack of independence.”*³

In addressing corruption as an obstacle to the rule of law, the Government set up the **Integrity and Anti-corruption Committee of the Judiciary in Kenya, 2003** to implement a policy known as “radical surgery”.⁴ The committee cited credible evidence of corruption on the part of five out of nine Court of Appeal Judges (56%), 18 out of 36 High Court Judges (50 %) and 82 out of 254 magistrates (32 %) in its report.⁵ Prior to informing the accused of the allegations against them, a “list of shame” was published in the media, naming the judges and magistrates implicated in the report. The Acting Chief Justice publicly advised those named on the list to resign quietly within two weeks or be suspended without pay or privileges and face tribunals. Justice Waki, a judge of the Court of Appeal, and one other judge, challenged the allegations against them, and after securing a public hearing, achieved their reinstatement in late 2004.⁶ Of the 82 magistrates implicated, 70 were “retired” by the Judicial Service Commission in the public interest. However, the process of publicly naming individual judges and magistrates as corrupt without giving them prior notice of charges against them was widely criticised, as was the pressure placed on them to resign from office. These actions were seen to compromise judicial independence, including security of tenure, and undermine the right to due process.⁷

Yet, radical though the process was, it failed to restore public confidence in the judiciary.⁸ On the eve of adoption of the Constitution in 2010, a judiciary-led taskforce on judicial reform noted 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 suboptimal as borne out by the number of judicial officers and staff who have been disciplined by the JSC 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.”⁹

Indeed, clamour for a fair, impartial and independent judicial system in the country had become more rather than less pronounced. The lack of confidence in the judiciary had in fact had profound consequences for the life of the nation. More than a thousand people were killed and hundreds of thousands displaced when the controversial outcome of the presidential election in 2007 was contested through violence, instead of peacefully in court.¹⁰

These events had tragically borne out the truth of the statement in the preamble to the Bangalore Principles of Judicial Conduct that public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society. In Kenya, this public confidence had virtually collapsed.¹¹ Judicial reform was now identified as one of the areas of focus towards restoring the credibility, integrity and independence of public institutions generally.¹² As one critical voice put it, first stripped of constitutional tenure by the government in the late 1980s, and thereafter led by a string of timorous, executive-minded chief justices, Kenya's judiciary had by the early 1990s become largely an accessory to the powerful, the corrupt and the venal.¹³ Transformation of the judiciary consequently featured prominently in the value system, design and text of the new Constitution. It was important in itself, and as one of the key guarantors of the new constitutional enterprise.

Thus, Chapter 10 of the Constitution, entitled “Judiciary”, contains a large number of provisions intended to create a judiciary that, by correcting and transcending the deficiencies of the past, would come to enjoy the confidence of the public and become a central element in the new democratic dispensation. The Constitution declares that judicial authority derives from the people, re-affirming the sovereignty of the Kenyan people.¹⁴ The courts and the tribunals are required to exercise their judicial authority in a manner that ensures that justice is done to all

irrespective of status, that justice is not delayed and that justice is administered without undue regard to procedural technicalities.¹⁵ The independence of the judiciary is guaranteed by the requirement that the judiciary shall not be subject to the control or direction of any person or authority in the exercise of the judicial authority.¹⁶ Appointments to the judiciary are done by an independent and broadly-based Judicial Service Commission,¹⁷ unlike in the previous constitutional dispensation where the President effectively had a personal discretion to appoint judicial officers.¹⁸ The Constitution also established an apex Supreme Court¹⁹ to provide fresh leadership to a judiciary that would be guided by comprehensively enunciated values and principles designed to ensure justice, fairness, inclusivity, social responsibility and support for the marginalised.²⁰

This then, was the historical and constitutional context in which, as a transitional measure to help restore public confidence in the judiciary, the Kenya Judges and Magistrates Vetting Board was established.

1.1 The Kenyan Model of Vetting

Vetting was a term originally used by veterinarians when checking on the physical health and soundness of horses before they participated in a race. In our context, vetting means a thorough examination to determine suitability for a particular office or function. It is virtually synonymous with “evaluate”, involving a special search for “flaws”. Judges were not elected, and enjoyed security of tenure. While

“Why hire a lawyer when you can buy a judge?”

the provisions concerning elections would ensure that the constitutional office holders who belonged to the other organs of government transited effectively through the election process, which would actually “vet” their suitability under the new Constitution, no such mechanism existed for judges.²¹ The judiciary itself acknowledged the need for reform. Given the public’s express concerns about the poor state of the judicial system, these concerns had to be

addressed in a way that restored public confidence in the administration of justice. Yet the means of restoring public confidence should not undermine the judiciary as an institution. A “clean slate” approach, like the “radical surgery”, ran the risk of undermining the judiciary and would also condemn wholesale all members of the judiciary. It was accepted that those members of the judiciary who wanted to continue should be eligible for reappointment, while those who preferred not to, could choose the option of resigning with their appropriate benefits. It was also understood that the processes of vetting should be in keeping with international principles.²²

Vetting has a particular significance in the context of transitional justice. It marks a decisive rupture with dishonourable aspects of the past.²³ It is intended to remove from positions of authority persons associated with the abuses and injustices of a previous era; to shatter the seemingly impregnable aura of impunity surrounding powerful figures thought to enjoy the favour of prominent judicial officers; to restore confidence in the integrity of the judiciary as an institution; and to reduce the risk of incumbent judicial officers blocking and resisting the judicial reform envisaged in the new democratic order. It should be added, in a country like Kenya, the process required special attention to a public conviction of corruption penetrating to the heart of the judiciary, captured by the popular statement: “Why hire a lawyer when you can buy a judge?”²⁴

A notable feature of judicial vetting in Kenya is its centrality to the whole project of constitutional transformation. It was certainly not designed to mark a change of political regime, a process which could have raised serious questions of judicial independence. Nor was it conceived of as an isolated spring-cleaning exercise intended to deal with problems of poor past performance by individual judicial officers. On the contrary it was seen as a crucial element of the overall constitutional design. If the judiciary was not revitalised and transformed in a manner that restored public confidence, then the integrity and sustainability of the whole constitutional project would be placed at risk. It was therefore vital that there be judges in office who could be trusted to interpret the Constitution in a fair manner, consistent with the requirements of the rule of law and the achievement of a more egalitarian society.

In the past, Kenya had not lacked eminently virtuous constitutional texts, nor had it been deficient in judges who were technically extremely proficient. Yet, all too often, judicial skills had been used to honour the texts more in the breach than in the observance. Without a renovated, robust, independent, and learned judiciary, sensitive to the needs, aspirations and sufferings of the people, inspired by the values and faithful to the text of the Constitution, and appreciative of internationally-accepted concepts of human rights, the promises of change in the Constitution would remain vacuous.

Indeed, those who had fought long and hard for a new constitutional order would suffer a double defeat. Not only would electoral disputes continue to be fought murderously in the streets; impunity survive for assassinations and torture, as well as for plundering of state coffers and land-grabbing; tribalism and caprice carry on being the order of the day in all spheres of governance; the disadvantaged and the marginalised still be unable to vindicate their rights, but justice would continue to go to the most powerful figure or the highest bidder. More than that, hope itself would be defeated, and cynicism, the enemy of constitutional democracy, would triumph. An honest, dependable and trusted judiciary was accordingly vital to serve as the sword and shield of the new constitutional dispensation.

It followed from this that, although one-off in character, the vetting of judges could not be seen as a stand-alone activity. Rather, it constituted one of a raft of measures designed to revitalise the judiciary and restore public confidence in it. Though vetting would be a necessary precondition for achieving the desired changes, it could not be sufficient in itself. It should neither assume the burden nor seek the glory of attempting single-handedly to transform the judiciary.

A second feature of the Kenya vetting process was that by its very nature it had to be transitional in character. It was intended to work quickly and decisively. The ordinary and enduring constitutional and statutory mechanisms for dealing with inappropriate judicial conduct would not be adequate. Though the permanent features of selection, disciplining and removal of judges would continue to operate in the ordinary way, something special and additional would be required. It would function in an *ad hoc* manner on a short-term basis, and automatically expire on the accomplishment of its mission. Parliament would be obliged as a matter of priority to adopt legislation providing for short and sharp interventions, to fulfil its constitutional responsibility to implement a vetting process.

1.2 Vetting in Other Jurisdictions

In states where the regime was overthrown by popular uprising, the entire judiciary was sometimes forced from office, as occurred in France when a new system of courts was established in the aftermath of the revolution of 1789. In many cases, purges of the judiciary have sadly played a part in the rise of new authoritarian governments. However, some states which are moving towards constitutional democracy have also found it necessary to replace all the judges at a certain level of the court system. For example, the resignation of all members of the Supreme Court in Liberia was one of the conditions of the Comprehensive Peace Agreement in 2003.²⁵ Although collective resignations or dismissals risk causing considerable disruption in the day-to-day work of the courts, there are countries which have decided to pay this price in view of the systemic problems or particular misdeeds of their judiciary in the past. The conduct of the judiciary has

sometimes been investigated by truth commissions, particularly in Latin American states that emerged from military rule in the 1980s, which can provide an important foundation for institutional reforms because they enable public engagement with the past.

Rather than relying on collective measures, other countries have chosen to deal individually with judges who served under a previous authoritarian regime. The Kenyan vetting process is one example of such an individual mechanism, and has benefited from the experience of individual mechanisms in Central and Eastern Europe where new constitutional democracies engaged in judiciary reforms from the early 1990s onwards. When it was preparing the harmonised draft constitution for Kenya, the Committee of Experts considered the approaches taken by East Germany, the Czech Republic, and Bosnia-Herzegovina.²⁶

Significant differences exist between the mechanisms used in each of these states. The Czech Republic adopted a policy of “lustration”, which barred judges who had been agents of the secret police or held certain positions in the ruling communist party from holding office for a number of years.²⁷ This approach focused on one aspect of the past – whether a judge had held certain memberships or positions – and thus responded to the Czech history of political oppression in which the one-party state and the secret police had had an enormous impact on people’s lives. An inevitable consequence of this form of lustration based on group membership was that there was little scope for the conduct of individual judges to be examined.

The reorganisation of the East German judiciary, by contrast, provided judges with more opportunities to have their own record considered.²⁸ Serving judges in the East were vetted to determine whether they should continue to hold office in a reorganised system of courts.²⁹ The vetting criteria reflected the country’s particular experiences under one-party communist rule. Judges could be dismissed if they had committed acts of inhumanity contrary to the ICCPR and UDHR; for instance, if they had penalised ordinary citizens who attempted to exercise their freedom of movement by applying to leave East Germany. There was also a broader ground for dismissal for judges who had engaged in political activities that rendered them personally unsuitable to continue as a judge, usually through active membership

of the governing party or of the feared secret police.³⁰ Few judges managed to satisfy this threshold: in East Berlin, only 17% of East German judges were allowed to continue in their posts, though the retention rate rose to between 41% and 63% in the other regions of East Germany.³¹ The disruption caused by such high rates of removal was mitigated to some extent by a large number of new judicial appointments, including many from West Germany. In this respect East Germany is an unusual case, since the country did not depend on its own resources alone because it was absorbed into a larger constitutional democracy.

The reappointment process for judges in Bosnia-Herzegovina was the next example of a comprehensive and individual mechanism which all judges had to undergo.³² To begin with the court systems that had operated during the conflict remained in place, but the judiciary struggled to build confidence amid widespread perceptions of corruption and political, religious or ethnic bias. This led to a comprehensive reappointment exercise that began in 2002. As in East Germany, this was a twofold reform involving both the restructuring of courts and the reform of judicial personnel. Local courts that had been reshaped by warlords and regional governments were replaced with a uniform federal court system, with court boundaries redrawn to avoid entrenching local fiefdoms and the separations brought about by the civil war. All judges holding office in the old courts were formally relieved of their positions at the start of the review, although they continued to hear cases in an acting capacity, either until they had completed their pending cases and retired, or until their application for a position in the new court structure had been determined. Applications for positions in the new courts were heard in phases, starting with the highest court of appeal and finishing twenty-one months later when appointments to the lowest courts were completed.³³ Kenya has followed this example by providing that vetting would begin with judges who were in the Court of Appeal on the effective date and then proceed to judges of the High Court, followed by magistrates. The logic of this measure is that disruption is reduced by clearing appeal routes in the shortest possible time.

The Bosnian process is more appropriately described as reappointment rather than vetting. Serving judges competed on an equal footing with new applicants.

This carried considerable potential for disruption, but it also meant that offences such as corruption or religious bias, which might pose considerable evidentiary difficulties, would not have to be proved; rather, the intention was that only those with the best records would be retained. Judges whose applications were unsuccessful could apply for reconsideration on the very limited grounds that favourable evidence they submitted had not been considered or that the panel had relied on material which it did not make available to the judge.³⁴ In the end, 70% of serving judges who reapplied were reappointed, and only 18% of the judges appointed to the new courts had not previously served as either a judge or a prosecutor.³⁵ To protect judicial independence from local pressure, a new institution was established at federal level, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC), which was made responsible for judicial appointments in future, after the reappointment exercise was complete, as well as for court budgets and judicial training.³⁶ The international community supplied half the members of the judicial appointments panel in each region and ensured that the remaining seats included representatives not only of the regional majority but also of minority ethnic groups.³⁷ The participation of international representatives was thus a strong feature of the Bosnian transition, which occurred when the government of the state was under overall international supervision, unlike in Kenya where the inclusion of three distinguished non-citizen Commonwealth judges was at the invitation of the Kenyan Parliament.

These are some of the examples that were available to Kenya when the vetting process was being designed. However, the Kenyan situation differs. Kenya was not the creation of a post-conflict situation, and faced unique challenges. The resulting Kenyan model is home-grown. It is hoped that in turn, both its successes and failures will prove relevant to other states undertaking this important and onerous task.

“The resulting Kenyan model is home-grown. It is hoped that in turn, both its successes and failures will prove relevant to other states undertaking this important and onerous task.”

1.3 Constitutional and Statutory Framework for the Vetting Process

The Constitution of Kenya, 2010 provides that within one year of the Constitution coming into force, Parliament would establish a process for reviewing the suitability of all sitting judges and magistrates. This was to allow Parliament to consult widely, consider approaches adopted in other countries and undertake responsibility for judicial reform, confident that it had addressed all the challenges that such a process inevitably raised.³⁸

The Sixth Schedule to the Constitution, which deals with transitional matters, accordingly provides in Article 23 that:

(1) 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 by 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 Article 10 and 159.

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

The effective date is the day on which the new Constitution came into force, that is, 27 August, 2010. The vetting process thus became applicable to all judges and magistrates who were in office on 27 August, 2010. Judicial officers appointed after that date were not subjected to vetting.

In order to comply with the constitutional requirement for the vetting process, Parliament enacted the Vetting of Judges and Magistrates Act, 2011 (the Act) which came into force on 22 March, 2011. The Act establishes an independent Board to be known as the Judges and Magistrates Vetting Board (the Board). The

function of the Board is, “To vet judges and magistrates in accordance with the provisions of the Constitution and this Act”. The term “vetting” is defined as “the process by which the suitability of a serving judge or magistrate to continue serving in the judiciary is determined in accordance with this Act”.

The Act provides that the vetting process once commenced shall not exceed a period of one year with a possibility of a further one-year extension by the National Assembly on request by the Board.³⁹

The Act was enacted after a considerable degree of consultation, especially with the Kenya Magistrates and Judges Association (KMJA). Critically, and as an outcome of consultations, Parliament incorporated six elements into the Act:

- Hearings would be conducted in private, unless the judge or magistrate opted for it being in public;
- All information obtained by the vetting body during the personal interviews and records of the judicial officer being vetted should be confidential;
- The rules of natural justice should apply to the body’s proceedings and it should at all times be guided by the standard of judicial independence, natural justice and international best practice;
- Judges from other Commonwealth countries should be on the body to ensure objectivity;
- A system of internal review of determinations by the body should permit review on the limited grounds of newly available evidence and patent error on the record; and
- Finally, judges and magistrates would be given the option of retiring, with full benefits due, before the vetting process kicked in.

1.4 Mandate

The mandate of the Board is provided for in the Constitution and the Vetting of Judges and Magistrates Act. The Constitution declares that the Board must vet the suitability of the judges in accordance with the values and principles set out in Articles 10 and 159.⁴⁰ Article 10 includes amongst its binding national values and principles: the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability. Article 159 goes on to enunciate three guiding principles of justice:

- It should be done to all irrespective of status;
- That it should not be delayed; and
- That it should be administered without undue regard to procedural technicalities.⁴¹

The Act provides both general and specific guidance. In general terms, it emphasises that the Board shall at all times be guided by the principles and standards of judicial independence, natural justice and international best practices.⁴² More specifically, it requires that when determining the suitability of a judge, the Board must consider the following:

- Constitutional criteria for appointment;
- Past work record, including prior judicial pronouncements;
- Criminal cases or prosecutions against the judge or magistrate concerned; and
- Complaints or other relevant information received from any person or body, including the Law Society of Kenya, the Kenya Anti-Corruption Commission, the Attorney General, the Judicial Service Commission and other identified bodies.⁴³

In considering these matters, the Board is expressly required to take account of professional competence, written and oral communication skills, integrity, fairness, temperament, good judgment, legal and life experience and demonstrable commitment to public and community service.

Each of the qualities consists of detailed elements.⁴⁴ Thus, integrity is said to include:

- A demonstrable consistent history of honesty and high moral character in professional and personal life;
- Respect for professional duties, arising under the codes of professional and judicial conduct; and
- Ability to understand the need to maintain propriety and the appearance of propriety.

Similarly, fairness is said to include:

- A demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and
- Open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views.

1.5 Structure

The Board consists of nine members, namely, the Chairperson, a Deputy Chairperson and seven other members. Six of the members are citizens of Kenya, of whom three must be lawyers and three non-lawyers.⁴⁵ The Secretary, who also holds the role of Chief Executive Officer, supports the operation of the Board and oversees the functioning of the Secretariat. To ensure expeditious disposal of matters, the Act allows the Chairperson to constitute three panels

comprising three members each to work concurrently. Each panel had to have one Kenyan lawyer, one Kenyan non-lawyer and one non-Kenyan Commonwealth judge.⁴⁶ The participation of Commonwealth judges was informed by the need to protect and promote the public interest. It was thought that the involvement of non-Kenyans would help to maintain neutrality; eliminate potential bias; promote professionalism and international best practice; and uphold due process.

1.6 Process

The process of vetting is outlined both in the Act and regulations set out under Section 33 which were published and gazetted on 24 January, 2012 with a view to providing a fair, just and effective vetting process (see Annexure B).⁴⁷ The Act goes on to state that the first judges and magistrates to be vetted shall be the Court of Appeal judges, followed by the judges of the High Court, the Registrar of the High Court, the Chief Court Administrator, chief magistrates and other magistrates in that order.⁴⁸

The Act provides that all information obtained by the Board during the personal interviews, and records of the judge being vetted shall be confidential.⁴⁹ It also states that the hearing by the Board shall not be conducted in public, unless the concerned judge or magistrate requests a public hearing.⁵⁰

The Board shall upon determining the unsuitability of a judge or magistrate to continue serving in the judiciary, within 30 days of the determination inform the concerned judge or magistrate of the determination in writing, specifying the reasons for the determination.⁵¹ The decision to remove a judge or magistrate shall be made public.⁵² Once informed of the decision of unsuitability, the judge or magistrate shall be deemed to have been removed from service.

A judge or magistrate who is dissatisfied with a determination may request for a review by the same panel within seven days.⁵³ The Board shall not grant a request

for review unless it is based on:

- The discovery of a new and important matter, not within the knowledge of the judge or magistrate at the time of the determination; or
- Some mistake or error apparent on the face of the record.⁵⁴

A decision of the Board on review shall be final.⁵⁵

The Board has inherent powers to regulate its own procedure and make regulations to enable it to carry out its functions.⁵⁶



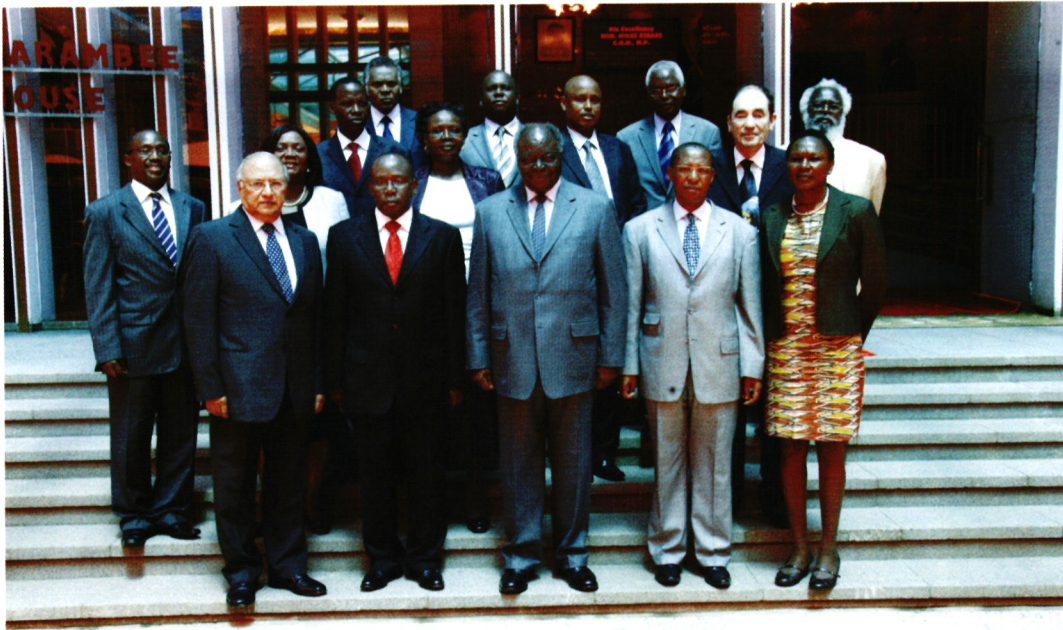
Justice Albie Sachs from South Africa being sworn in by Chief Justice Dr. Willy Mutunga as the JMVB Chairman Sharad Rao looks on.

1.7 Composition of the Board

The six Kenyan members were shortlisted and recruited through a competitive process. They were interviewed by a selection committee composed of representatives from the Cabinet Office, Office of Prime Minister, Office of the Attorney-General, Judicial Service Commission, Public Service Commission, Law Society of Kenya and the Ministry of Justice, National Cohesion and Constitutional Affairs.⁵⁷ After the interviews had been completed, 18 names were shortlisted by the Public Service Commission and six names were selected. The Constitutional Implementation Oversight Committee published the names and invited memoranda from members of the public on their suitability. The CIOC then vetted the members in an open public forum and forwarded their names for approval to Parliament, which debated the matter on 1 September, 2011. After gaining parliamentary approval, the six members were gazetted on 2 September, 2011. They are Mr Sharad Rao, Chairperson (lawyer); Mrs Roseline A. Odede, Vice Chairperson (lawyer); Mr Justus Munyithya (lawyer); Mr Abdirashid Abdullahi (non-lawyer), Ms Meuledi Iseme (non-lawyer) and Prof Ngotho wa Kariuki (non-lawyer). They were sworn in on 10 September, 2011.

The remaining three members were to be non-citizens of Kenya who were serving or retired judges, each of whom should have served as a Chief Justice or a judge of a superior court in a Commonwealth jurisdiction.⁵⁸ Hon. Chief Justice Georgina Wood from Ghana was appointed and sworn in on 3 November, 2011. Following extended delays, two of the original Commonwealth judges, Lord Justice Stephen Sedley from the United Kingdom and Hon. Justice Louise Otis from Canada, eventually declined their invitations to join the Board. They were replaced by Hon. Justice Albie Sachs from South Africa, who was sworn in on 18 January, 2012 and Hon. Justice Frederick Chomba from Zambia, who was sworn in on 19 January, 2012. This completed the composition of the Board.

The first meeting of the Board was in the Ministry of Justice, and the first item on the agenda was to elect the Vice-Chairperson, namely, Mrs Roseline A. Odede.



Group photograph with President Mwai Kibaki. Front row (L - R) Sharad Rao, Attorney General Githu Muigai, Justice Minister Mutula Kilonzo and Roseline Odede. Second row (L-R) PS Justice ministry Dr Gichira Kibara, Georgina Wood, Meuledi Iseme, Abdirashid Abdullahi and Albie Sachs. Back row (L-R) Reuben Chirchir, Private Secretary to the President Nick Wanjohi, Justus Muniyithia, Secretary to Cabinet Francis Muthaura and Ngotho wa Kariuki.

1.8 The Secretariat

The Board is supported by a Secretariat, which is headed by a CEO who is also the Secretary to the Board, Mr. Reuben Chirchir. The Secretariat consists of Assisting Counsels, Finance Officer, Human Resource Officer, ICT Officer, Supply Chain Managers, Public Communication Officer, researchers, process servers, Hansard recorders, legal assistants, investigators, Administrative Assistants, drivers and security officers. Four staff members were seconded to the Secretariat from the Ministry of Justice, while others were competitively recruited. The full staff complement of the Secretariat is reproduced in Annexure F.

CHAPTER TWO

METHODOLOGY, PROCEDURE AND SYSTEMS OF VETTING

- ❑ Introduction
- ❑ Regulations
- ❑ Public Sensitisation, Participation, and Awareness Raising
- ❑ Issues Raised during Sensitisation and Outreach Activities
- ❑ The Gathering and Compilation of Information
- ❑ Stakeholder Engagement
- ❑ Receiving and Processing of Information/Complaints
- ❑ Dispatching Information to the Judges
- ❑ Responses
- ❑ Research and Processing of Responses
- ❑ Preparing for Interviews
- ❑ The Interview Process
- ❑ Decision-making Process
- ❑ Determinations
- ❑ Public Announcement
- ❑ Request for Review
- ❑ Conclusion

2.0 Introduction

Parliament enacted the Vetting of Judges and Magistrates Act, 2011⁵⁹ which was more substantive than procedural. There was therefore both a constitutional and a statutory requirement that the Board set up systems and procedures of vetting. Hence the Board had to devise regulations and procedures and other tools that would guide the process of vetting judges as required by the Constitution and the Act. These regulations were aimed at providing a fair, just and effective process.

This chapter discusses the procedures and guidelines adopted by the Board to enable it execute its mandate of vetting judges and magistrates in accordance with the Constitution and the Act.

2.1 Regulations

In order to operationalise the Act, the Board had to develop rules and regulations to direct the process of vetting and to ensure that vetting proceeded within the parameters set by the Constitution and the Act (see Annexure B).

2.2 Public Sensitisation, Participation and Awareness Raising

The Board, in order to ensure effective discharge of its mandate, considered it necessary to inform the public of its mandate and mode of conducting business, as well as the manner and extent of the involvement of the public in the vetting process. There was need to enlighten the public on the mandate of the Board, why it was formed, its composition, and how it planned to achieve the designated mandate as stipulated in the Constitution and the Act. In order to achieve this, the Board embarked on a public sensitisation and awareness programme that would run throughout the year.

The most intensive and rigorous public sensitisation and awareness programmes were held in the months of January and February 2012. During these sessions, the Board also distributed the information/complaint form known as *JMVB 1*. The Board used these opportunities to gather information and collect as many complaints as possible before it began the vetting process.

The Board then divided itself into three teams, which held various forums in different

parts of the country. Each team was supported by staff from the Secretariat. The first team⁶⁰ visited Narok, Kericho, Kisii, Kisumu, Nakuru, Bungoma and Eldoret. The second⁶¹ visited Machakos, Nyeri, Meru, Embu and Nanyuki, and the third⁶² visited Thika, Malindi, Mombasa, Voi, Kwale. In aggregate, the teams held a total of 17 meetings in the months of January and February 2012.

During the forums, the teams made presentations highlighting, among other things, the reason for the enactment of the legislation establishing the Board, the mandate of the Board, composition of the Board members, the process of their appointment, the procedure of the vetting process, and the issues that would guide the Board in its determination of the suitability or otherwise of the respective judges to continue serving in the judiciary. In addition to the complaint forms, the teams also distributed to members of the public copies of the Act and the regulations, as well as indicated to the public where and how to obtain the complaints forms, how to fill them and where to send them.

In order to achieve wide and effective public participation, the Board also made use of press releases, briefings and advertorials.



Judge Sachs, Judge Chomba, Chief Justice Georgina Wood and Roseline Odede (Vice-chair) during a public sensitisation session.

2.3 Issues Raised during Sensitisation and Outreach Activities

During public outreach visits, several concerns were brought to the attention of the Board. First, many raised concerns about the confidentiality of the information and evidence submitted to the Board. These concerns stemmed from fear of the complainants of retribution by judicial officers against whom they had provided damning information. Participants, however, generally supported an open and public vetting process similar to those of recent interviews carried out for senior appointments to public office.

The Board addressed these concerns, providing assurances that it was taking steps to guarantee the confidentiality of the information it received. The Board took the opportunity over the course of these outreach activities to explain that considerations of due process and the sensitive nature of vetting compelled it to give the judges and magistrates the leeway to opt for a public or a private hearing. Nonetheless, the Board invited the public to monitor and take part in the proceedings through other avenues.

Many participants expressed dissatisfaction that other officials involved in the administration and delivery of justice, such as accountants, clerks, state counsels, prosecutors and lawyers, were excluded from the vetting process. It was repeatedly pointed out that instances of corruption and other judicial vices were often carried out by these officials. Further, police reform was generally considered to be an urgent priority in restoring confidence in the judiciary. From the outreach activities, it became clear that delayed judgments presented significant problems and were of particular concern to members of the public.

2.4 The Gathering and Compilation of Information

Section 18(1)(e) of the Act gives the Board powers to gather information from different sources. The first step that the Board took to gather information was to call for complaints and other relevant information from the public and other

bodies by publishing notices in the Daily Nation and The Standard newspapers.⁶³ Members of the public were to submit information/complaints as prescribed in the *JMVB1* form. However, any complaint/information which was not in the prescribed format was also considered by the Board.

The Board wrote to the bodies and institutions mentioned in section 18(1)(e), requesting for any complaint or other relevant information filed with them against a judge. The Board also wrote to the Chief Registrar of the Judiciary requesting files (both public and confidential), as well as information and complaints which may have been lodged with the judiciary with respect to the judges who were to be vetted. Further, the Board requested the Chief Registrar to facilitate the distribution of vetting questionnaires to all the judges.

Information and/or complaints touching on the judges were received by the Board included complaints from members of the public and complaints or information furnished by the Law Society of Kenya, the Ethics and Anti-Corruption Commission, the Judicial Service Commission and the International Commission of Jurists. Limited information was also received from the National Intelligence Service.

Unfortunately, and despite written requests from the Board, no complaints or information were received from the Advocates Disciplinary Committee, the Advocates Complaints Commission, the Office of the Attorney-General, Public Complaints Standing Committee, Kenya National Human Rights and Equality Commission, and the Police.

Information that was received by the Board was treated with utmost confidentiality.

2.5 Stakeholder Engagement

The Board worked closely with the stakeholders listed under section 18 (1) (e). The Board created linkages, and developed effective working relationships with these stakeholders. Board members would be invited to attend stakeholder

forums to share the challenges, opportunities and experiences involved in the vetting process. To this end, a round table meeting was organised in Naivasha where the regulations developed by the Board were discussed and validated. Core focus meetings were also held with various stakeholder groups, during which issues touching on common areas of interest were discussed. The Board was able to gather information relevant to the vetting of judges over the course of these interactions.

2.6 Receiving and Processing of Information and Complaints

The Board has established a system of processing and receiving information. Information and complaints received at the registry would be registered by the Board's legal department and then forwarded to the assisting counsel assigned to prepare the vetting record of the specific judge. The assisting counsel would then evaluate, analyse and assess the merit or otherwise of a complaint or any other relevant information.

A matrix table would be prepared indicating details of the complaint, including when it was received, who the complainant was, what the complaint was about and the assisting counsel's remarks on the same. Apart from the analysis of the complaints received, the panel would summarise the vetting questionnaire submitted by a judge and highlight any adverse issue.

Complaints would be rejected on any one of the following grounds: -

- That such a complaint did not disclose sufficient evidence;
- That it was frivolous or vexatious; and
- That it was in the nature of an appeal to the Board.

If the Board made a preliminary determination that there were complaints that a judge ought to respond to, he/she would be informed accordingly. A complaints file would then be prepared and would contain the following documents:

- The Notice-to-File-Response and Notice-to-Appeal;
- The complaints and supporting documents;
- The vetting questionnaire;
- The curriculum vitae of the judge;
- The wealth declaration forms and analysis of the same;
- Sample judgments and/or rulings issued by the judge;
- The Judicial Service Commission transcript, if any.

2.7 Dispatching Information to the Judges

The legal department summarised the information/complaint(s) in a matrix. The Board decided which complaints should be served on the judge, who would then be issued with a notice and required to file a response within a given time-frame, normally within ten days from the date of service.⁶⁴ When further information or complaints were received after the initial notice, an additional addendum was sent to the judge.

If the Board intended to discuss any issue with the judge other than the complaints, an addendum would be attached to the Notice-to-File-Response. The issues that the Board would raise in the addendum included:

- Past work record, including judgments and rulings;
- Failure by the judge to disclose full information on the declaration of

income, assets and liabilities form as required under the Public Officers Ethics Act, 2003;and

- Failure by the judge to provide full information on sources of income, full inventory of assets and financial statement of spouse.

The Notice-to-File-Response and the addendum would require the judge to:

- Respond to the complaints and/or issues raised within 10 days from the date of the Notice:
- Provide any other information that the judge may wish to bring to the attention of the Board;
- Confirm if the judge wished to have the proceedings conducted in private or public;
- Confirm if the judge wished to cross-examine any of the complainants in the Notice.

The Notice-to-File-Response would be accompanied with a Notice-to-Appear,⁶⁵ requiring the judge to appear before the Board on a specific date.

2.8 Responses

A judge served with a Notice-to-File-Response and an addendum was required to file their response within 10 days from the date of notice.⁶⁶The Board did not prescribe a format for responding to the Notice. However, the judge was expected to respond to all matters raised as fully as possible. The judges were guided by the regulations, which stipulated that the response should contain a summary of the material facts on which the judge wished to rely on in answer to the complaint(s).⁶⁷ The response was to be as brief as the nature of the complaint allowed. Though the summary was to be brief, the judge was at liberty to annex any supporting

documents and or evidence he or she deemed necessary.

It was a challenge for some judges to respond within ten (10) days of the Notice, hence they would seek an extension of time to file their response. Some of the grounds that the judges relied on to seek an extension were:

- Inability to obtain court files and other relevant documentation within the time- frame;
- Complaints were too many to write a satisfactory response within the time stipulated.

Using its discretionary powers, the Board would grant extension of time in order to ensure that the process was fair, impartial and just.

2.9 Research and Processing of Responses

Once the Board received the judge's response, it would be forwarded to the assisting counsel assigned to the judge's file. The assisting counsel, together with the research officer, would analyse and evaluate the evidence provided by the judge vis-a-vis the complaint and supporting documents adduced by the complainant. Thereafter, a report highlighting the nature of complaint, the judge's response and the assisting counsel's recommendation, together with the complaint and response file, would be presented to the interviewing panel.

Vetting is a time intensive process. Before the Board could proceed with the interviews, a large volume of material had to be collected and analysed. The vetting process entailed receipt of complaints or compliments from parties that had been affected by the work and conduct of particular judges and magistrates. Files had to be compiled, and a matrix of complaints produced.

2.10 Preparing for Interviews

The Board followed a systematic procedure prior to calling a judge to appear before the vetting interview. The general process was as follows:

- Requests were sent to judges to fill in a vetting questionnaire and bio data forms. Judges were also required by the Ethics Commission to provide a wealth declaration form, together with bank statements, setting out their income, assets and liabilities;
- Complaints were received from members of the public – both individuals and interested organisations (such as the Law Society of Kenya). These complaints were acknowledged by the registry;
- Complaints, along with more general lines of inquiry, could be investigated by Board investigators. The complaints were then forwarded to Assisting Counsel;
- Assisting Counsel and research officers entered the data into the complaints matrix.
- Research officers recorded and summarised information from the vetting questionnaires and bio data forms;
- Assisting Counsel presented the complaint matrix and summarised vetting questionnaire to the Board;
- Complaints that met the Board's vetting threshold were summarised and a Notice-to-File-Response was served on the judge;
- The judge had to file an answer with the Board's registry within ten days;
- Assisting Counsel and research officers prepared the complaint and response files for the Board.

2.11 The Interview Process

The Act requires that the Board conduct private interviews unless the concerned judge has opted to have a public interview.⁶⁸ The interview process is set out in the following steps:

- The judge appeared before a panel of Board members for the vetting interview;
- The panel questioned the judge about the complaints, evaluated and analysed the judge's suitability and took into account factors enumerated in section 18 of the Act, along with the requirements set out in the Constitution;
- After the interview, the panel discussed issues raised, produced a report and made a recommendation on the suitability of the individual to the full Board;
- The Board analysed the panel's recommendations and made a determination on the suitability of the judge to remain in office;
- The determination was served on the judge;
- Any judge who was found unsuitable was given 7 days to file a request for review;
- If specific criteria set under 22(2)(a) or (b) were satisfied, the Board could grant review of its determination.⁶⁹

In conducting the interviews, the Board could either sit as a full Board or the Chairperson could constitute three panels of the Board to work concurrently.⁷⁰ The Board decided to vet the Court of Appeal judges as a full Board. The main reason for this was to create thresholds and benchmarks that would guide members in the evaluation of the suitability or unsuitability of a judge in subsequent interviews.

Subsequently, three panels were constituted by the Chairperson during hearings of the High Court judges. Each panel was composed of one Kenyan lawyer, one Kenyan non-lawyer and a non-citizen Commonwealth judge, as required by the Act.⁷¹ The panel would interview the judge and thereafter submit its recommendation to the full Board for consideration. Ordinarily, the panel would be supported by an assisting counsel, a research assistant, a Board clerk and two Hansard recorders.⁷²



An interview in progress.

The interview process was divided into three phases. The **first phase** was introductory. Here, the Chair would introduce the members present, the assisting counsel, the Secretary to the Board (if present), the Board clerk, the Hansard team and any other member of the Secretariat. The judge would thereafter introduce himself or herself and the advocate (if any). The Chair would then ask if the judge objected to the jurisdiction of the Board or the presence of any of the persons introduced to him or her in the hearing. The Board developed a guiding document, which functioned as a template to assist with this process (see Annexure C).

The **second phase** was the interview stage. This stage had two sections. In the first, the judge was required to respond to the specific complaints as outlined in the Notice-to-File-Response. In the second, the Board dealt generally with the relevant considerations under section 18 of the Act and Article 10 and 159 of the Constitution.

In conducting the interview, the Board relied on the following:

- The vetting questionnaire (JMVB5);
- The declaration of assets and liabilities form;
- Bank statements;
- Complaints and other relevant information received;
- Response to the complaint;
- Judicial Service Commission transcripts for interviews conducted with the judge concerned for any post applied for, if any; and
- Any past work record of the judge including rulings, judgments and academic dissertations.

The **third and final phase** comprised submissions and closing remarks. Here, the judge and the advocate were given an opportunity to make their submissions (oral or written) and their closing remarks, if any. Thereafter, the judge would be requested to give a feedback on whether the process was fair. The judge would be informed that he or she would be notified of the determination in due course. The proceedings of the entire interview were recorded verbatim by the Hansard team.

2.12 Decision-making Process

The panel would deliberate on the proceedings of the interview, analyse documents, evidence, information and submissions made during the interview and in the course of research, and come up with a tentative position on the suitability or unsuitability

of a judge. The panel would make a report, sign the same, and submit it to the full Board, giving its recommendations as to the suitability or unsuitability of a judge for the Board to make the final determination.

In order to draft the report the panel relied, inter alia, on the following:

- The documents, evidence and any information submitted during the interview process both by the assisting counsel and the judge;
- The judge's demeanor throughout the interview process;
- The submissions and closing remarks of the judge; and
- Sample of best rulings and judgments supplied by the judge, as well as past pronouncements discussed with the judge.

The panel also considered the matters set out in section 18 of the Act, including:

- Intellectual capacity of the judge;
- His or her knowledge of the law;
- Quality of legal judgment;
- Competence and diligence;
- Ability to work well with others; and
- Organisational and administrative skills.

Based on the interview and related findings, the panel made its recommendations.

2.13 Determinations

The Board, after receipt of the report by the panel, would make the final decision on the suitability or unsuitability of a judge. In making its decisions, the Board operated according to the considerations set out below:

- It weighed all the evidence and information before it with due diligence and care;
- Its evaluation was solidly based on the material before it;
- It took into account the principles of natural justice and rule of law, the Bangalore Principles and international best practices; and
- It applied the principles and criteria set out in the Constitution and the Act.

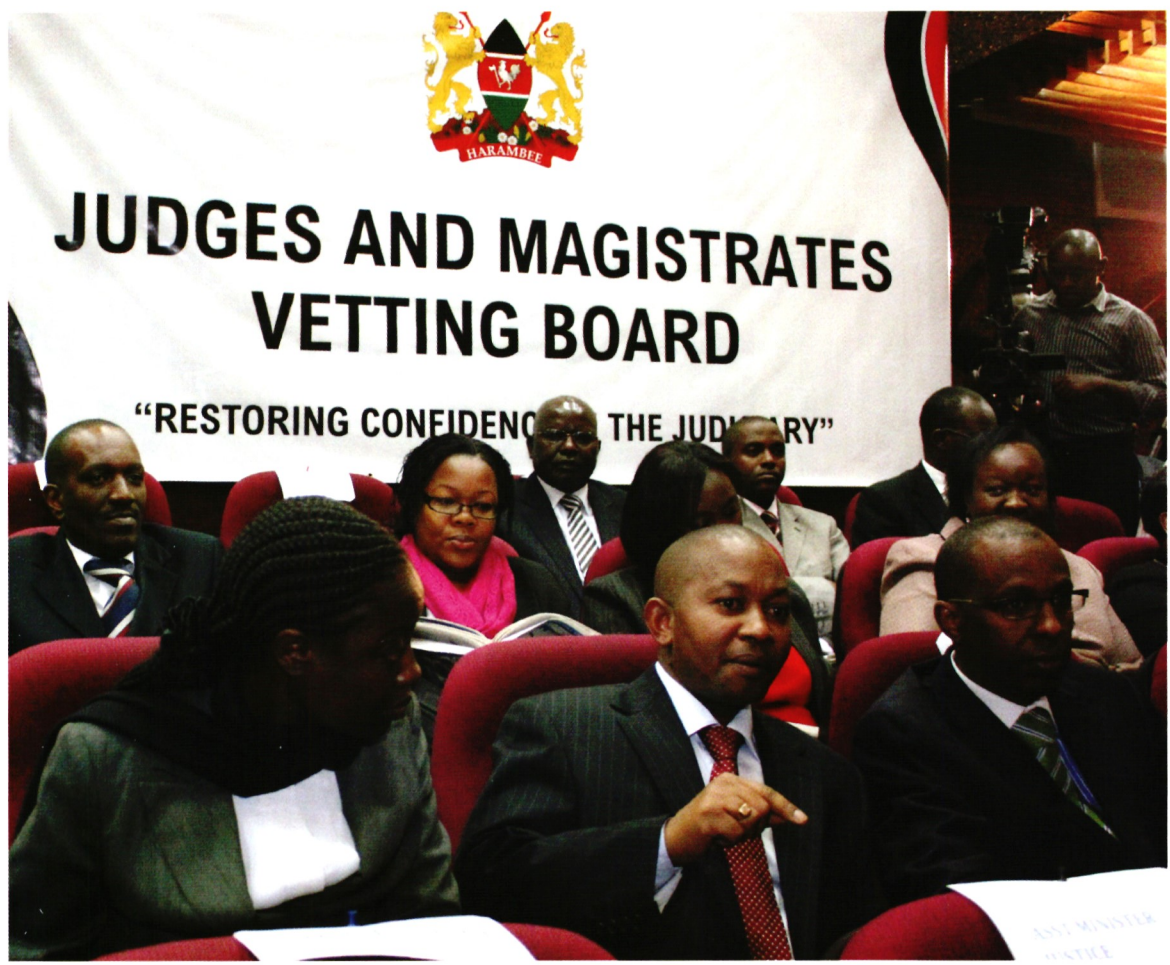
Within 30 days of the determination, the Board informed the judge concerned of the determination in writing, specifying the reasons for the determination.⁷³

Determinations were made after thorough investigations involving hours and days of interviews and perusal of hundreds or even thousands of pages of documents in respect of each judge. These included complaints, court records, five judgments submitted by the judge concerned, wealth declarations and judge's responses. In addition, the members would frequently read transcripts of the proceedings of Judicial Service Commission interviews with the judges concerned, and would always go through the Hansard records of the panel interview with the judge. Every judge required extensive individual attention. The Board received complaints against all the judges.

In the first phase, where Court of Appeal judges were being interviewed, all available members took part in the interviews. Afterwards, however, the Board functioned in panels of three. The panels would then make written recommendations to the Board as a whole. The Board would then make its determination. The preparation of determinations took time and effort. Although the Act only required that determinations be publicised in the case of judges found to be unsuitable, the Board felt that in the interests of transparency, it should also make announcements of determinations of suitability. In this respect, the Board frequently included in its announcements references to matters of special public interest, explaining why, even if the Board had concerns over certain aspects of a judge's work, in the overall, it had decided that the judge had the requisite qualities to remain in office.

2.14 Public Announcement

The practice was to serve the determinations on the judge concerned. Public announcements of the determinations were conducted at the Board's offices in Nairobi. All media houses were invited to the announcements of the determination. Thereafter, the Board would supply copies of the determination to the Chief Justice, the Chief Registrar of the Judiciary, the Judicial Service Commission, Law Society of Kenya, and media houses among others. In addition, the Board would upload the determinations on to its website www.jmvpb.or.ke for ease of access by the public.



LSK Chairman Eric Mutua with Ahmednasir of the Law Monthly and members of LSK at the first announcement of determinations at KICC.

2.15 Requests for Review

If a judge was dissatisfied with the determination of the Board, he or she could, within seven days of being informed of the determination, request for review⁷⁴ to the same panel. Once the Board received the Application for Review, the Board would send a Hearing Notice to the judge concerned informing him or her of when to appear before the Board. The Notice contained the following guidelines:

- The judge was to file written submissions within seven (7) days from the date of the Notice, in support of the grounds relied on the application for review;
- The judge was to address in particular whether the request for review fell within the ambit of section 22(2)(a) or(b) of the Act which provides as follows:
 - Discovery of a new and important matter which was not within the knowledge of, or could not be produced by the judge or magistrate 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 due diligence;
 - Mistake or error apparent on the face of the record.

There was no standard format required for requesting a review, provided that the grounds for review set out above were captured.

When the Board received the written submissions, the same would be forwarded to the assisting counsel and research officer to prepare the review file. The review file contained:

- The request for review;
- The hearing notice and all the notices relied on at the interview stage;
- The Hansard transcript of the concerned judge;
- The Board's determination.

If a judge's request for review did not meet the above threshold, the same would be dismissed and the Board's earlier determination upheld. If a judge's request met the above threshold, then the matter would be reexamined in the light of the basis for the granting of the request.

2.16 Conclusion

This chapter outlined the methodology and systems adopted by the Board in the vetting process. Of note was the particular care the Board exercised in making sure that the process was both fair to the judges being vetted, while at the same time meeting the requirements of thoroughness and transparency anticipated by the Act and the Constitution.



Board members with Prime Minister Raila Odinga and Justice Minister Eugene Wamalwa.

CHAPTER THREE

DECISIONS BY THE BOARD

- ▣ *Guiding Principles*
- ▣ *General Overview*
- ▣ *Judges Found Suitable by Consensus or near Consensus*
- ▣ *Judges Found Suitable with Dissent*
- ▣ *Judges Found Unsuitable*
 - *Fairness and Impartiality*
 - *Requests For Review*
 - *Integrity and Propriety*
 - *Work-style and Temperament*
 - *Good Judgment and Access to Justice*
 - *Intellectual Capacity and Diligence*
- ▣ *Judges Found Suitable but with Caveats*
 - *Delay*
 - *Conclusion on Delay*
- ▣ *Undue Reliance on Technicalities versus the Rule of Law*

3.0 Guiding Principles

The Board was aware that the vetting process was *sui generis* - of its own kind. It could not 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 had to be structured around the objectives, processes and values

identified by the Constitution and the Act. The Board accordingly had to proceed carefully and appropriately within these specific constitutional and statutory parameters.

The Board's role was not to carry out a purge but to conduct a vetting process. A purge would have involved automatic exclusion based purely on actual or presumed membership to an identified group. The vetting procedure, on the other hand, was 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 was compatible with the criteria established by the Constitution and the Act.⁷⁵ Thus the Board's objective was not to punish, discipline, exonerate or reward the judge, but to help restore public confidence in the judiciary. If the processes followed were themselves arbitrary and its decisions were not solidly based on material before it, public confidence would not be restored. Equally, if judges who had manifestly failed to meet the required criteria were passed as suitable, public confidence would not be restored.

Determinations of suitability could not be made in a pre-ordained or mechanical manner. Nor could there be a one-size-fits-all formula applicable in all cases. Each determination had to be fairly and appropriately arrived at, and had 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.

The amplitude and success of the Board's work has accordingly been heavily dependent on the information and complaints presented to it, whether by members of the public or the Law Society of Kenya (LSK) or other public bodies listed in Chapter Two.

The LSK led the way in providing relevant and useful information to the Board. Unfortunately, a large number of institutions identified in the Act as potential sources did not respond adequately to requests from the Board for information.

However, while not its primary function, the Board was able to conduct its own investigations.

The Board was mindful that its role was not to sit as a Court of Appeal in relation to the factual or legal correctness of rulings given or judgments delivered by the judge. The Board was also aware that many litigants who lost a case were convinced that the court could only have gone against them because of bias or corruption. At the same time, the Board found it both appropriate and necessary to examine the past work record of the judge, including prior judicial pronouncements, to see if it manifested any departure from the qualities expected of a judge. Thus, a perusal of copies of the relevant court records at times proved useful in deciding questions concerning judicial work-style and temperament. The Board paid attention to the context, content and impact of the published decisions given by the judge, where allegations of bias and tendencies to protect impunity had been made.

The Board was conscious of the fact that the Constitution and the Act required it, and it alone, to have both the first and the final word on the suitability of the judge. All of these factors underlined the importance of the Board weighing the evidence before it with special care. It had to be ensured that its evaluations were solidly based on the material before it; the need to be resolute could not override the necessity to be principled and fair. Indeed, restoring public confidence in the judiciary required the Board to function in a manner that was simultaneously firm, fair and expeditious. It had to conduct itself without fear, favour or prejudice. In a word, the vetting process itself had to be just.

Guided by this approach, bearing in mind the need to restore public confidence in the judiciary, using the processes outlined above, applying the criteria laid down in the Constitution and the Act, taking account of the requirements of natural justice and the need to look at the suitability or unsuitability of the judge as an individual, the Board went on to consider and reflect on all the material before it. In this way it made final decisions and determinations in each case.

3.1 General Overview

In fulfilling its mandate, the Board made determinations in relation to 53 judges. With respect to judges who were on the Court of Appeal at the time the Constitution came into force, 5 were found to be suitable to remain in office (56%) and 4 unsuitable (44%). In the case of 44 judges who were on the High Court on that date, 33 were found suitable (75%) and 11 unsuitable (25%). However, two of the judges found unsuitable in this category succeeded in their requests for review, and had their determinations of unsuitability replaced by determinations of suitability. In total, then, out of 53 judges vetted, 40 were suitable (75%) and 13 unsuitable (25%).

The greatest number of complaints related to allegations of **incompetence**, frequently associated with claims that the judge concerned was **biased** against the complainant. Going into many of these complaints in detail would have required the Board to sit in effect as a court of appeal. The Board felt it would not be appropriate for it to take on this role.

Although the question of **lack of impartiality** was not the most common foundation for complaints overall, it played a particularly significant role in relation to the judges on the Court of Appeal, which, until recently, had been the highest court in the land. Relying largely on pronouncements made by the judges themselves, the Board found that three of these judges had significantly and unduly distorted the law in a manner that granted impunity to powerful and wealthy public figures. Given their lack of introspection and capacity to face up to the damage that their decisions had caused to public confidence in the judiciary, the Board decided that they were not suitable to remain in office.

“A large category of complaints related to **integrity**, often associated with allegations of bribe-taking. In practice, however, it was rare for any tangible or substantive proof to be offered.”

A large category of complaints related to **integrity**, often associated with allegations of bribe-taking. In practice, however, it was rare for any tangible or substantive proof to be offered. As will be discussed later, although there were strong grounds for believing that corruption had penetrated deeply into the judiciary, there were a number of reasons why relatively little hard evidence came to the fore. Yet, the Board felt there was sufficiently compelling substantiation in the case of five judges either of a failure of integrity or of the existence of impropriety, to necessitate determinations of unsuitability.

Then, there were a number of cases in which issues of **temperament and work style** were prominent. Three High Court judges failed to make the grade on this score. One High Court judge was found to be unsuitable on the grounds of **lack of good judgment and denial of access to justice**. One High Court judge was found unsuitable due to a **lack of competence and diligence**.

Full details of all the judges vetted can be found in Annexure D. It will be seen that the 53 judges vetted can be grouped into four categories. The first consists of judges who were found to be suitable by consensus or near consensus (34). The second comprises judges who were found to be suitable by a majority of the Board, without consensus or near-consensus (3). The third includes judges found to be unsuitable (13) and the fourth contains the names of judges found to be suitable, but with caveats (3).

3.2 Judges Found Suitable by Consensus or Near-consensus

After thorough investigations, interviews and analysis, the Board found that the following judges were suitable by a unanimous or near-unanimous decision to remain in office:

Court of Appeal Judges:

- 1) *Justice Philip Tunoi,*
- 2) *Justice Erastus Githinji,*
- 3) *Justice Onyango Otieno ,*
- 4) *Justice Philip Nyamu Waki.*

High Court Judges:

- 1) *Justice Jackton Boma Ojwang*
- 2) *Justice Hannah Magondi Okwengu*
- 3) *Justice Paul Kariuki Kihara*
- 4) *Justice John Wycliffe Mwera*
- 5) *Justice Msagha Mbogoli*
- 6) *Justice David Kenani Maraga*
- 7) *Justice Lessit Jessie Wanjiku*
- 8) *Justice Wanjiru Karanja*
- 9) *Justice Roseline Wendoh*
- 10) *Justice David Onyancha*
- 11) *Justice Daniel Musinga*
- 12) *Justice G.B.M Kariuki*
- 13) *Justice George Matatia Abaleka Dulu*
- 14) *Justice Festus Azangalala*
- 15) *Justice Isaac Lenaola*
- 16) *Justice Frederick Andago Ochieng*
- 17) *Justice Kimaru Luka Kiprotich*
- 18) *Justice Matthew Anyara Emukule*
- 19) *Justice Ruth Sitati*
- 20) *Justice Milton Makhandia*

- 21) *Justice Philomena Mwilu*
- 22) *Justice Maureen Adero*
- 23) *Justice Mohammed Warsame*
- 24) *Justice Aggrey Otsiyula Muchelule*
- 25) *Justice William Ouko*
- 26) *Justice Florence Muchemi*
- 27) *Justice Said Juma Chitembwe*
- 28) *Justice Joseph Karanja*
- 29) *Justice Hellen Omondi*
- 30) *Justice Mary Kasango.*



Board members and Secretariat staff with members of the Constitution Oversight and Implementation Committee of Parliament. Also in the picture is Minister of Justice, National Cohesion and Constitutional Affairs Hon. Eugene Wamalwa at a retreat, 11th - 13th October, 2012.

3.3 Judges found suitable with dissent

A number of judges were found to be suitable without consensus or near-consensus.

Court of Appeal Judges:

- 1) *Justice Alnashir Vishram*

High Court Judges:

- 1) *Justice Martha Karambu Koome*
- 2) *Justice Kalpana Hasmukhrai Rawal*

In the case of **Justice Alnashir Vishram** the determination was by a majority and the dissenting Judgments and reasons of three of the nine members were availed to the judge. One of the tasks imposed by the Act on the Board was to examine the work record of each judge, including past adjudications.

Two issues concerning Justice Vishram claimed special attention from the Board. The first concerned an extremely high damages award made by him against two British authors and their publishers in a book alleging that a former minister, Nicholas Biwott, had been implicated in the murder of Dr. Ouko, the Kenyan Foreign Minister who had become known for his willingness to speak out against high level corruption. The Board was unconvinced by the reasons offered by the judge for the high award, and felt that the judge had taken an unduly bland view of the minister's possible role.

Nevertheless, the evidence before the Board did not establish that this decision had been part of a pattern establishing judicial connivance in creating a shield for impunity around powerful figures.

The judge was also questioned at length about documents prepared at the time when he had embarked on legal practice which, it was alleged, could have

established that he had been liable for debts resulting from the collapse of a bank in which someone with whom at some stage he had been in partnership, had deposited money held by the firm. The majority of the Board felt that the evidence was too inconclusive to justify a finding against the judge.

The majority also took note of a number of highly creditable judgments submitted by the judge. Together with his general composure and erudition and the manner in which he appeared to embrace the values of the Constitution and the need for judicial reform, the majority felt that the judge was suitable to remain in office.

Three members of the Board, however, prepared a vigorous dissent which they sent to the judge. In their view, his conduct as a young lawyer evading responsibility for a debt incurred by his law partner had been unacceptable. The same applied to the entirely unjustified damages award he had given in the defamation case. In their view, the judge was not suitable to remain on the Bench.

Justice Martha Karambu Koome was one of only two judges who elected to be interviewed in public. A former Council Member of the Law Society of Kenya, she had been in the forefront of the struggle for human rights and defended political detainees on treason charges. She had been prominent in campaigns for the rights of women, as well as being active in the field of rights and welfare of children. In September 2011, the judge was elected Chairperson of the Kenya Magistrates and Judges Association.

At the interview the judge was questioned on the issue of joinder of parties which arose in one complaint. It was felt by some members that the position taken by the Judge had been incorrect and that by her response she had exposed her inability to properly understand, appreciate, interpret and apply the law.

The judge was also questioned over a succession matter flowing from a woman-to-woman marriage. While the judge was to be commended for recognising and dealing with the reality of the relationship, the manner in which she had disposed of the property raised doubts on her ability to properly understand and apply the law.

“Despite many hours of discussion, the Board was unable to reach consensus. The Board’s vote on suitability tied 4 to 4, one member having recused herself from the hearing and determination. In the circumstances, there being no clear majority one way or the other, the Board agreed that the judge was entitled to continue to serve”

The judge was questioned on the legal requirement for valuation and verification of assets before a distribution order is made. The judge said that she was aware of the law, but did not apply it, as it was an unnecessary expense on the parties. This position by the judge was felt to be unfortunate, as failure to value and ascertain assets could lead to a distribution that was not fair or just, as evidenced in the case.

In another matter, it was felt that the judge had shown a lack of fairness by upholding an appeal against a custody order made in the magistrate’s court. The judge had proceeded with the actual hearing of the appeal *ex parte*, without stating any reasons in the record for doing so, knowing full well that the complainant, who did not have the benefit of counsel, had been in court that morning, and was intent on being heard. In matters involving the welfare of children, it was imperative that all parties be granted a hearing by the court. It is also a tenet of natural justice, that all parties be accorded a fair hearing, and the courts must be extra vigilant to secure this right where a party is unrepresented. The judge’s haste in proceeding to hear the appeal in the absence of a party, in a case that the judge admitted was very emotive, displayed a lack of fairness and good judgment.

This, it was felt, fuelled a perception that she could be unduly predisposed to take shortcuts and lean one way in gender- related matters.

The other issue of concern to some members was the judge’s failure to have any regard to the fact that the children had been moved outside the jurisdiction of the court to Tanzania without leave of the court, and placed in the custody of persons not parties to the court proceedings, and to whom custody had not been granted.

These members felt that this ruling could now be cited to remove children from a court's jurisdiction without leave of the court, invoking the nefarious "best interest of the child principle", leading to an increased and flagrant defiance of the law, and, possibly, child trafficking. However, other Board members felt that the Judge's approach had been right. The judge's main point was that a full inquiry on custody was still to be made by a new magistrate. In the interim, it was in the best interests of the children to retain the emotional security of staying on in the custody of their aunt with whom they had grown up, rather than be plucked away and given to their biological father, whom they barely knew and whom they said they did not recognise.

Another area of concern raised by members of the Board was a disconnect seen to exist between the proceedings and the judgment. Facts appearing in the judgment were considered not to have been supported in the record of proceedings. This displayed a lack of diligence, and poor writing skills. The judge should try to work on these failings, and improve her ability to capture accurate records of the proceedings.

Other members of the Board, however, felt that the judge's good qualities far outweighed any deficiencies. Most of the cases for which she had been criticised were before the Court of Appeal. No suggestion had been made that in any of the matters the judge had been manipulating the law to promote impunity. Her integrity had not been impugned. She appeared to manage her case roll with aplomb. If there was concern that she was unduly intent on combating patriarchy, this was a matter to be discussed by the judiciary as a whole. And if in the meantime, she erred, she did so in favour of what she regarded as promoting human rights. In particular, she was to be commended for supporting the principle that the interests of the child should be paramount.

Despite many hours of discussion, the Board was unable to reach consensus. The Board's vote on suitability tied 4 to 4, one member having recused herself from the hearing and determination. In the circumstances, there being no clear majority

one way or the other, the Board agreed that the judge was entitled to continue to serve. There was, however, consensus that the judge should be reminded that in her commendable zeal to provide practical and fair solutions, she should always be aware of the danger of undervaluing the importance of maintaining legal rigour and providing sufficient documentation of each and every step taken.

Justice Kalpana Hasmukhrai Rawal received her law degrees in India, where she practised for three years under the tutelage of PN Bhagwati, a renowned human rights lawyer and pioneer of public interest litigation, who later became Chief Justice of India. After moving to Kenya she became the first female lawyer to establish private practice in Kenya (1975). Appointed to the Court of Appeal in 2011, in June 2012, she was made head of the Commission of Inquiry into the helicopter crash that caused the death of Honourable Professor George Saitoti and five other Kenyans.

During an extensive interview, a number of concerns arose. The judge was questioned over a matter in which she ordered the exhumation of the deceased person's body from a plot owned by one member of his family, to be reburied on a plot owned by another branch of the family. The complaint was that she had ordered the reburial without following the proper procedures for an order of exhumation. Her response was that the exhumation was to settle as quickly as possible a simmering family dispute, and that it turned out that her decision coincided with the wishes of the deceased as expressed in his will. The Board felt that nevertheless she should have found a way of ensuring that the strict requirements of the law were met and all cultural sensitivities carefully considered.

The judge was questioned at considerable length regarding her consistency in awarding damages in different areas of the law. Her decision to award compensation in the region of Kshs. 1 million to a worker who had suffered serious loss of bodily amenities stood in contrast to the five-times larger sum she had awarded to a wealthy individual for damage to his reputation.

The Board noted, however, that in a recent decision she had granted a very substantial sum of damages as compensation for prolonged detention and ill-treatment during the period of arbitrary repression. In a strongly reasoned judgment, she had emphasised that even if detention without trial had been authorised, as other judges had held to be the case, the Constitution at the time could not have sanctioned the degrading circumstances and prolonged character of the detention.

A considerable amount of time at the interview was devoted to examining a matter concerning disputed ownership and use of land that turned out to have great development potential. Her main award had in fact been in favour of the complainant and against his economically more powerful opponent. Yet the benefit of the award had been nullified, the complainant said, by onerous requirements attached to an order that he provide security pending the final outcome of the proceedings. Reference was also made to the fact that after the trial had been running for two years the judge had discovered on seeing a photograph in an affidavit, that when she had still been in private practice a number of years before, her firm had acted briefly for one of the directors of a company that was a party in the litigation. The judge had immediately brought this to the attention of the parties and asked if any of them wished her to disqualify herself. All the parties had however asked her to continue. The judge also acknowledged that when on a visit to Rwanda she had once stayed at the home of the sister of this director, but that had been well before the litigation in the matter under dispute. Some members felt she should have automatically disqualified herself.

Other members, however, while agreeing that the order for security had been stringent, felt that the complainant could have done more legally and financially to take advantage of the fact that the main award had been in his favour. They were also of the view that the judge had acted correctly in giving the parties the option to start the proceedings from scratch, without further costs and delay. Having agreed to her carrying on with the matter, it was not now open to any of them to complain simply because they were dissatisfied with aspects of the outcome.

Another complaint was that the judge had erred in backdating a sentence of imprisonment to run from the date of the offence rather than of the arrest. The judge acknowledged that this had been an error, but stated that it had been inadvertent and that she had supported correction by the appellate court. The Board accepted this explanation.

With regard to her acquittal of a prominent political figure on a charge of murder, the judge's denial that she had been aware of the identity of the defendant did not convince all Members of the Board. The judge explained that gross inadequacies in forensic evidence had left her no option but to acquit.

Questions were also raised about her having declared a law to be unconstitutional, with a resultant limitation on the ability of the Kenya Anti-Corruption Commission to require the furnishing of information to explain the origins of an official's private wealth. The judge pointed out that though she favoured vigorous investigation of corruption, the provision had put the onus of proving certain facts on the defendant, violating the presumption of innocence. The Board noted that the question of the constitutionality of reverse burdens of proof has been controversial in many jurisdictions. The judge's approach in this matter was defensible and was not demonstrated to be part of a pattern of decisions involved putting a strain on the law in a way that furthered impunity.

Finally, questions were raised about the judge's temperament. The judge herself said that, given the great volume of work, she was often anxious to speed things up. One view on the Board was that her temperament left much to be desired. Another view was that at most she showed a degree of impatience not uncommon in courts all over the world. There was consensus that there was no evidence to suggest grave temperamental problems, such as uncontrolled outbursts, bullying, or gratuitously wounding or belittling remarks.

Some members felt that, taken cumulatively, the above elements indicated that she was not suitable. The majority opinion however, was that her proven good qualities, manifested over a long period of time, outweighed the deficiencies; that

basically she was honourable and hard-working, with a genuine commitment to doing justice; and that amongst all the judges interviewed, she had been one of the few who had acknowledged that corruption had been rampant in the courts, mentioning that when in private practice she had given up criminal law because of its pervasiveness.

The Board was unanimous in calling upon the judge to take notice of the above points, and in particular not to allow any haste to get through her roll to impede calm and courteous treatment of all those who appeared before her.

After extensive deliberation, the Board found on a vote of 5 to 4 that the judge was suitable to continue serving on the Bench.

3.4 Judges Found Unsuitable

As mentioned above, findings of unsuitability were based on different grounds, namely, lack of fairness and impartiality; integrity and propriety; and work-style and temperament.

3.4.1 Fairness and Impartiality

A central question raised, particularly in relation to the past work record and pronouncements of senior judges, was whether they manifested a lack of fairness and impartiality.⁷⁶ The issue was both important and difficult; important because it touched directly on the very question that had contributed to the setting up of the Board, namely, to a lack of trust in the judiciary, with the result that perceptions of electoral cheating had been pursued murderously in the streets, rather than peacefully in the courts; and difficult because it impinged on two sides of the coin, namely, the duty of the judge to manifest independence of thought and decision-making, especially in matters concerning abuse of power by those in authority and the wealthy, on the one hand, and the right of judges not to be penalised for following their own conscience when making decisions, on the other.

The point of departure for the Board was that judicial independence must be jealously guarded; each judge has an individual judicial conscience; in any jurisdiction, some judges tend to be literalist in their approach to interpreting laws, others more purposive; some develop a reputation for being executive-minded, others for favouring the individual; some as being tough on crime, others soft. Indeed, judicial philosophy and approach can vary from judge to judge, decision to decision and country to country.

These were not issues of direct concern to the Board. Its queries, rather, related not so much to whether a particular case had been correctly decided on the facts or the law, but to whether the decision had been so extraordinary in itself, and so embedded in a larger pattern of legally-strained decisions, as to point to the existence of a judicial mindset that was manifestly lacking in fairness and impartiality. Associated with this was the issue of whether the decision(s) involved an unacceptable degree of bending of the law in order to achieve a pre-determined result favouring powerful personalities. The ultimate question was whether the degree and pattern of bending the law was of an order that would inevitably have undermined public belief in being able to get a fair hearing in litigation involving powerful personalities.

The Board found three members of the Court of Appeal, **Justice Samwel Riaga Omollo**, **Justice Samuel Bosire** and **Justice Joseph Nyamu**, to be unsuitable mainly on the ground of their lack of impartiality.

3.4.1.1 Justice Samwel Riaga Omollo

Justice Omollo was questioned extensively about his handling of a petition brought by Mr. Matiba, a presidential candidate in the 1992 elections, alleging irregularities in the voting process. Justice Omollo participated in two decisions of the Court of Appeal which had the cumulative effect of preventing the Elections Court from hearing this petition. The decision of the Court of Appeal was that Mr. Matiba, who had become paralysed following his detention by the state, could not authorise his wife to sign the petition on his behalf. The Board was astonished by

the totally unpersuasive technicism of the principal judgment, which had read the statutory provision concerned in a peremptory and totally literal way that excluded any possibility of signature by anyone else in any circumstances, even where the petitioner was unable to sign for himself because of physical incapacity. Justice Omollo had gone out of his way in the second of these cases to add a concurring judgment to the decision of the court, which the Board found to be particularly troubling. In addition to the concurrence reinforcing the main judgment's defiance of common sense and closing down of space for democratic contestation, it gratuitously showed grave disrespect for disabled people, castigated the petitioner in an ungenerous and uncalled-for manner that manifested no sensitivity to the fact that he could well have been paralysed as a result of torture, and appeared to curry favour with the incumbent President.

The judge was also challenged over a series of decisions he had given in other highly publicised political matters, in all of which he appeared to lean in favour of authoritarian repression rather than open up pathways for democratic expression. A particularly egregious aspect of one of these matters was that the President had publicly, and correctly as it turned out, predicted an outcome pleasing to himself, without the judge responding publicly in any way to what had been open humiliation of his office. The Board also examined whether Justice Omollo had upheld standards of judicial impartiality in private legal disputes. The Court of Appeal, with Justice Omollo presiding, had refused to re-open a case when approached by a litigant who tendered credible evidence that the judge who heard the case had placed himself in serious conflict of interest by allegedly assisting one of the litigants. The Board was left with the strong impression that the Court had not started with the law and ended with the result. Rather, it had for reasons of expediency manoeuvred the law in such a manner as to achieve a desired result, namely, to avoid having any dirty judicial laundry washed in public, even if this meant that a manifest injustice perpetrated by a member of the judiciary against a litigant would not be faced up to. The inevitable consequence was to further a public perception that in order to evade examining charges against one of its former members, the judiciary would re-interpret its own precedent, obliterate the

charge that court processes had been tainted, and leave the apparently wronged litigant out in the cold.

There was consensus amongst members of the Board on a number of positive features in the judge's career. He had given many years of service to the judiciary. He presented highly credible evidence of having been treated in a disrespectful manner by the then President in his early years on the Bench, at a time of the one-party state, when signs of independence, judicial or otherwise, were severely responded to. He had undoubtedly contributed in a multitude of signal ways to the life of the judiciary. Equally, there was consensus amongst members of the Board with regard to certain negative features. In particular, it was agreed that the judge had played an active role in frustrating rather than enhancing judicial scrutiny of alleged electoral irregularity, that he had manifested undue partiality in favour of the authorities at a time of severe political repression in the country, and that he had not held back from using his judicial authority to manipulate the law in order to achieve a result that favoured impunity, limited democratic expression and curtailed freedom.

The Board was divided, however, in relation to how the positive and negative features should be balanced out, more especially with regard to how the manifest failures of the judge in the past impacted on his suitability to continue serving on the Bench. A majority of the Board members considered that the negative features were exacerbated by the judge's lack of introspection when interviewed. These members also felt that the judge had not shown sufficient capacity for introspection and an ability to analyse in an objective manner the severe judicial failures for which he had been responsible at a difficult time in the life of the nation. The judge on his own admission stated that they had failed Kenyans and victims of the Nyayo House torture chambers. But he showed inadequate appreciation of how deeply and negatively the actual judgments he had delivered had impacted on public confidence in the fairness of the judiciary. A minority of members, on the other hand, were of the view that the manner in which he had adjudicated had to be seen in the context of the repression of the times; that he

was not a corrupt judge; that he had made many positive contributions to the judiciary over the years and that he still had a major contribution to make in the context of the new constitutional dispensation. By a substantial majority, with two members dissenting, the Board determined that Justice Omollo was unsuitable to continue to serve in the judiciary. He requested in terms of section 22 of the Act for review by the same panel.

Before dealing with the request by Justice Omollo, it is necessary to outline the manner in which the Board approached requests for review. Section 22 of the Act provides that the Board shall not grant a request for review unless it is based on the discovery of new and important matter, or on some mistake or error apparent on the face of the record. The decision by the Board shall be final.

The Board noted that the gateway for review was extremely narrow, namely, either the existence of new information or a patent error on the record. At the same time it and it alone had both the first and the final word on the suitability of the judge. It was accordingly incumbent on the Board not to lose sight of the need to respect natural justice in the pursuit of speedy completion of the vetting process. The Board should thus lean in favour of an interpretation that permitted the review to proceed, and not be ultra-technical or unduly formalistic. At the same time the Act required it to make a very large number of Determinations in a short period of time. If called upon to revisit fully every finding of unsuitability, because it had to deal with a total appeal rather than limited review, it would never be able to complete its work.

The first issue to be decided in relation to each matter was whether a case had been made out for granting the request for a review. If the answer was that it had

“ The first issue to be decided in relation to each matter was whether a case had been made out for granting the request for a review. If the answer was that it had been, the panel would have to consider and the Board decide whether a case had been made out for reversing the decision of unsuitability”

been, the panel would have to consider and the Board decide whether a case had been made out for reversing the decision of unsuitability. Adopting this approach, Justice Omollo's submissions were considered after having been highlighted by his counsel. He argued that there had been two major errors of law. The first was that he had been found unsuitable on the basis that his decision in *Rai Plywood*, in which five judges had sat, had fallen short of judicial impartiality, whereas two other judges on that panel had been found to be suitable. In the Board's view this argument ignored the fact that his signing on to that decision had only been a part of the elements that had been weighed in the scales. Other and far weightier considerations, not present in the case of the other two judges, were felt by the majority of the Board to be highly relevant. The second major submission was that he should have been given notice that the Board wished to ask him about the *Matiba* case, thereby denying him his right to natural justice. The Board observed that a judge's pronouncements are part of his work record that the Board is obliged to examine. In a Judicial Service Commission interview held in the previous year, the issue of his judgment in *Matiba* had been sharply raised, and he had every reason to expect that the Board would ask similar questions. Mr. Matiba had been a presidential candidate, the case had been a high-profile one and the judge had been willing to answer questions about it, despite initial protest by his counsel.

In the result the judge had not produced an application that met the necessary criteria, and his application for review could not succeed.

3.4.1.2 Justice Samuel Bosire

Issues of fairness and impartiality were also central to the determination of the Board that **Justice Samuel Bosire** was unsuitable to continue in office. Justice Bosire was questioned at length about his conduct as Chair of the Commission of Inquiry into the Goldenberg Affair. The Commission had been formed to investigate claims that billions of Kenya shillings had been misappropriated through questionable transactions that attracted state subsidies for the export of gold. Prominent personalities at the highest levels of government were said to be implicated.

Justice Bosire was asked about his response to an order of the High Court to the effect that the Commission should summon ten prominent public figures, including the former President, to testify before it. In his vetting interview before the Board, Justice Bosire took the view that the court order was not binding upon him, and appeared to have defied that order, adding by way of explanation that he had no power to compel the persons in question to attend the Commission. The Board expressed its deep concern about this response.

This assertion flew in the face of an explicit provision in the Commission of Inquiry Act stating that every Commission shall have the power of the High Court to summon witnesses. The judge then went on to contend that the affected persons enjoyed the right to silence, and that he as presiding officer could do nothing about what he called the decision “to keep mum” on the allegations made against them. The Board found this to be an extraordinary reading of the law. The very purpose of the Commission was to dig and delve into matters of great public concern, involving huge sums of money, in relation to which the Commission had to decide whether senior public personalities were implicated. If it had summoned the key witnesses in the manner ordered by the High Court, it would then have been up to the witnesses to decide whether to defy the summons and bear the consequences, or appear before the Commission and claim their right to silence, and bear the consequences. The Commission’s responsibility was to break the silence, and not to invoke it. The responsibility for investigating a scandal of this order did not rest with the judiciary alone, since Parliament and the Attorney-General might have failed to fulfil their responsibilities. But the failure of others did not diminish his failures, given the centrality of the Goldenberg Inquiry in the life of the nation and the completely unpersuasive and legally indefensible manner in which he defended his refusal to summon prominent personalities put on notice of adverse mention. His conduct as Chair of the Commission of Inquiry was thus seen by the public as providing a crucial link in the chain of impunity that linked many public authorities.

When asked about the causes of the low levels of public confidence in the judiciary, Justice Bosire suggested that the main reasons were that a lack of resources

facilitated corruption in the judiciary and that it was not uncommon for politicians to further their own interests by alleging that judges were corrupt. The Board found that the profound problems facing the judiciary could not be explained away in the simplistic terms offered by the judge. On the contrary, the defensive tone which he adopted was indicative of a resistance to acknowledging the moral and jurisprudential failures which had led to a plummeting degree of confidence in the judiciary, which ceased to be looked on as an honest and impartial arbiter of people's rights. Members of the Board were unanimous in concluding that Justice Bosire was unsuitable to continue to serve in the judiciary.

“ In the Board's view this [requesting for the recusal of Professor Ngotho wa Kariuki] was equivalent to saying that a judge who had been involved in divorce proceedings should not handle divorce cases, or that one who had been a victim of crime should not sit in criminal trials.”

Justice Bosire requested a review under section 22. He submitted that the determination contained errors on the face of the record in three main respects. The first was that the determination suggested that he had condoned the use of torture or presided over trials in which such abuse occurred. A perusal of the determination made it clear that the Board had at no stage made such findings against him. The Board had in fact commented on his defensive attitude and lack of outrage at the tortures that had taken place. This had been after his counsel had suggested that the existence of torture was not notorious, and that witnesses who had been tortured should have been called. Further, his counsel had produced evidence that one of the Board members (Professor Ngotho wa Kariuki) had been a victim of torture and should not have sat in the hearing. In the Board's view this was equivalent to saying that a judge who had been involved in divorce proceedings should not handle divorce cases, or that one who had been a victim of crime should not sit in criminal trials.

The second assertion of error on the face of the record

was that the Board had erred by failing to give him notice that it wished to discuss matters not the subject of specific complaints, namely, his conduct as head of the Goldenberg Commission and as Judge Advocate. The Board noted that in his CV he had referred both to his work on the Goldenberg Commission and as a Judge Advocate. This formed part of his past work record which the Board was required to consider.

The third submission was that the Board had erred in finding that the judge had deliberately and flagrantly defied the High Court order requiring the Commission to compel the attendance of certain high profile figures. In fact, the Court of Appeal had temporarily suspended the High Court order pending the hearing of an appeal. The Board noted that the judge had not raised this point at the time of the interview and that it could not be said to constitute an error patent on the record. Nevertheless, the Board was reluctant to perpetuate an error, even if originally of the judge's own making. In order to protect the integrity of its own processes it would strike out any reference in the determination to the judge having defied a court order. The Board accordingly reconsidered afresh whether on all the findings that remained undisturbed the judge was suitable or not. In doing so, the Board considered that, given the centrality of the Goldenberg Inquiry in the life of the nation and the completely unpersuasive and legally indefensible manner in which he defended his refusal to summon prominent personalities put on notice of adverse mention, his conduct was seen by the public as providing a crucial link in the chain of impunity. This severely damaged public confidence in the judiciary in an important moment in the life of the nation to such an extent as to render him unsuitable to continue in office. The Board reaffirmed its determination that the judge was not suitable.

3.4.1.3 Justice Joseph Nyamu

Justice Joseph Nyamu was the third member of the Court of Appeal to be found unsuitable on grounds which included a lack of fairness and impartiality. The Board was particularly concerned about a period during the latter part of the judge's tenure



President Kibaki shares a light moment with Board members

as head of the Constitutional and Judicial Review Division in Nairobi, when a leading advocate alleged that the judge had served as a “gate-keeper” for powerful vested interests, an allegation which the judge dismissed in vehement and unbecoming terms by attacking his critic. The Board found that at the beginning of his tenure Justice Nyamu had contributed to the fight against corruption, particularly when he delivered the aforementioned High Court decision which required the Goldenberg Commission of Inquiry to summon certain prominent persons to appear before it. However, this stance soon gave way to a series of decisions that seemed to disclose a very different pattern. One after the other, attempts by prosecuting authorities to hold prominent business or political figures to account were frustrated by rulings given by the judge. Moreover, in each case, the rulings appeared to strain the law to such a manifest degree to produce impunity as inevitably to raise doubts in the public mind in relation to the impartiality of the courts.

This series began with Justice Nyamu's decision in the *Saitoti* case in 2006. In this case, the judge decided to expunge portions of the findings presented in the report of the Goldenberg Commission, and to order a permanent stay of prosecution against the late Professor George Saitoti on the grounds that because of the unreliable findings of the Commission that were in question and the period of time that had passed, Professor Saitoti could not receive a fair trial. The public could be forgiven if it felt that instead of showing at least a minimum of judicial resolve to keep open the possibility of appropriate accountability for at least one of the major figures whose name had featured prominently in relation to the huge scandal, the judgment drove the last nail of impunity into the coffin against him. The implication that no magistrate in the country could give a fair judgment was insulting and unacceptable. The pattern continued with stays of prosecution in the *Koinange* and *Kotut* cases, both ordered by Justice Nyamu on grounds including the unreliability of findings made by the Goldenberg Commission. The would-be defendant in the second of these cases was the Governor of the Central Bank of Kenya, who was alleged to have permitted the fraudulent movement out of the country of KSh 3.5 billion. The Board noted the use of relentless repetition rather than calmly-stated logic as the basis for the judge's ruling, which was indicative of a lack of balance.

Justice Nyamu also granted orders restraining investigations into corruption associated with the Anglo Leasing scandal. In the *Nedermar* case, the judge halted investigations by the Kenya Anti-Corruption Commission (KACC) into alleged corruption in the sale of military equipment and ordered the return of passports which had been seized to prevent some of the suspects from fleeing the country. This judgment also exhibited questionable reasoning, and a willingness to err even further on the side of secrecy than the military had requested. Similarly, in the *Khamani* case, another decision relating to the Anglo Leasing scandal, the judge had again ordered the release of passports seized from those suspected of involvement in corruption, and relied on a "strange and tortuous reading of the law" in order to do so.

The judge was asked to comment on the claim made by his critic that decisions

like the above had encouraged public perception of a judiciary shielding prominent personalities from corruption charges. His answer was two-fold. In the *Khamani* case, he said, the order that passports be returned would in fact have aided investigations and prosecutions, because the alleged masterminds could now use the passports to return to Kenya to face the music. Secondly, the judge pointed out that he had given decisions against the government in cases involving the environment, as well as one where he had nullified a huge award of costs that poor people were being called upon to pay. In the Board's view, these responses evaded the question put to him, and failed to show appreciation of the damage done to public expectations of judicial impartiality caused by the series of judgments referred to above. In conclusion, the Board was unanimously of the view that Justice Nyamu was unsuitable to continue serving in the judiciary.

Justice Nyamu requested a review under section 22. In his request, the judge sought to introduce what he called a new and important matter in the form of a sworn statement by the land registrar stating that the transaction had been a proper one. The Board explained that even if it accepted counsel's explanation for not having tendered the document timeously, it was not persuaded that it would be "important" in the context, considering the Board had been at pains to stress that it was not making any finding at all on the merits of the dispute. Similar reasoning applied to a resolution by the company controlled by the judge authorising the purchase of the land. Secondly, the judge claimed that he was entitled to raise new arguments about cases where the Board had criticised him for contributing to a culture of impunity, because he had not been given sufficient notice that the Board wished to question him about these cases. The Board noted that the cases involved pronouncements relative to

"Judicial corruption is not the only way in which judges may fail to have integrity, but it is one of the most serious. In a number of cases complainants stated they were sure the judge had been compromised, but then were unable to provide any solid evidence to back up their assertion"

his work record in high profile matters, which had been raised in his Judicial Service Commission interviews as well as in the press. Furthermore, a Board member had expressly advised him at the conclusion of a hearing day that on resumption he would be asked about Saitoti and other cases. The judge had in fact addressed these cases, and his critics, in further written submissions presented to the Board before the resumed hearing. The judge was merely seeking a second bite of the cherry.

Counsel raised a number of other questions challenging the manner in which the vetting process was being conducted as well as the guiding principles established by the Act. These submissions in effect amounted to a challenge to the constitutionality of the vetting process itself. They invited the Board to make a finding that its mandate was unconstitutional. This was an invitation that the Board could not accept. In the result, the judge's request for review did not meet the established criteria, and could not be granted.

3.4.2 Integrity and Propriety

Judicial corruption is not the only way in which judges may fail to have integrity, but it is one of the most serious. In a number of cases complainants stated they were sure the judge had been compromised, but then were unable to provide any solid evidence to back up their assertion. Two possible conclusions can be drawn from the dearth of substantiation. The first is that the general public perception about levels of judicial corruption, confirmed by the report of the Task Force on Judicial Reform headed by Justice Ouko, and acknowledged by some judges at the interviews,⁷⁷ was out of keeping with reality. The second is that there were extraneous reasons why the evidence did not arrive at the Board. The Board is inclined to adopt the second position.

It would have been expecting too much for people to come forward and declare that as patriotic Kenyan citizens seeking a clean judiciary, they were willing to go to jail and have judgments favourable to them set aside. Similarly, those advocates who must have been most in the know about what was going on did not avail the

Board any knowledge they might have had. The Act gave no express authority to the Board to grant indemnity to persons willing to acknowledge their participation in compromising judges. Meanwhile the Board itself had only minimal investigative capacity and, unfortunately, was unable to get much assistance, if any at all, from agencies tasked by law to root out corruption.

The Board is accordingly of the view that the complaints that reached it of corruption represented only the tip of the iceberg, or, to localise the metaphor, the ears of the hippopotamus. Yet, even the most justified assumption of widespread corruption in the courts, would not permit the Board to jump to negative conclusions about a particular judge in a particular matter. In each case the Board had to accept the need to be guided by the actual evidence before it, and not by generalisations.

The Board also had to consider complaints alleging lack of high moral character in professional life, as well as failure to understand the need to maintain propriety and the appearance of propriety.⁷⁸

Allegations were made that while still in private practice, some judges had failed to measure up to the standards expected of them. Other allegations concerned the manner in which judges participated in what is popularly known as land-grabbing. The argument was that whether or not the acquisition of land had been lawful under the law as it stood at the time, the benefits associated with the holding of public office had been so untoward and so extensive as inevitably to compromise the appearance of independence of the judge in the public eye.

It should be added that in all matters dealing with integrity, the candour of the judge concerned at the interview was regarded as being of special relevance. Even allowing for the fact that the vetting process was inherently stressful there could be no justification for a judge to attempt to deceive the Board in anyway.

Five judges were found to be unsuitable on grounds of lack of integrity or failure to maintain propriety. One of these was a member of the Court of Appeal, **Justice Emmanuel O’Kubasu**, who filed an application for the Board to review its decision,

which was later dismissed. The other four judges were members of the High Court, and it must be emphasised that their determinations of unsuitability remain subject to review.

Justice O’Kubasu was questioned in relation to several matters in which impropriety was alleged. In one matter, which was reported to the Board by the LSK, the witness ran a butchery, and one of his customers was the judge. After falling out with his landlord and facing eviction from his premises, the witness got in touch with the judge to find out what he should do. The judge advised him to get a lawyer. He did so, and the lawyer duly filed proceedings in court to get a stay of eviction. The matter came before the judge, who granted the stay. Sometime thereafter, when the witness heard that the judge was going to visit London, he invited the judge to stay as a guest at a hotel in London, which belonged to the witness’s brother. After the judge’s interview, in which the witness also appeared and was questioned by the Board and counsel for the judge, the Board was left with grave concerns about two matters. First, the judge stated that at all material times he had been unaware that the witness had been the litigant in question. Having heard the evidence and questioned the witness and the judge, however, and bearing in mind the general familiarity between the two of them, the Board found this assertion to be quite implausible. Secondly, with regard to the stay at the hotel in London, there was a head-on conflict between the judge and the witness, who claimed to have met the judge while he was staying in the hotel. The Board could find no reason why the witness should invent his story. He made it clear several times in his evidence that he regarded the judge as his friend and had no grudge against him. Indeed, it became clear on a number of occasions when he was testifying, that he was protective of the judge and unwilling to give damaging evidence against him. The Board accordingly came to the firm conclusion that the judge had undoubtedly not been candid when he denied to the Board that he had stayed at the hotel and the bills had been taken care of by the witness. Whatever inference might or might not have been drawn from an acknowledgement by the judge that he had indeed enjoyed the hospitality of the witness’s brother at the time, the Board took a very

serious view of the willingness of the judge to attempt to mislead it on the factual issues involved.

In another case the complainant, an advocate, pointed to a number of inconsistencies in a judgment delivered by the judge. The complainant testified that he had heard that the judge had been bribed in this matter, but his evidence was hearsay upon hearsay, which the Board could not accept as proof of bribery. However, the judge displayed a disconcerting lack of candour when questioned about his relationship with a prominent businessman, who had a beneficial interest in one of the companies which were party to this case. The judge denied knowing the businessman, and insisted that he had never heard of him. This latter statement was unconvincing, given that the businessman was a figure very well known to the public in Kenya.

The Board found that Justice O’Kubasu had failed to maintain the propriety that is required of a judge. This was evident both from his conduct in relation to the butcher’s case and from his lack of candour when questioned about these and other matters before the Board. In his favour, the Board acknowledged that the judge had resisted political pressure in the past and refused to convict accused persons against the evidence, including when Prof. Ngugi wa Thiong’o was brought before him on trumped-up charges. The judge had, however, failed to meet basic requirements of impartiality and integrity. The Board concluded, with one dissent, that he was unsuitable to continue to serve in the judiciary.

Justice O’Kubasu requested a review under section 22. His three principal submissions challenged various factual findings of the Board. The Board decided that these submissions were not based on errors of fact apparent on the face of the record, with the result that the application for review could not be granted.

In the case of **Justice Leonard Njagi**, the Board was asked by the Ethics and Anti-Corruption Commission to consider an allegation that the judge had been involved in the illegal transfer of land belonging to the Kenya School of Law. While the judge

was principal of the Kenya School of Law, a parcel of its property was transferred to a private company in which he was a director. The property in question included a residence that was occupied by the judge. When questioned about this, the judge claimed that he had been forced to transfer the property by a man who was introduced to him by a former student. The man visited the judge in his office while armed with a gun and insinuated that he had contacts in the intelligence services and could do anything. The judge said that, at the man's insistence, he had signed papers to authorise the transfer of the land. More than ten years had passed since this incident, however, and yet the judge had not reported it to anyone. The Board found it to be unbelievable that someone of the judge's stature could be coerced into signing a document and then fail to report the illegality, and concluded that his account was implausible. On the other hand, if he had indeed allowed himself to remain silent, that would confirm that the judge did not have the mettle to decide cases without fear or favour. The Board, with one member recusing, unanimously concluded that the judge was unsuitable. As in the case of the other High Court judges, this determination remains subject to review by the Board.

In the case of **Justice Muga Apondi**, the Board also dealt with a land transaction. The issue was whether it had been proper for the judge to accept an allocation of state land in the judiciary compound where he was stationed, which he resold within months to a private buyer at ten times the price he had paid. The Board's concern in this case was not whether the judge had broken the law when acquiring and then selling the land at a huge profit. It was whether, even if the transactions were lawful, they were appropriate, particularly for a judge. When questioned, the judge appeared unable to distinguish between what was legally permissible on the one hand, and what was judicially wise on the other. He personalised the complaint made against him by challenging the integrity of the complainant and stating, without providing any evidence, that officials of NGOs made their living from using foreign donations to bring complaints of this kind. Finally, the judge insisted that there was no difference between the benefit he received and the benefits all judges are entitled to today under legislation permitting judges to get

housing finance at government-subsidised interest rates. It is troubling that the judge should equate a benefit made available equally and by statute as a matter of legal entitlement to all judges, to discretionary allocations made by officials of the Executive to judges who could be seen as finding favour with them.

The propriety of this land transaction was not the only matter of concern to the Board in Justice Apondi's case. A majority of the Board considered that the judge would appear to have lost his objectivity in circumstances where he felt that his role as a judge was being challenged in any way. Instead of responding with composure and an open mind to legitimate questions raised about his disqualifying himself because of pressure, bringing in the police to investigate an advocate who had angered him and making a quick coup out of getting and selling state land associated with the judiciary, he had retreated into an obdurate defensive/aggressive mode, personalised his response to the critics, and failed to manifest the serenity and objectivity required of a judge. Another view was that although the judge's conduct left something to be desired, he had shown himself to be a hard-working, committed and experienced judicial officer. Merely being in receipt of an allocation of state land should not invariably lead to a judge being found unsuitable, and the Board had accepted another judge as suitable who had been allocated land even though the allocation had been disputed and was the subject of pending court proceedings. The majority considered that the circumstances of this allocation and the judge's failure to appreciate the impact on public perceptions of judiciary were matters of particularly serious concern in this case. Justice Apondi showed an inability to understand that the public would have specially high expectations that judges would conduct themselves in an impeccable manner and refrain from deriving windfalls from what would be perceived as an unduly cosy relationship with public officials whom they might one day be called upon to hold to account. Instead, he simply re-iterated that what he had done had been lawful, and required no reconsideration. The Board decided by a clear majority that Justice Apondi was not suitable to continue to serve. As in the case of the other High Court judges, this determination remains subject to review by the Board.

Justice Joseph Sergon faced allegations of financial impropriety both while on the Bench and during his previous career as an advocate. His conduct as a judge was questioned in relation to a case in which the complainant alleged that the judge was influenced through corruption to deliver a ruling against him and others; and that the judge accompanied one of the parties to the bank in suspicious and questionable circumstances immediately after the delivery of the ruling. The complainant testified that on the day on which Justice Sergon delivered his judgment, he saw the judge enter first one bank and then another in the company of a litigant who had been party to the case just concluded. Furthermore, the complainant testified that a mole had informed him that a certain sum of money had been transferred to the judge as a bribe. Although this part of his evidence was hearsay, the Board found two unusual deposits in the judge's bank statements for the relevant period, which were of amounts of the order of magnitude suggested by the complainant. The judge offered inconsistent explanations of where this money had come from, and failed to deliver more comprehensive information on these transactions as promised. The panel and the Board considered that, although a negative inference was not to be drawn lightly, they were satisfied that the allegations were credible. The complainant had no incentive to fabricate his story. The court case was finalised and the complainant would not receive any benefit through attacking the judge. Moreover, he made the original complaint at the time when the events occurred. Taking all the evidence and facts into consideration, the only conclusion available to the panel was that the judge was covering up the truth, and lacked fiscal integrity.

The Board also considered allegations that while in private practice as an advocate, Justice Sergon had failed to repay money received on behalf of a client, some of which was eventually repaid in instalments. The reasons provided by the judge for not handing the money over to the client were unsatisfactory from the beginning. Following repeated requests, the judge produced only a partial set of bank statements for his former law firm during the relevant period, after previously suggesting that the firm's records had been destroyed when it was subsequently wound up. The panel which interviewed the judge considered that this amounted

to an attempt to cover up past misdeeds and to mislead the Board. Three members of the Board were absent from deliberations on the judge's suitability. This left a majority of six, and their conclusion was that Justice Serگون was unsuitable to continue to serve. The judge has since applied for review, and the application has been heard. A decision is pending

3.4.3 Work-style and Temperament

Section 18 of the Act requires that, amongst other things, the Board must take account of:

- Professional competence, which includes the ability to work well with a variety of people;
- Demonstrable possession of compassion and humility.

In considering the question of work-style and temperament,⁸⁰ the Board noted that judges are not automatons. If they cannot feel the laughter, sorrows, anger and joys of humanity they should not be on the Bench. They are human beings drawn from the ranks of the people, acting in the name of the people and dealing with the conflicts and passions of the people. They too have their emotions, their pride, their sensitivities and their disappointments. And yet as judges, while retaining close links to the people, they have to abstract themselves from the ordinary hurly-burly of popular life. That, indeed, is the judge's dilemma - how to be compassionate, and dispassionate, at the same time. Public trust in the fairness and objectivity of the courts is central to the successful operation of the judiciary. If the courts themselves behave in an unjust way, then the public loses confidence both in the judiciary as an institution, and in the Constitution as the basic law of society.

Even though in the most difficult times many Kenyan judges had fulfilled their functions with dignity and fairness, far too many others had become identified with arbitrariness and intrigue. Cultivating an imperial style, they had exhibited in every action a hauteur that separated them from the *wananchi*. Any criticism

of the way they worked had been treated as an attack on them as persons so that intolerance became the order of the day. Contempt of court proceedings instituted in the name of upholding the dignity of the courts, easily morphed into clumsy mechanisms for preserving the self-esteem of thin-skinned and easily-wounded judicial officers. Judicial caprice created a climate in which advocates hesitated to do their duty to speak fearlessly.

As guardians of justice, the courts had themselves to be just in everything they did. Their authority should have come not from the awe they commanded, but from the respect they earned. Their courts should have been places of welcome, not of fear.

Decisions rankled not just because the litigants had lost their cases, but because the litigant believed the judges had behaved in an arbitrary, disrespectful and abusive way. Yet everyone who entered a court was entitled to receive equal concern



Sharad Rao (Chairperson), Reuben Chirchir (CEO) and Joan Vwamu (Programme Officer – UNDP) during a media briefing on progress of the vetting process.

“Just as in the animal kingdom there would be equal place for the elephant and the gazelle, so too in the judiciary there must be space for every range of personality.”

and protection. There should have been no room for uncivil, arbitrary or unduly subjective emotionalism by the judge. The judicial oath may not require judges to love their litigants as themselves, but it does obligate them never to despise, belittle or wound their litigants in a way that they would not permit being done to themselves.

Once more, however, when dealing with questions of work-style and temperament, the Board had to avoid generalisations about the past. It also had to be on guard against being unduly swayed by the bitterness that many litigants feel after losing a case. Similarly, it could not insist on perfection of conduct in a judiciary that was understaffed, lacked appropriate facilities and

organisation, and had little benefit of training. Finally, the Board could not attribute too much personal responsibility to individual judges who had merely reflected a general judicial culture of haughtiness; it was the unsuitable culture that needed to be eliminated; not the individual judge.

In these circumstances it was only when complaints of judicial arbitrariness and subjectivity indicated conduct exceeding reasonable bounds that questions of unsuitability would arise. The Board bore in mind that each judge was an individual with his or her own style of work and temperament. Some judges hardly opened their mouths, while others never closed them; some were emotionally inscrutable, while others wore their hearts on their sleeves. Just as in the animal kingdom there would be equal place for the elephant and the gazelle, so too in the judiciary there must be space for every range of personality.

What mattered was that differences of individual work-style and temperament should not have been so capricious as to transgress certain shared parameters of expected judicial behaviour. In particular, behavioural tics should not have been so

exaggerated as to affect the manner in which justice was done, and was seen to be done. Accordingly, the particular work-style and temperament of a judge should not have been of an order likely to:

- Distort the fair and just outcome of the case; or
- Affect the fairness of the process as experienced by all those involved in the litigation, and witnessed by the public and the media; or
- Tarnish the reputation of the judiciary as an institution playing a key role in upholding constitutional democracy.

There was no simple formula for evaluating failures in respect of work-style and temperament. In making an overall assessment of suitability, the Board looked to a number of factors, including:

- The context, impact and consequences of the proven arbitrariness of the judicial conduct;
- The extent to which it violated well-established and internationally-accepted norms of judicial conduct; and
- Its persistence, repetition and impact on public confidence in the judiciary.

In doing so, it was accepted that judges had good days and bad days. Also, that if every frown or impatient gesture would render a judge unsuitable, then the Bench could be completely denuded of incumbents. The ultimate test would be whether, bearing in mind all the difficulties under which the judiciary was operating, and acknowledging that a degree of robustness and lack of polish did not necessarily need to be fatal, the judge's conduct was so injurious, so repetitive and, in all likelihood, so unamenable to correction, that any reasonable member of the public would say: "That's just too much, this person is incorrigible and simply not fit to be a judge!"

Complaints regarding work-style and temperament were laid against many judges. Board members frequently found it necessary at interviews to draw the attention of judges to the importance of handling judicial matters in a calm, courteous and fair manner. In three matters the issue of work-style and temperament became central to the ultimate decision on suitability. All three matters remain subject to review by the Board⁸¹.

In the case of **Justice Mary Ang'awa**, a general complaint was that the judge had a habit of detaining lawyers, litigants and witnesses in her court at her pleasure. A specific complaint came from a senior advocate against whom the judge had issued a warrant of arrest for contempt of court on the grounds that he had failed to be in court to hear a judgment delivered by her. A second complaint came from a doctor called as an expert witness, who had been humiliated by the judge for coming directly from work in a bush shirt and then subjected to a summons for contempt for returning to his work after completion of his evidence without her permission, and then made to wait unnecessarily for hours in court.

The greatest cause for concern was the inability of the judge to see that her style and conduct had been unbecoming and not justified by law or practice. The judge was adamant that her style had helped restore order and sanity in the courts and root out corruption. The Board respectfully disagreed. It was not looking for an insincere, hand-wringing apology coerced by the vetting process. Rather it sought to discover whether the judge had any insight into how rigid and bizarre her exercise of power had been. The lack of introspection and acknowledgement of the effect of her inappropriate manner of proceeding, led to the conclusion that her unsuitable conduct in the past would continue into the future. The Board unanimously, with one member recusing, found Justice Ang'awa unsuitable to continue serving on the Bench.

Justice Murugi Geteria Mugo also faced a number of complaints about her temperament. The Rift Valley Law Society described the Judge as moody, abrasive and insulting and alleged that she had frequently been absent from

her station. One advocate complained that the judge refused to hear him when his matter was before her, and asked him to leave her chambers, and that this resulted in a miscarriage of justice. The judge admitted that the advocate was in her chambers but offered no plausible reason for failing to hear him. Another advocate complained that the judge had him detained for contempt of court, after he sought her recusal in a matter. The judge took offence at the application and stated that the advocate had made serious unfounded and untrue allegations against her, thus lowering the dignity of the court. The advocate apologised and said, “If I have sounded impertinent...”. The judge took offence at the word “if” and immediately committed the advocate for contempt. The Board finds that that was extreme in the circumstances. Indeed, she defended her actions, and showed a lack of remorse or capacity for introspection. The inability of the judge to see that her conduct was unbecoming and detrimental to the parties appearing before her was disconcerting. Some indication from the judge that she understood that her conduct was improper and affected access to and dispensation of justice in her courts would have ameliorated the issue. The Board decided by a majority of seven to one, with one member abstaining, that she was unsuitable to continue to serve in the judiciary.

3.4.4 Good Judgment and Access to Justice

As already discussed, the Board was required to consider the work record of the judge, including prior judgments and rulings, to see if it manifested any departure from the qualities expected of a judge. Although the Board was not a court of appeal, it would be alert to any signs that a judge either deliberately engaged in bending the law to favour powerful personalities, or had simply displayed, inadvertently or otherwise, such a lack of good judgment, practical sense and sensitivity to constitutional values as to frustrate access to justice for the people of Kenya who appeared in the judge’s court.

When assessing whether a judge possessed good judgment, the Board was required by the Act to consider whether the judge was able to strike a “sound balance between abstract knowledge and practical reality” and whether the judge

could “resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles”.⁸² One judge who was a member of the High Court was found to be unsuitable on this ground.

The principal complaint against **Justice Jeanne Wanjiku Gacheche** was made by the Law Society of Kenya. It concerned unprecedented blanket conservatory orders issued by the judge with wide and adverse consequences for thousands of claimants who had been insured by the three companies concerned. A perfunctory response by the judge showed little appreciation for the manner in which she had damaged public confidence in the judiciary, extending ex parte orders without hearing opposing argument. The Board, with one vote against, was of the view that the judge was unsuitable to continue serving on the judiciary.

The judge requested a review under section 22. Two principal arguments were advanced. The first was that a member of the Board should have disqualified himself because he had once been an official of the LSK. The Board noted that the judge had been asked at the interview whether she had any objection to any of the members sitting and she had replied: “No, I do not have”. There was nothing to show that the member’s firm had, unbeknownst to her, in fact been involved in any way in the frustrated insurance matters. To justify disqualification, some connection with the judge, or some interest far more direct and specific than having once served in the LSK, was required.

The second argument was that the Board had made errors of fact and law by acting without evidence of the harm done to litigants, law firms or public confidence. The Board noted that an estimated four thousand litigants had learnt from notices published in the press that any litigation they had undertaken to secure compensation from companies with which they had been insured, had been halted. Many had already won awards in the courts, which they could not collect. And far from sitting as a court of appeal in the matter, the Board had merely affirmed what the judge’s colleagues on the High Court had ultimately held, that her intervention in favour of the insurance companies had had no basis at all in law.

The Board therefore concluded that a case had not been made out for the determination to be reviewed.

3.4.5 Intellectual Capacity and Diligence

In the case of **Justice Joyce Nuku Khaminwa** of the High Court, the Board found no indication that the judge had in any way compromised her integrity. The Board was not concerned with lack of impartiality, temperament, or delay. Indeed, the judge had a history of outstanding performance in pursuit of justice. However, it became clear over the course of the interview that she had been slowed down by illness, from which she had not fully recovered. She had difficulty in finding the strength and composure to manage a single day's vetting interview. The Board accepted the judge's assurances that she was no longer ill. However, in light of concerns arising out of the interview process, the Board expressed serious doubts as to whether the judge possessed the energy, focus and concentration to do the arduous work required of a judge. These factors necessarily impacted on both the capacity and competence of the judge. On this basis, the Board found Justice Khaminwa to be unsuitable.

3.5 Judges found Suitable but with Caveats

The issue of how delay⁸³ in rendering judgments and rulings impacted on the suitability of judges occupied much attention from the Board. It raised a number of special problems and led to considerable public controversy. As will be seen below, it also resulted in the Board producing a cluster of determinations of suitability, which were made subject to a number of express caveats.

3.5.1 Delay

The Board's focus was not so much on the notorious systemic delays which plagued the justice system but were frequently beyond the control of individual judges. It was on delay at a stage when the judge was peculiarly in control, when the time had come for delivering judgments and rulings in matters where evidence and

argument had been completed. Delivering judgment was, indeed, the judge's core function. It was neither a favour nor a courtesy to the litigant. On the contrary, it was the aspect of a judge's work that most directly invoked his or her individual conscience and literally lay in his or her hands (or, if delivered orally, issued from his or her mouth).

The preparation of reserved judgments is by its nature a private and lonely activity that requires the greatest self-motivation for a judge. The litigants have entrusted their fate to the judiciary, investing their hope, money, time and nervous energy in the legal process. Then, to their dismay, they find that all their expectations are suddenly and indefinitely immobilized by the dilatoriness of the judge. Leaving litigants in limbo grievously undermines the dignity of the court. It encourages corruption and inspires resort to forcible or cunning self-help. In addition courts play an important role in facilitating investment (both domestic and international), economic growth, commerce, industry and development; delay in the delivery of decisions frustrates this process. It is the enemy of the rule of law; it tarnishes the prestige of the institution, diminishes the esteem of the judge or judges responsible and raises serious questions about their suitability to remain in office. The people of Kenya wanted to enjoy all the rights promised to them in the Constitution; they wanted to do so not in some imaginary world of abstract words, but in the here and now of their daily lives. It was not right that they be condemned to ask for the bread of justice, only to receive the stone of silence.

The Board was accordingly required on a case by case basis to make an overall evaluation of where a particular judge responsible for delays should be located on the broad spectrum of default. In doing so, the Board relied on the evidence before it and its knowledge of the difficulties under which judges laboured. In making this ultimate value judgment, it sought to give appropriate weight to the nature and extent of the individual failure of the judge concerned, in the context of systemic and institutional problems, particular work situations and relevant

“The Board was accordingly required on a case by case basis to make an overall evaluation of where a particular judge responsible for delays should be located on the broad spectrum of default. ”

personal circumstances.

Questions of degree and impact arose. Factors taken into account included:

The length of delay;

- The volume of delayed decisions;
- The urgency of the matters to be decided;
- The particular systemic pressures faced by the judge sitting at a particular station;
- Personal factors such as ill-health or bereavement; and
- The steps taken by the judge to audit, manage and eliminate the backlog.

These factors did not constitute a closed checklist to be applied mechanically. In each case, an overall evaluation had to be made, taking account of the impact of the delay, the circumstances in which the judge was obliged to work and the steps taken by the judge to correct the backlog. The ultimate question for the Board was whether the delays were, on their own or in conjunction with other factors, of such magnitude as materially to damage public confidence in the judiciary.

It is in this context that the Board evaluated the performance of four judges against whom complaints had been received of inordinate and extensive delays in delivering judgments. The first two had been appointed to the Supreme Court, namely Justices Ibrahim and Ojwang. The third was Justice Nambuye, who had been appointed to the Court of Appeal. And the fourth was Justice Waweru, of the High Court. They were interviewed in that order.

The Board found that the **Justice Mohammed Ibrahim**, presently of the Supreme Court, had shown himself to be a sensitive, warm, intelligent and fair-minded judge with a wealth of experience and a commitment to pursuing justice and serving his community and nation. The one significant blot on his record had related to his inordinate delay in delivering of judgments and rulings.

The judge acknowledged that he was in default in respect of 29 matters in the Nairobi High Court (2003-2006); 79 in Eldoret High Court (2006-2009) and 162 in the case of Mombasa High Court (2009-2011). He appended a copy of a letter he had sent to the Chief Justice, requesting that he be released for three months to enable him to deal with the 264 matters where his judgments and rulings were still pending. It also contained a reply from the Chief Justice releasing him for three months from current duties.

The Board considered whether the answer was to suspend final delivery of the determination to give the judge a chance to eliminate the backlog. However, given past undertakings by the judge that were not met, coupled with the qualified nature of the leave given by the Chief Justice, the Board was doubtful that the judge could complete the task as promised. In any event, the damage to confidence in the judiciary had already been done. The delays were so prolonged, so extensive, and so massive in impact, that it would have been giving the judge false hope to believe that if he cleared the backlog by the end of August, he could be considered suitable to remain on the Bench.

In the result, the Board issued a determination to the effect that the judge was not suitable to remain in office. The judge issued a notice of application to have the decision reviewed by the Board.

The application for review started with a preliminary objection that there had been an appearance of bias on the part of a member of the interviewing panel. The Board felt there was merit to the objection, in so much as an independent observer, sensitive to the context in which the Board was functioning, might well have come to the conclusion that in the circumstances there was possibility of bias. In the interest of justice being seen to be done, the vetting interview of Judge Ibrahim, and the subsequent determination, was declared null and void, so that the judge be interviewed afresh.

The fresh panel noted that, contrary to the doubts the Board had originally expressed, the judge had indeed managed to clear the backlog. The underlying problem still remained, however, namely, how to weigh the magnitude of his good qualities against the egregiousness of his proven deficiency.

One member of the Board was absent and two had disqualified themselves. The six remaining members were all agreed that the judge had many admirable qualities that made him eminently suitable to be on the Bench. They were also of one mind that the delays for which he had been responsible had been spectacularly bad.

Different viewpoints were expressed, however, in relation to where, given these competing considerations the axe should fall. One position was that the damage had been so enduring, profound and extensive, that public confidence in the judiciary would only be restored if he were obliged to leave office. The opposite approach was that he was a manifestly good judge with one major failing, who had now been shocked into awareness of his need to correct his ways, and had proven in practice his capability to do so.

By a clear majority, the axe fell on the side favouring hope, permitting the judge to continue in office. At the same time, caution required inclusion in the determination of the caveats mentioned in the determination of Justice Waweru (see below), plus a fourth caveat that the Chief Justice ensure that all judgments and rulings be delivered within the next 30 days. Subject to the four caveats, the majority decision of the Board was that the judge was suitable to remain on the Bench.

It is instructive to compare the approach of the Board to delays for which **Justice Jackton Boma Ojwang** had been responsible. An experienced and highly qualified academic and prolific author, he had accumulated a backlog of 145 cases during his last year on the High Court in Mombasa before being appointed to the Supreme Court. For prolonged periods the judge had been obliged to fly on a regular basis to Nairobi for intensive treatment for a life-threatening health problem. When restored to health, he had set about catching up in a disciplined and rigorous way and had cleared the backlog prior to the interview. The Board noted that his case could be favourably distinguished from that of the other two judges who were also accused of inordinate delays, and accepted the recommendation of the panel that interviewed him that he was suitable to continue as a judge.

Justice Roseline Naliaka Nambuye, presently of the Court of Appeal, was the first woman Chief Magistrate in Kenya. She was appointed to this position in January

1991. She had long been committed to securing rights for women and was the current Chair of the Kenya Women Judges Association.

Her delays in rendering judgments ranged from four months to four years. A number of decisions remained undelivered at the time of the interview. The Board commented that she had failed to produce an audit of pending decisions for the interview with the panel.

The Board found that she had shown herself to be compassionate, hard-working and fair-minded. However, the judge's inability to say no, or to manage her caseload and her courtroom effectively, had contributed to delays that served to undermine the delivery of justice. By a majority, the Board decided that the repetitive and enduring character of the delays rendered the judge unsuitable to continue serving on the Bench. She requested a review.

In response to the application, the Board acknowledged the existence of an error on the face of the record, namely, that its determination included an incorrect statement that the judge had not produced an audit of matters still outstanding. In fact, all the requisite information had been provided in voluminous material the judge had furnished. In addition, by the time of the fresh interview, she had completely cleared the backlog.

The Board had been impressed by the seriousness with which the judge had responded to the vetting process. She had shown an unusual willingness to learn from and take to heart criticisms made of her work. In terms of accessibility and empathy, she had long been regarded as a role model. In the light of her capacity for introspection, the Board came to the conclusion that she had the will and capacity to serve as a respected, hard-working and wise judge on the Court of Appeal. With one dissent, the Board decided that she was suitable to remain in office. This decision was subject to the three caveats as in the case of Judge Waweru highlighted below.

The main complaint against High Court **Judge Peter George Hatari Waweru** also related to a series of delayed judgments, a number of which had stretched to more

than a year. The judge explained that the basic cause was that he had suffered from multiple, recurrent and severe medical problems, coupled with consequent depression. In his view, he had not been accorded sufficient support from the judiciary while undergoing prolonged radical treatment.

The judge produced persuasive medical testimony to show that he had achieved a remarkable and sustained recovery. He appeared to be of good health, was well-spoken and apparently on top of his game.

His interview had been postponed at his request to enable him to show that he had conquered his medical problems and was now in a position to clear the backlog and serve the nation. By the time the interview took place he had in fact succeeded in doing an audit and eliminating the backlog completely.

Bearing the above factors in mind, the Board made the following general observations concerning its approach to delay:

- Delay in the delivery of judgments and rulings has had a strong negative effect on public confidence in the judiciary;
- Systemic problems had contributed considerably to creating the backlogs;
- Nevertheless, in similar situations many judges had managed to keep the backlog under reasonable control, while others had failed to do so;
- Reforms in the judiciary should of themselves bring about a significant improvement in case management;
- No clear, operational and effective benchmarks had been in place during the material period. Nor had there been effective leadership from senior judicial officers to keep judges up to the mark;
- The judge concerned had shown many very positive judicial qualities, including a capacity to relate warmly and well with litigants in keeping with the values and spirit of the new Constitution;

- The vetting process itself had succeeded where other pressures had failed, namely, in getting the judge to audit and finalise uncompleted work.

Taking all these factors into account, the Board came to the conclusion that the judge should be found to be suitable to continue in office, subject to **three caveats**:

- A request that the Chief Justice, in consultation with the judiciary as a whole, establish clear benchmarks and systems of accountability for avoiding unreasonable delay;
- A request that the Chief Justice require specific undertakings from the judge to avoid unacceptable delays in the future; and
- A request that should there be a recurrence of such delays, the Judicial Services Commission be encouraged to take appropriate disciplinary action against the judge concerned, taking account of the delays established during the vetting process.

A majority of the Board was satisfied that the judge was in a strong position to make a positive contribution to the judiciary, and was suitable to remain in office.

3.5.1.1 Conclusion on Delay

All the members found the issue of delay to be difficult. The intensity of the public controversy that followed the Board's decisions reinforced the need for careful adherence to due process, as well as for furnishing reasons with as much amplitude as the requirement of confidentiality permitted. It should be stressed that the decision had to be by the Board members and by them alone. Any attempt by senior judicial officers, or by the legal profession, to influence the Board's decision would have been quite unworthy and totally disregarded by the Board.

“Any attempt by senior judicial officers, or by the legal profession, to influence the Board's decision would have been quite unworthy and totally disregarded by the Board.”

The dilemma facing the Board was how to weigh two strongly competing considerations: on the one hand, the delays had been unacceptably long (and, in one case, spectacularly so); on the other, apart from having manifested a serious incapacity to manage their court work properly, all four of the judges had demonstrated the potential to make a meaningful and positive contribution to Kenya's new judiciary. Two had in fact been promoted by the Judicial Service Commission (JSC) to the new Supreme Court and a third to the Court of Appeal. Their new work environment would be far less conducive to delays because of smaller court rolls, coupled with collegial management and more direct supervision by the Chief Justice. All had received a severe jolt and the vetting had succeeded where all other pressures had failed, namely, in getting the judges concerned to find the will, energy and capacity to clear their backlogs. Yet as mentioned above, the delays had been egregious.

The Board had to distinguish between delay caused by systemic failures, such as unequal distribution of workload, problems with production of witnesses and logistical inadequacies, and delay caused by corruption, lack of diligence or sheer neglect of duty. The Board had, therefore, to consider the judge's performance against both this wider systemic context and the workload of the individual judge.

There are some issues that do not allow for neat solutions. When the Board could not achieve consensus, the majority opinion prevailed. On this basis, subject to certain caveats, all four were found suitable to continue in office.

Thus, in the end, after protracted proceedings interrupted by litigation and much heated public debate, no determination of unsuitability on the grounds of delayed judgments was made. The Board did, however, make proposals for mechanisms to be put in place to reduce delay in the future.

3.6 Undue Reliance on Technicalities versus the Rule of Law

The courts and the tribunals are required to exercise their judicial authority in a manner that ensures that justice is done to all irrespective of status, that justice is not delayed and that justice is administered without undue regard to procedural technicalities.⁸⁴ The Board is unaware of any other constitution in the world that has chosen to elevate the avoidance of undue technicalities to the status of an express constitutional value. Article 159 (see Annexure G) of the Constitution of Kenya, 2010, states that:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) Justice shall be administered without undue regard to procedural technicalities.

Sad Kenyan experience indicates why those words were included. In far too many instances, procedural and other technicalities had been used to defeat the ends of justice, and protect and, therefore, perpetuate impunity. The new Constitution marked a break with the past by emphasising substantive justice.

Before concluding this chapter, it is necessary to consider complaints that judges had relied unduly on technicalities and failed to ensure that constitutional values were upheld and substantive justice done. The Board did not find any judge primarily unsuitable on this ground, although it noted the use of unpersuasive technicalities by some of the judges who were removed on other grounds, particularly those found to have bent the law in a manner that damaged public confidence in the impartiality of the courts.

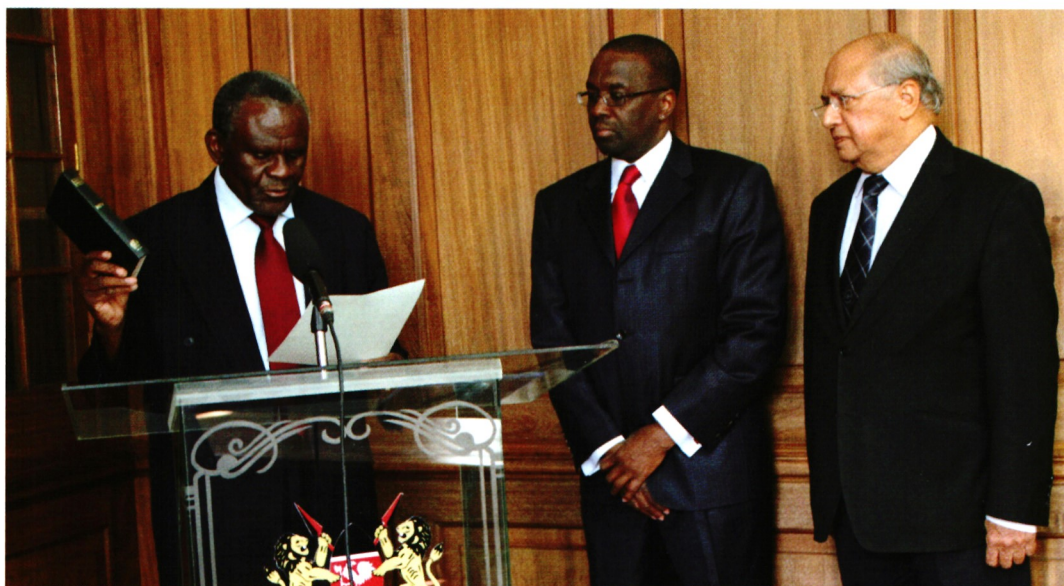
“To some extent, reliance on undue technicality was a systemic problem, as recognised by the Constitution.”

To some extent, reliance on undue technicality was a systemic problem, as recognised by the Constitution. Chapter 10 of the Constitution contains a large number of provisions intended to create a judiciary that, by correcting and transcending the deficiencies of the past, would come to enjoy the confidence of the public and become a central element in the new democratic dispensation. The Constitution declares that judicial authority derives from the people, re-affirming the sovereignty of the Kenyan people.⁸⁵ The raising of technical and procedural questions was a particularly strong weapon in the armoury of those who sought to defend the powerful and the wealthy with the connivance of compliant judges. Substantive questions could be evaded and matters left to drift in the courts for so long that outcomes became irrelevant. Reliance on ultra-technicality was used to impede the work of agencies set up to investigate malfeasance by those in positions of authority. Far from furthering the rule of law, these narrow, technical rulings, issued in the name of legality, contributed massively to the prevalence of impunity. Indeed, they undermined the rule of law, promoting a spirit of lawlessness that proceeded from the highest in the land all the way down. The unhappy lesson for the country was that the emancipatory vision of the rule of law should not be confused with the tyranny of heartless legalism.

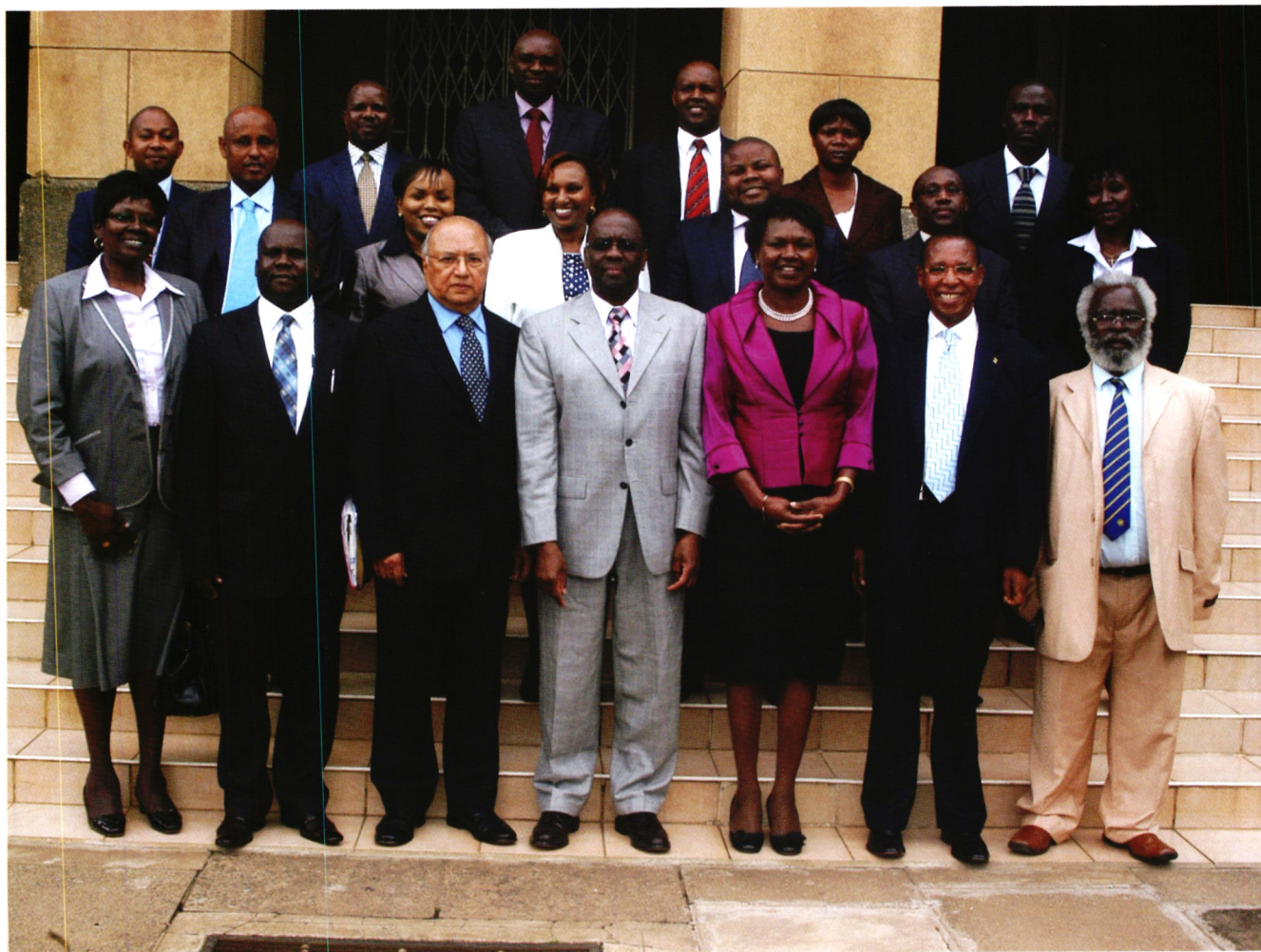
None of this is to say that rigour in maintaining legality and following proper procedures should be discarded in the name of achieving substantive justice. It is simply to emphasise that in interpreting and implementing legislation, the rule of law requires that the objective at all times should be to achieve the vision of justice proclaimed by the Constitution. Thus, adherence to the rule of law under the Constitution would require:

- Expansive interpretations of the law that favoured national values and the social objectives set out in the Constitution, and worked towards ameliorating the conditions of the underprivileged and the marginalised groups referred to in the Constitution; and
- Purposive interpretations of statutes that promoted coherent functioning of the legislature in keeping with constitutional objectives.

Seen in this light, the vetting process is not inherently threatening to the rule of law or intrinsically violatory of judicial independence. On the contrary, its objective is to help preserve a judiciary that the public believes will fearlessly uphold the rights of all in society, particularly those whose rights have most been disregarded in the past. It is to remove the taint of being seen as a judiciary that is corrupt, unduly favourable to those in power, obsessed with technicalities, incapable of dealing with cases with requisite promptness and generally unable or unwilling to administer justice in an appropriate manner. And it is to enable the many conscientious judges on the Bench to hold their heads high in the knowledge that the public trusts them and believes in their capacity to do justice. It is thus in the interest of the judiciary as a whole, and of each member, that a fresh start be made so that the public is persuaded that the traumas undergone by litigants in the past will not continue into the future.



Justice Frederick Mwela Chomba from Zambia being sworn in by Chief Justice Dr. Willy Mutunga as the JMVb Chairman Sharad Rao looks on.



Chief Justice Dr. Willy Mutunga (front row, 4th from left) with Board members and Justice Minister Mutula Kilonzo (front row, 2nd from right)

CHAPTER FOUR

REFLECTIONS

- ❑ *Introduction*
- ❑ *The Creation of an Unprecedented Body*
- ❑ *Defining “Suitability to remain in office” in the Kenyan Context.*
- ❑ *Ensuring Natural Justice in a Transitional Process Intended to be Swift, Resolute and Comprehensive.*
- ❑ *Combining Confidentiality and Transparency.*
- ❑ *Creating Collegiality and a Common Vision in a Body Purposely Made Diverse.*

4.0 Introduction

The existence of the Board did not begin with the appointment of Board members. It was a culmination of diverse yet coordinated steps and efforts cultivated towards sustaining the functioning and perpetuity of the Board. Indeed, it signaled the beginning of a very unique and challenging task as the Board members would later find out. The Board had to make functional an institution that had typically no precedent, not in Kenya nor in any other country in the world. The only tools available to the Board were the Constitution of Kenya, the Vetting of Judges and Magistrates Act (VJMA), 2011, and other legislation which stipulated certain guiding principles and standards to be applied.

Notably, neither the Constitution nor the legislations stipulated the *modus operandi* for the Board. It was upon the Board to craft its own mode of operation. This proved quite a challenge as there were many competing interests at stake. On the

one hand, there was the overall need to restore public confidence in the judiciary, while on the other hand there was the need to give a fair and impartial hearing to the judicial officers, some of whom had spent all their career life in the judiciary. The Board had to strike a delicate balance between these two interests. It had to ensure that the processes adopted and decisions reached, in an attempt to restore public confidence in the judiciary, would in no way compromise the internationally recognised standards and principles of fairness and impartiality.

This chapter provides a reflection of how the Board approached the vetting process. It captures the journey that led to the creation of a body (the Board) with virtually no precedent. Revolving around this was the issue of how the Board sought to define the concept of “suitability to remain in office” within the Kenyan context. To be considered among other things was the fact that the Board was meant to be a transitional body, specifically bound to ferry the judiciary into the new constitutional dispensation. It being a transitional process, an issue arose as to how the Board would ensure it adhered and applied the principles of natural justice in a process that was intended to be swift, resolute and comprehensive. Another issue that came to the fore was how the Board would combine the parallel principles of confidentiality to the judge and transparency to the public. The composition of the Board was also in itself a challenge, as it meant creating collegiality and a common vision in a body that was purposely made diverse. In the midst of all these issues, the Board could not work in isolation; it had to work closely with the Government and other stakeholders.

4.1 The Creation of an Unprecedented Body

The Judges and Magistrates Vetting Board (JMVB) was operationalised through the appointment of the members to the Board.⁸⁶ The appointments were made after an extremely thorough and competitive process which saw only six members selected to undertake the task of vetting judges and magistrates.⁸⁷ The three non-

citizen members of the Board were identified by the President in consultation with the Prime Minister, and appointed on the approval of the National Assembly.⁸⁸

Notwithstanding the appointment of the members, the Board could not commence business immediately for various reasons. First and foremost, the Board could not just begin vetting; it had to carefully consider the mode of operation and methodology to be applied to the process. This was made more challenging by the fact that the vetting process not only involved the myriad of competing interests mentioned above, but was also a process very “alien” to the Kenyan jurisdiction. Thus, the Board members had to be their own models and trailblazers on a road that had never been trodden before.

Second, there were operational challenges which the Board encountered from its very inception and which it had to deal with. The Board did not have office space to operate from. Further, for the Board to be fully operational, it needed a fully equipped and functional secretariat which was not in place at the time. In addition, the Board did not have funds to enable it meet day to day costs.⁸⁹ All these issues needed to be addressed first if the Board were to meet both the constitutional and legislative time frames imposed on the vetting process.

The Board quickly began holding a series of meetings with major stakeholders in a bid to source for funds. Once the Board had sourced for funds and procured some office space, it began recruiting members to the Secretariat. The first to be employed was the Secretary/ CEO, Mr. Reuben Chirchir, followed by six Assisting Counsels and twelve researchers. Other employees of the Secretariat were to follow later on.

Through intense consultations between the members and the Assisting Counsels, guided by the provision of the Constitution and the VJMA, the Board came up with rules of practice and procedure to guide the vetting process.⁹⁰



Judge Musagha Mbogoli, Eric Mutua (Chair- LSK) and Sharad Rao during the LSK Annual Dinner (2013)

4.2 Defining “Suitability to Remain in Office” in the Kenyan Context

This is one of the major issues that the Board had to grapple with from the beginning. To be able to inclusively but exhaustively define the term **“suitability to remain in office”** the Board considered both international and national threshold requirements and benchmarks. In terms of the international standards, the Board considered the threshold criteria enshrined in the *Bangalore Principles on judicial conduct* (2002) which arguably represent the views of majority democracies.

According to its preamble, the *Bangalore Principles* “establish standards for ethical conduct of judges” and are “designed to provide guidance to judges” and to aid members of the government, lawyers and the general public “to better understand and support the judiciary”. The Bangalore principles include provisions aimed at six key areas related to individual judges: independence; impartiality; integrity;

propriety; equality; and competence and diligence. Each of these six categories impacts on a judge's ability to decide a case without bias or prejudice and thus has a bearing on the independence of the judiciary as whole.

The Board relied on both the Constitution and the VJMA. The Constitution declares that the Board must vet the suitability of the judges in accordance with the values and principles set out in Articles 10 and 159.⁹¹ Article 10 includes amongst its binding national values and principles: the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability. Article 159 goes on to enunciate three guiding principles of justice:

- It should be done to all irrespective of status; and
- It should not be delayed and that it should be administered without undue regard to procedural technicalities.⁹²

For its turn, the VJMA provides both general and specific guidance. In general terms it emphasises that the Board shall at all times be guided by the principles and standards of judicial independence, natural justice and international best practices.⁹³ More specifically, it requires that when determining the suitability of a judge, the Board must consider the following:

- Constitutional criteria for appointment;
- Past work record, including prior judicial pronouncements;
- Criminal cases or prosecutions against the judge or magistrate concerned; and
- Complaints or other relevant information received from any person or body, including the Law Society of Kenya, the Kenya Anti-Corruption Commission, the Attorney General, the Judicial service Commission and other identified bodies.⁹⁴

Thus, the Board did not seek to coin a single definition for the term, “**suitability to remain in office**”. Rather the Board applied certain threshold requirements and benchmarks against which the suitability of the judges and magistrates was tested. These threshold requirements, taken in totality, formed the Board’s definition of “suitability to remain in office”.

4.3 Natural Justice in a Transitional Process should be Swift, Resolute and Comprehensive

The Board’s desire and indeed that of the general public was that the Board would transit the judiciary into a new constitutional dispensation through a process that was fair, just and impartial. But the issue that arose was how the Board was required or expected to uphold the rules of natural justice in a process that was “alien” and transitional. The rules of natural justice⁹⁵ as reiterated in various international instruments⁹⁶ and our own Constitution⁹⁷ require that judges and magistrates be given a fair and impartial chance to present their cases, with no exception. As such, the Board had no choice but to beat all odds and ensure the realisation of the internationally recognised principles.

On the right to a fair hearing, the Board ensured that the judges were given a fair chance to rebut all the allegations made against them. First and foremost, the judges were served with a Notice-to-Appear and a Notice-to-File-Response.⁹⁸ The Notice-to-Appear served as a notice of the date of the hearing/interview. The Notice-to-File-Response required the judge to respond to the complaints that had been leveled against him/her. To expedite the process, the judges were given ten (10) days within which to respond. A ten-day period was long enough for the judges to adequately respond to the complaints, but also short enough to ensure that the Board worked within the legally stipulated timeframes.

During the interview, the judges were accorded the option of a public or private

hearing. They were also granted the right to representation by counsel of their own choice. Further, in the first set of interviews (interviews for Court of Appeal judges), the Board sat as a full Bench in order to come up with uniform standards and methodology to be applied when the Board split into panels. When the Board later on split into three panels, each panel was comprised of a lawyer, non-lawyer and a Commonwealth judge, as required by the Act , to protect the interview against bias.

The judges were then taken through the complaints that had been lodged against them, and given sufficient time to explain and or clarify where need be. However, in line with the need to be swift, the Board opted not to question the judge where it was satisfied with the written response. The judges were also accorded a full opportunity to cross-examine persons who had complained against them. At the end of the hearings, all judges were asked on record if they felt that that they were accorded a fair hearing.

To ensure expeditious disposal of the matters, the Board worked tirelessly, sometimes sitting late into the night (with the concurrence of the judge) to ensure that the interviews were concluded. This safeguarded the judges' right to be heard without undue delay.

Finally, the judges were accorded their right to apply for review. This was exercised by all Judges who had been found unfit by the Board and indeed some judges initially deemed unfit to hold office were cleared after their reviews.⁹⁹

No doubt, the Board explored all the avenues available to it to ensure that it upheld the principles of fair and impartial hearing. Indeed, all the judges who had been vetted confirmed at the interview that the process had been fair.

4.4 Combining Confidentiality and Transparency

The task of determining the suitability of a judge or magistrate to continue serving in the judiciary is sensitive and entails dealing with information that is sometimes personal and confidential. However, in as much as the vetting process was personal to the judges, it was public in the sense that there was a lot of public expectation and interest in the process. Accordingly, the Board had to strike a balance between being confidential to the judge¹⁰⁰ and keeping the process transparent¹⁰¹ particularly to the public. This essentially meant that the process had to be seen to be open and transparent. The Board thus had to draw a fine line between transparency and involving the public on one hand, and maintaining a certain level of confidentiality on the other.

To begin with, all members of the Board and Secretariat took an oath of secrecy whereby they undertook to keep confidential all information received within the Board. The Board advertised the vetting schedule in the media and carried out sensitisation meetings round the country, where the public was given an insight into the workings of the Board. This also gave the public an opportunity to lodge their complaints against judges or magistrates.

The judges were also given an opportunity to opt for either private or public hearing. In the event that a judge preferred a public hearing, the media was informed and given the opportunity to air the proceedings. Also, members of the public were allowed to attend the hearings. This was seen with Hon. Lady Justice Martha Koome and Justice David Maraga, who opted for a public hearing. Further, where there were witnesses, the Board informed them of the need to keep matters discussed confidential in the interest of the process.

At the time of preparing the determinations, two sets of determinations were prepared; one specifically for the judge, and one which was read by the Chairman and which went out to the public. The determination given to the judge was detailed, while the one availed to the public, omitted certain details in protection

of both the judges' and the complainants' rights. This ensured that confidentiality was maintained, while at the same time, ensuring the process was transparent and the public was kept informed of the Board's progress. Finally, the Board posted all its determinations and other relevant information on its website.

4.5 Creating Collegiality and a Common Vision in a Body Purposely Made Diverse

The Board is diverse in terms of not only academic qualification of members, but also their work experience and cultural backgrounds. In terms of academic qualifications, the Board is comprised of three Kenyan lawyers, three Kenyan non-lawyers and three non-citizen Commonwealth judges. The Kenyan members were drawn from different ethnic groups. The Commonwealth judges were drawn from a list of distinguished and eminent persons.

Notably, the composition of the Board was not by coincidence; it was by design. Although the members were drawn from various educational and cultural backgrounds, they had one vision before them, that is, restoring public confidence in the judiciary. Each of the Board members had a crucial role to play. Whereas the Kenyan lawyers enriched the Board with a legal mind, the non-lawyers assisted the Board with the non-legal aspects. They helped the Board think outside the legal conduit as a criterion for determining suitability. The Commonwealth judges on their part enhanced the Board with a vast wealth of experience from their jurisdictions. Thus, although the members varied in terms of their qualifications and cultural backgrounds, each contributed towards achieving the overall goal.



Board members briefing the President. Also in the picture are Hon. Mutula Kilonzo, the Attorney General Prof. Githu Muigai, Secretary to the Cabinet Francis Muthaura, Dr. Gichira Kibara, Permanent Secretary Ministry of Justice.

CHAPTER FIVE

CHALLENGES

- ❑ *Introduction*
- ❑ *Recruitment and Procurement*
- ❑ *Financial Difficulties*
- ❑ *Space Constraints and Logistics of Moving*
- ❑ *Strict Legal Timelines and Delay in Legislative Amendments*
- ❑ *No Middle-ground*
- ❑ *Litigation*
- ❑ *Media Relations*
- ❑ *Commonwealth Judges*
 - *Recruitment*
 - *Language*
- ❑ *Inaccessibility of Information*
 - *Lack of Information from Professional Bodies*
- ❑ *Wealth Declarations*
- ❑ *Novel Process and Learning on the Job*
- ❑ *Conclusion*

5.0 Introduction

The process of vetting judges and magistrates was established under a clear Constitutional directive and with great public support. However, it would be a fallacy to assume that operationalising and carrying out the vetting process has been smooth sailing. From its inception, the Board encountered difficulties, including resistance from various forces. On occasion, the very existence of both the Board and the vetting process came under threat. However, the Board was able to navigate past the majority of obstacles it faced. Judicial vetting has so far

been implemented successfully, and the Board has been efficiently pursuing its mandate.¹⁰² While the Board wishes to record the problems the vetting process has encountered, it acknowledges the contribution that facing up to and overcoming these setbacks has made in shaping and strengthening the vetting process. This chapter will discuss some of the challenges faced by the Board in the hope that these insights will be useful both within Kenya and to other jurisdictions that may wish to undertake a similar process in the future.

5.1 Recruitment and Procurement

The Board was presented with strict timeframes for the completion of its work. Time legally started running as soon as Board members were appointed.¹⁰³ At this point, it was expected that the Board would need exactly two months to put its house in order and commence the vetting process.¹⁰⁴ Office space had to be secured and staff recruitment expeditiously carried out. At this time, the Board had not been provided with the necessary budget to make these arrangements. Furthermore, although the Board was intended to be an independent body, it was treated as though it fell within the remit of the Ministry of Justice, National Cohesion and Constitutional Affairs. As such, it had to rely on financial support from the ministry. The Board was also expected to operate according to the dictates of the relevant Government rules and regulations, and abide by circulars which set out the applicable procedures and processes for certain matters, including the recruitment of staff. This entailed putting notices in the national newspapers and waiting for a certain period to receive applications. These restrictive procedural requirements threatened to undermine the vetting process from the beginning.

From a practical perspective, the provision of a two-month preparatory period was not adequate to take care of the many aspects – from staffing to leasing and furnishing an office to putting in place appropriate information technology and management systems – necessary to create a vetting institution from scratch. It would have been more practical for the Board to have had the freedom to explore

alternative recruitment and procurement arrangements, such as head-hunting, in order to ensure the speedy launch of the process. To date, the Board is still in the process of recruiting more members to the Secretariat. Streamlining the organisational dimension of the vetting process and minimising delay are of particular importance in light of the fact that vetting is designed to be a transitional process. Vetting is intended to proceed expeditiously according to a strict timetable.

As soon as the Board procured office space on the 22nd floor of the Anniversary Towers, Nairobi, and employed members of staff to the Secretariat, it could begin its work. However, further practical obstacles soon arose.

After the appointment of new Board members, recruitment of staff and the securing of offices, the Board began to craft its mode of operation. Procedures to direct the vetting needed to be adopted. These included establishing how the Board would handle the complaints received against the judges, the method to be followed during the actual interviews, the elements to be included in the determinations and how to deal with requests for review. The Board, with the help of the assisting counsels, developed the Vetting of Judges and Magistrates (Procedure) Regulations.¹⁰⁵



Board with Members of Parliament including Chair of the CIOC Hon. Abdikadir Mohammed

5.2 Financial Difficulties

As noted above, the Board lacked an independent financial management system. As a result, it relied on the Ministry of Justice, National Cohesion and Constitutional Affairs for its budget. This state of affairs meant that the Board did not possess adequate finances to support its activities and projects, let alone to remunerate its employees.¹⁰⁶ The Board was also not able to expeditiously carry out its activities due to the bureaucracy involved in securing the necessary disbursements from the ministry.

The Board was not able to acquire office equipment and materials which were key to its proper functioning. More often than not, the Board accrued expenses for services offered by outside providers. The Board even ran out of basic things like photocopying paper, writing pads, pens and binding materials.

Also, the Board was not able to carry out public sensitisation in good time. This impacted negatively on the Board's delivery as it limited the number of complaints that the Board might otherwise have received from an informed public. The Board is convinced that the public would have lodged more complaints had it been made aware of the vetting process in good time.¹⁰⁷



The Board making announcement of determinations.

5.3 Space Constraints and Logistics of Moving

The nature of the vetting task demanded that the Board have adequate and secure office space. To begin with, the process attracted a great deal of public interest and the safety of Board members and staff had to be considered. Further, information received by the Board in the form of complaints was highly confidential and sensitive. The Board needed to ensure that such information would not leak to the public in order to protect both the complainants and the privacy of judges against whom such complaints had been lodged. In addition, the vetting proceedings, which are intended to be confidential, needed to be conducted in sound-proofed chambers.

Given the urgency of its task, the Board required enough space to immediately accommodate a full complement of staff in order to discharge its functions at capacity. However, the space available to the Board on the 22nd floor of Anniversary Towers was not adequate to achieve these ends. The Board had to divide this space between Board members and staff, and also reserve space to be used as the vetting chamber. That is why from the very beginning, the Board was not able to have concurrent sessions of two or three panels.

With time, the Board procured more space on the first floor of the same building, though this has not been without challenges. Files and other material containing highly confidential information have had to be ferried from the first floor to the 22nd floor. This exposes the information to risk of leakage. The Board was finally able to procure more office space on the fifth floor of nearby View Park Towers, and to relocate administrative and financial divisions of the Board to this location. This has helped to decongest the Board's offices, and has created room for the establishment of a second chamber. However, the physical distance between different sections of the Board presents obvious logistical difficulties and hinders the effective operation of the vetting process.

5.4 Strict Legal Timelines and Delay in Legislative Amendments

The vetting process, being transitional, was required to operate according to strict legal timelines. The vetting powers of the Board were granted for one year, with the possibility of renewal on request for a further year.¹⁰⁸ From a practical perspective, the period of one year would not have been adequate for the Board to complete the vetting of 53 judges and 316 magistrates and 13 kadhis. This meant that the Board had to petition Parliament for an extension of time.

Along with the one-year time limit, the original Act made reference to a series of internal time periods in relation to when the various categories of judicial officers were to be vetted. The judges of the Court of Appeal were to be vetted within three months, those of the High Court within three months, and the magistrates within six months.¹⁰⁹ The review applications were to be finalised within one month after the vetting of all judges and magistrates had been completed. These milestones were intended to place maximum pressure on the Board to complete its task in a speedy manner.

The first three-month period lapsed before the Board could finalise the vetting of the Court of Appeal judges.¹¹⁰ In the face of court challenges to its mandate, the Board chose to suspend the interviewing and vetting of the judges. To avoid possible litigation, the Board approached Parliament to amend the Act to remove the strict timelines,¹¹¹ which the legislature ultimately did.¹¹² However, the amendment was included as part of an omnibus Bill, which considerably delayed its adoption. As a result, the resumption of the Board's work was unnecessarily delayed.

The Act was eventually amended by the Statute Law (Miscellaneous Amendments) Act 2012, which came into effect on the 12 July, 2012, after the three-month period stipulated for vetting judges had elapsed (see Annexure A).¹¹³

The Amendment replaced the original section 23, thereby removing reference to the three-month limitation on the vetting of judges of the Court of Appeal and High Court. The amendment also eliminated the direction to consider reviews only after the vetting of all judges and magistrates had been completed. The Board's mandate was also extended until the 28 February, 2013. While dealing with the issues of timeframes, however, Parliament also inserted a provision entrusting the vetting of magistrates to the Judicial Service Commission, rather than the Board, in an attempt to ensure that the Board would comply with the new timeframes.¹¹⁴ Immediately after the amendment came into effect, the Board resumed vetting.

The Vetting of Judges and Magistrates (Amendment) Act 2012 further amended Vetting of Judges and Magistrates Act. The amendment was passed by Parliament in November, 2012 and came into force on 14 December, 2012, following presidential assent and gazetting (see Annexure A).¹¹⁵ The amendment reverts the vetting of magistrates to the Board,¹¹⁶ and extends the period of the Board's functioning to 31 December, 2013. It also directs that the Board shall conclude the process with respect to any judges, chief magistrates and principal magistrates by 28 March, 2013.

The amendment introduced the following changes:

- It clarifies that a judge or magistrate who requests review shall, pending the decision of the Board, be suspended from office pending the decision of the Board;¹¹⁷
- The Board is granted power to co-opt members of the Judicial Service Commission in the vetting process for the purpose of vetting magistrates, provided the co-opted members are not serving magistrates;
- It provides that proceedings of the Board shall not be invalidated by reason of a vacancy or defect in the composition of the Board;¹¹⁸

- The Chairman has power to constitute three panels to concurrently and expeditiously vet the judges;
- It provides that decisions of the Board leading to the removal of a magistrate are not subject to question in, or review by, any court;
- The Board can request information on the suitability of the judges from the National Police Service Commission.

On reflection, the Board considers that although the strict timelines were intended to make sure that the vetting process was completed swiftly, they served to hinder rather than expedite the process. Much time was lost as the Board sought an amendment of the Act to remove the time lines, and also to request for an extension of time. It would have been more effective for the Board to have possessed the freedom to set its own timelines within the overall term provided for vetting.

5.5 No Middle-ground

The Act provides for judges to be found either suitable or unsuitable. For example, there was no provision for probationary or cautionary determinations. This presented a challenge to the Board, given the many variables in the grounds for making a determination. For instance, how to compare a judge accused of delay, but who had many complicated cases to deal with, to another who had finished all his/hers, though few in number and uncomplicated in nature.

5.6 Litigation

Along with the delays occasioned by the legislative amendments which prudence required for the Board to continue to function, the Board has also faced serious delays and impediments to its work as a consequence of challenges brought in

the courts. One court case was directed at the Board even before it was properly established. Questions were raised as to the constitutionality of the projected vetting process in the petition of *Dennis Mogambi Mong'are v Attorney General & 3 others* (2011).¹¹⁹ The court dismissed the petition.

Although the above decision confirmed the validity of the vetting process, challenges to the mandate of the Board in the form of litigation have continued. Judges who have been found unsuitable, and who have had their review applications dismissed, have moved to court to question the jurisdiction of the Board.¹²⁰ Five applications and petitions have been filed in the High Court with a view to challenging the jurisdiction and constitutionality of the Board and its mandate.¹²¹

While no decision has yet been reached on the substantive matters in question, a number of rulings have nonetheless been made, including the issuance of conservatory orders, initially made for two weeks and later extended. This forced the Board to cease its work for a number of weeks. The conservatory orders were in place for a total of 35 days. This resulted in disruption to the Board's timetable and a consequent delay to the vetting process.

Prior to the Board finding her unsuitable, Justice Gacheche filed an application in the High Court seeking leave to apply for judicial review and petitioning to stay the proceedings of the Board.¹²² The judge sought orders quashing the proceedings of the Board; prohibiting the Board from commencing or continuing with her vetting or from making a determination; and prohibiting the Board from serving her with notices since the time for vetting had expired and had not been extended in accordance with the Act or the Constitution of Kenya. In a decision dated the 24 July, 2012, the High Court refused to stay the vetting process or to make orders in relation to any of the prayers sought, but instead directed the matter to the Chief Justice to empanel a Bench to hear the matter.¹²³

On 13 August, 2012, further proceedings were initiated. The Centre for Human Rights and Democracy, together with Richard Etyan'ga Omanyala and Bishop Francis

Ranogwa Oziova, filed a constitutional petition in the Eldoret High Court.¹²⁴ The applicants sought conservatory orders effectively staying the operation of the Board pending the hearing and determination of the petition, which sought to challenge the jurisdiction of the Board and the constitutionality of the vetting process. The High Court, in a ruling by a single judge, stayed the operation of the Board for ten days, pending a request to the Chief Justice to constitute a three-member panel.¹²⁵

On the 25 September, 2012, a three-judge Bench of the High Court granted conservatory orders, by a two to one majority,¹²⁶ staying the work of the Board for a further fourteen days and referring the substantive proceedings to the Chief Justice to constitute a High Court Bench of five judges.¹²⁷

The Chief Justice empanelled a five-member bench to hear and determine the one application and four petitions filed in the High Court, which related to the work of the Judges and Magistrates Vetting Board.¹²⁸ However, it took some time to constitute the Bench and as a consequence the work of the Board was effectively stayed for a further two weeks.

A five-member Bench of the Judicial Review Division of the High Court at Milimani issued a ruling on 30 October, 2012,¹²⁹ directing that the matters raised should be heard and decided separately, but consolidated for the purposes of determining the preliminary issue raised by the Law Society of Kenya as to whether the High Court had jurisdiction to hear the matters.¹³⁰

The judges found that the High Court had the right to review a decision for error of

“The judges found that the High Court had the right to review a decision for error of law apparent on the face of record of the Vetting Board, which may be an error going to the jurisdiction of the Board as distinguished from error within its jurisdiction.”

law apparent on the face of record of the Vetting Board, which may be an error going to the jurisdiction of the Board as distinguished from error within its jurisdiction. The High Court ruled that they had an inherent supervisory jurisdiction over the vetting process.

On 30 October, 2012 the court also ordered that the conservatory orders that had been made on 25 September, 2012 be lifted so the Vetting Board could continue with its work, pending the hearing and determination of the application and petitions. The Board therefore resumed its sessions on 7 November, 2012. The Court also ordered that affected judges, whose vetting process had been completed, should not be de-gazetted prior to the determination of the application and petitions. Finally, the Court directed that the application and petitions should be heard separately and in accordance with the principles outlined in their ruling.

The Law Society of Kenya, which had been enjoined as an interested party in Eldoret Constitutional Petition No. 11 of 2012, then filed further proceedings in the Court of Appeal. A principal ground was that the Constitution expressly declared that no process or decision of the vetting body should be questioned in any court. The Court of Appeal issued orders granting a stay of all proceedings in and orders made by the High Court pending a hearing of the substantive issues.

The matter was set down for substantive hearing before a five-member Bench of the Court of Appeal in December, 2012.¹³¹ Following repeated adjournments, it was established in February, 2013 that the matter could not proceed after one member of the Bench, Justice Kantai, requested to recuse himself on the grounds that he had represented one of the respondents while in practice. A new Bench had now to be constituted. Thus the matter remains before the court and the litigation continues.

While the Board has been able to continue with its work, the litigation and related orders have had a considerable impact on the timeframes for vetting the judges. These setbacks delayed the vetting process by more than five weeks. In fact, the

impact stretched beyond the weeks of delay occasioned directly by the orders of the court. Before the Board could continue with its work, fresh notices had to be provided to the judges awaiting vetting and new timetables established. This in turn lengthened the existing delay to the Board's functioning and caused undue distress to the judges awaiting interview. The resulting delays reduced the time available for the Board to meet the strict vetting timeframes and led to additional pressure on the operation of the Board. The litigation has drained the time, energy and resources of the Board. Negative publicity associated with the litigation has also created public confusion around the vetting process.

5.7 Media Relations

In general terms, the media has given the Board positive and generous support and coverage. The Board's determinations, along with the two interviews where the judges opted for a public hearing, were broadcast live on television. However, the Board has experienced problems with examples of negative and inaccurate media coverage in opinion pieces by individuals opposed to the vetting process. Whereas the Board was at all times committed to upholding constitutional principles of fairness and impartiality, allegations were made that some Board members were biased and partial and that revenge was the driving force behind the vetting process. As such, the Board faced the risk of losing the support of the public, which was essential if the Board was to succeed in contributing to the restoration of trust and confidence in the judiciary.

5.8 Commonwealth Judges

Two of the Commonwealth judges selected to serve on the Board, who had waited for some time for their nominations to be confirmed, namely, Lord Justice Stephen Sedley from the United Kingdom and Hon. Justice Louise Otis from Canada,

eventually declined their invitations. This delayed the initiation of vetting further, as the Board had to wait for the President in consultation with the Prime Minister to replace the two judges, with the approval of the National Assembly.¹³² Justice Albie Sachs from South Africa and Justice Frederick Chomba from Zambia were identified, approved by Parliament and eventually sworn in in January 2012. They joined Lady Chief Justice Georgina Wood from Ghana and, finally, the Board was fully constituted. The terms of the Commonwealth judges were subject to the terms set out in the Act.

The Board has been working to address recruitment of additional Commonwealth judges. Requests for replacement were presented to Parliament in time, but Parliament did not address the matter before dissolving, and the Board must now wait until a new Parliament is formed following the elections. This is likely to take a number of months and has the potential to create further delays. The Board intends to use the time to continue carrying out inquiries for the next phase of vetting. This situation also places significant and disproportionate pressure on the remaining Commonwealth judges, as the Act requires that a Commonwealth judge must be on every panel.

5.8.1 Recruitment

The recruitment and replacement of Commonwealth judge was slow and cumbersome. This situation was made worse by an Act that did not allow for flexibility in terms timeframes, thus complicating the situation in relation to judges who were unable to be in the country for long periods of time. Also, it took a long time for Parliament to approve judges.

5.8.2 Language

In light of the participation of Commonwealth judges, the Board had to deal with the question of language. In a number of instances, the services of interpreters had to be sought to translate from Swahili to English for the purposes of public sensitisation activities and witness testimony.

5.9 Inaccessibility of Information

In carrying out its investigations, the Board encountered two main challenges in accessing information. The first related to a dearth of correct and accurate information from various stakeholders and complainants. Some witnesses approached by the Board were unwilling to record statements or appear before the Board to give evidence. Accessing evidence of actual bribery and corruption also proved challenging. Such scenarios tend to involve a willing giver and a willing receiver. The Board was, therefore, limited with respect to the findings it could make in this area. The Act did not provide for any form of witness protection or limited immunity, which may have encouraged further disclosure on the part of witnesses and complainants.

The second challenge related to existing material that the Board was unable to access. For example, in matters that required information from telephone service providers, the various companies were hesitant in submitting their records, citing customer confidentiality. The Board also struggled to access confidential material, including the personnel files of judges. In dealing with past cases, the Board also faced challenges in accessing and retrieving court files. On many occasions, court registries would record these files as missing or misplaced. Some courts also seemed unwilling or unable to provide information requested, particularly relating to the number of cases heard by individual judges, their rates of delivery and overall numbers of delayed judgments.

5.9.1 Lack of Information from Professional Bodies

While the LSK provided valuable information, other bodies identified in Section 18 of the Act were not as forthcoming. The Board had to rely on its own investigative capacity.

5.10 Wealth Declarations

A number of challenges relating to the wealth declarations submitted by judges and magistrates emerged. The required forms were often submitted late. At times, they were incomplete and additional information had to be requested from the judge, leading to delays. Some of the information provided was incorrect and, on occasion, the information was not provided. These problems had an impact on the Board's ability to efficiently carry out its work.

5.11 Novel Process and Learning on the Job

As discussed in Chapter One and in 5.9.1, limited material was available from other jurisdictions to provide a comparative dimension and to assist the Board in establishing its processes by reference to other similar cases. Learning opportunities and the refinement of procedures had therefore needed to occur on the job, as the vetting process unfolded.

5.12 Conclusion

Despite these challenges, the Board successfully completed the vetting of all the Court of Appeal judges and judges of the High Court. Review applications have been finalised for all of the Court of Appeal judges and for a significant number of High Court judges. The Board began vetting the magistrates on 5 February, 2013.



Board members at the Ghana High Commission after signing the condolence book for the late president of Ghana, John Evans Atta Mills

CHAPTER SIX

STATISTICAL OVERVIEW OF VETTING

- ❑ *Introduction*
- ❑ *Public Sensitisation*
- ❑ *Number of Interviews*
- ❑ *Judge's Representation*
- ❑ *Witnesses*
- ❑ *Summary of complaints relating to judges of the Court of Appeal and the High Court*
- ❑ *Volume of work*
- ❑ *Conclusion*

6.0 Introduction

The Board had to peruse voluminous documents, listen to many witnesses, create files for each judge containing all the complaints and relevant material, and rationalise all the information presented to it. This was in addition to holding several public sensitisation tours and meeting with stakeholder bodies and individuals. The tables, figures and graphs set out in this chapter capture and simplify the range of operations and sheer volume of work involved in vetting, as well as summarises the decisions reached by the Board. Statistical methods also directly contributed to the vetting process, particularly in the form of data collection (receipt of complaints), data management (complaints matrix), evaluation, analysis, recommendation and report writing.

6.1 Public Sensitisation

Public outreach and sensitisation activities have been discussed already in Chapter Two. However, a detailed breakdown of the numbers offers further insight into the Board's processes. From 25 January to 4 February, 2012, members of the Board visited 17 regions around Kenya,¹³³ and held 20 meetings with members of the public, representatives from the legal profession and inmates from Shimo La Tewa Prison. In total, 1204 citizens and 234 lawyers participated directly in these sensitisation activities. In January 2013, after the mandate to vet magistrates reverted to the Board, representatives from the Board made an additional 17 public outreach visits.¹³⁴ As a result of these efforts, 1551 members of public, 17 journalists and 11 lawyers were informed of the work of the Board and were invited to participate in registering complaints or indications of support as part of the process of addressing the suitability of the magistrates. Annexure E contains two tables - entitled "Public Outreach, Areas Visited by JMBV Representatives" - that set out the dates and locations of JMBV public outreach activities in greater detail.

Table 1 sets out a summary of the external outreach activities carried out by the Board, including the total number of public sensitisation meetings; media briefings and interviews granted to the media by individual Board members, and meetings with the Law Society of Kenya, including presentations at Continuing Legal Education seminars.

Table 1. Number of External Outreach Activities Carried Out by the Board

External Outreach Activities	Number
Sensitisation Meetings with Public	37
Media Briefings (not including announcements)	5
Interviews with the Media	4
Meetings with Law Society of Kenya at CLE events	22

6.2 Number of Interviews

Panels of the Board participated in a total of 15 interview sessions and four review sessions in relation to the nine Court of Appeal judges. As for the forty four High Court judges, the Board participated in a total of 77 interview sessions and 14 review sessions. In sum, for the 53 judges vetted by the Board, a total of 110 hearing sessions were held. A single interview session typically occupied a full day, beginning at 9.30am and finishing at 5.30pm or later, with only a short health and refreshment break.

A number of factors contributed to instances of multiple interview sessions. These included the number of complaints which required responses, additional requests for further information, and the need to provide for complainants and witnesses to appear in person and be questioned.

Only two Court of Appeal judges were evaluated over more than two sessions. However, ten High Court judges were involved in interviews that exceeded two sessions. Table 2 sets out the number of interview sessions per Court of Appeal and High Court judge.

Table 2. Number of Interview Sessions per Court of Appeal and High Court Judge

Number of Interview Sessions	Court of Appeal Judges	High Court Judges
One	2	23
Two	4	11
Three	N/A	5
Four	2	2
Five	N/A	3

Along with the time spent in the interview sessions, the Board also spent considerable time in deliberations. A total of 46 Board meetings had been held

at the time of going to print , along with seven retreats to Mombasa, Kisumu and Naivasha, which provided Board members with the opportunity for in-depth discussion and concentrated deliberation.

6.3 Judges' Representation

A majority of judges chose to have legal representation when appearing before the Board. A number had more than one advocate present, while others elected to represent themselves. The Board notes that the Judiciary provided no financial or practical support to judges and magistrates undergoing vetting. Judges were expected to cover the costs of counsel from personal funds. As mentioned above, Annexure D, attached, sets out a table of all vetted Court of Appeal and High Court judges, together with the names of their representative(s), if any. For completion, this table also includes the composition of the panel, the assigned Assisting Counsel, and the research officers and Board clerks involved in each case.

6.4 Witnesses

Over the course of the interview sessions, the Board frequently heard testimony from complainants and witnesses as part of the process of assessing complaints that were made against the judge concerned. In total, 40 of the witnesses that appeared before the Board were members of the legal profession and 75 were members of the public. Although it was often time consuming, the Board took pains to ensure adequate opportunity was provided for the questioning of witnesses, both by members of the panel and by the judge and his or her advocate. Table 3, below, sets out the number of witnesses that appeared over the course of proceedings in relation to each judge. It is notable that in the case of Court of Appeal Judge Emmanuel O'Kubasu, a total of seven witnesses appeared before the panel, while in the case of High Court Judge Muga Apondi, a total of twelve witnesses appeared before the panel.

Table 3. Number of Witnesses Appearing Before the Panel

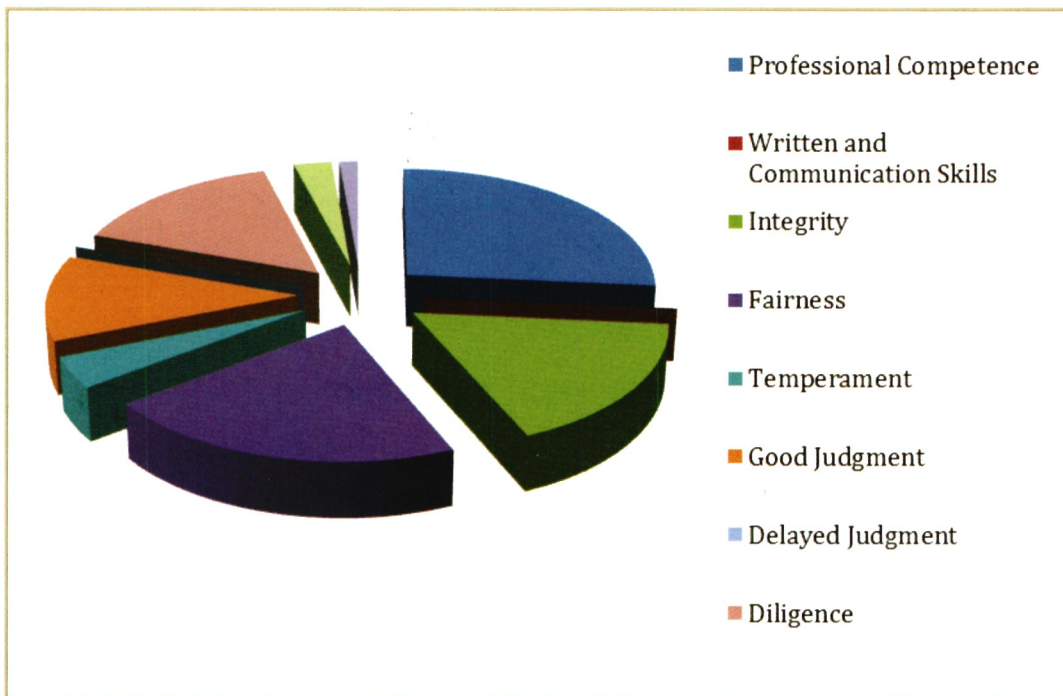
Judge			Number of Witnesses Per Judge				
			None	1	2	3-5	5 and above
Court of Appeal	Public		20	7	9	7	1
	Legal Professional		25	8	8	3	--
	Total		45	15	17	10	1
High Court	Public		3	3	1	1	1
	Legal Professional		5	4	--	--	--
	Total		8	7	1	1	1

6.5 Summary of Complaints Relating to Judges of the Court of Appeal and the High Court

On behalf of the Board, the registry received a total of 363 complaints against Court of Appeal judges and 1057 complaints against High Court judges. The complaints received were categorised based on the statutory criteria, namely: professional competence; written and oral communication skills; integrity; fairness; temperament; quality of judgment; delayed judgment; bias; and corruption.

Graphs 1 and 2 (below) detail the nature of complaints received against Court of Appeal and High Court judges respectively. As illustrated below in Graph 1, the majority of the complaints against Court of Appeal judges involved professional competence (26%), fairness (21%), integrity (17%), delayed judgment (15%), and quality of judgment (12%). The fewest number of complaints related specifically to allegations of bias (3%) and corruption (1%), though these factors were frequently included as aspects of complaints on competence, fairness and integrity.

Graph 1. Nature of Complaints Received Against Court of Appeal Judges



Graph 2 illustrates a similar trend with respect to High Court judges, where professional competence (44%), integrity (21%), fairness (11%), delayed judgment (9%) encompassed the majority of the complaints. Cases of bias and corruption were not separately recorded, but were frequently included as part of complaints on competence and integrity.

Graph 2. Nature of Complaints Received Against High Court Judges

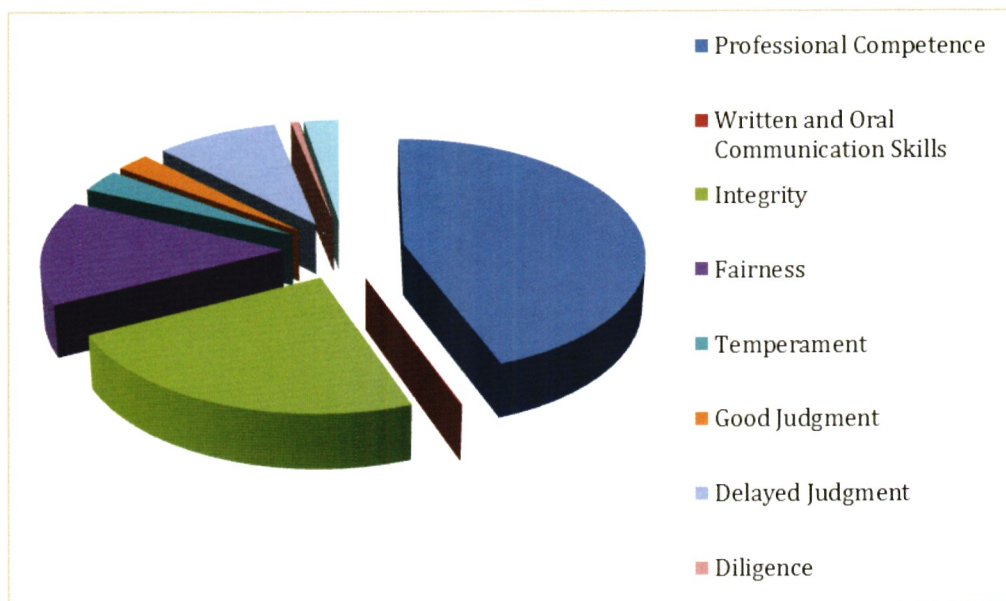


Table 4 sets out this information in tabulated form (Table C and D in Annexure E capture the summary of complaints for individual High Court and Court of Appeal judges respectively)

Table 4. Nature of Complaints Made Against Court of Appeal and High Court Judges

Vetting Criteria	Number of Complaints		
	Court of Appeal	High Court	Total (%)
Professional Competence	96	469	565 (40%)
Written and Oral Communication Skills	0	1	1 (<1%)
Integrity	62	245	307 (22%)
Fairness	77	151	228 (16%)
Temperament	15	33	48 (3%)
Good Judgment	42	27	69 (5%)
Delayed Judgment	0	97	97 (7%)
Diligence	56	6	62 (4%)
Bias	10	0	10 (<1%)
Corruption	5	0	5 (<1%)
Not Specified	0	28	28 (2%)
Total	363	1057	1420

6.6 Volume of work

At least two thick files of written material would be compiled for a typical interview, running to between 400 and 700 pages each. The smallest interview file contained 200 pages and the largest 1500 pages. A total of one hundred Hansard transcripts were produced; 19 recording interviews with Court of Appeal judges and 89 recording interviews with High Court judges. These ran to hundreds of pages and were a valuable resource for the Board. Intensive and co-ordinated efforts were required to collect and manage information and to compile the files. Records of JSC interviews and summaries of wealth declarations also required attention and analysis. The volume of work involved in vetting, in the carrying out of interviews and associated preparation and deliberation, presented a demanding assignment.

6.7 Conclusion

To date, the Board has vetted nine Court of Appeal judges and 44 High Court judges. Four Court of Appeal judges and nine High Court judges were found to be unsuitable. Thus, the Board found 75% (or 40 judges) to be suitable and 25% (or 13 judges) to be unsuitable. As illustrated in the statistics set out in this chapter, ensuring both the efficiency and the fairness of the vetting process demanded considerable time, energy and resources.

CHAPTER SEVEN

LESSONS LEARNED AND WAY FORWARD

▣ Introduction

▣ Lessons Learned

- *Extending Reform Processes*
- *Inaccessibility of the Courts*
- *Weak Oversight and Supervisory Mechanisms*
- *Poor Working Environment*
- *Support for Junior Officers*
- *Authoritarian Management System and Demystification of the Court Process*
- *Delays*
- *Ignorance of citizens*
- *Political Interference*
- *Poor Co-ordination among Court Officials*
- *Temperament*
- *Arrogance*

▣ Way forward

- *Extension of the Vetting Process*
- *Commonwealth Judges*
- *The Legal Profession*
 - *Misconduct*
 - *Litigation culture*
- *Training of Judicial Officers*
- *Abuse of Rights by City Council askaris and other Security Personnel*
- *Transforming Judicial Culture*

▣ Conclusion

7.0 Introduction

This is an interim report, as the vetting process is still in progress. In the final report, the Board will examine the vetting process itself in order to draw lessons learned, and make recommendations that could aid future vetting exercises in Kenya or other countries that may consider undertaking a vetting process of their own.

The historic exercise of vetting afforded the Board a unique opportunity to engage with judicial officers, other employees of the judiciary, as well as members of the public on multiple issues relating to the administration of justice. It also came across information relating to the administration of justice in Kenya more generally. Thus the Board gained an intimate insight into the state of the Kenyan judiciary. The conclusion the Board came to was that the problems affecting the judiciary are multi-sectoral, and went beyond the judicial officers to encompass a range of sectors, areas and players. As such, vetting should form only a part, albeit an important one, of a wider reform effort. The Board wishes to share these insights in order to encourage public dialogue on these issues.

This chapter, therefore, discusses lessons learned from observing the state of the Kenyan justice system, and makes general recommendations on sectors, players and processes that have an influence on access to and delivery of justice.

7.1 Lessons Learned

7.1.1 Extending Reform Processes

The police, the prosecution, advocates, prison officers, probation officers and paralegals have a role to play in the administration of justice and they should not be ignored in the transformation of the judiciary.

The Board observed that officers involved in the court process often acted in an uncoordinated fashion. Efforts should be made to achieve greater coordination among the various players in the court system, for example, in preparing witnesses.

7.1.2 Inaccessibility of the Courts

The culture in the courts was hostile and disrespectful. The judiciary was detached from the people it served. The language used in courts was too technical for laypersons to understand. Members of the public complained that judges and lawyers often huddled together and engaged in discussions out of earshot of litigants.

For disabled people, lack of access was exacerbated by unavailability of sign language interpreters and absence of access ramps.

7.1.3 Weak Oversight and Supervisory Mechanisms

Most judicial officers were never punctual and did not have set targets or indicators for measuring performance. Other officers reported to work while suffering from poor health. There was no system to ensure accountability of officers to the people they served. Members of the public recommended that all judicial officers sign performance contracts like all the other public servants.

7.1.4 Poor Working Environment

Judicial officers have over the years worked under very poor terms and conditions of service. A judge or a magistrate, for instance, would be expected to cover a large geographical area without facilities like transport or offices. It was unrealistic to expect the officers to deal with huge numbers of cases efficiently and fairly. The Board noted that there was need to invest in case researchers so that judges and magistrates could concentrate on their core function of determining cases.

7.1.5 Support for Junior Officers

Huge differences exist between the benefits available to judges and magistrates. This became apparent during the vetting exercise. While judges could afford one or two lawyers, the magistrates could barely afford to meet the costs for preparing their defence, including making photocopies. The judiciary might consider offering junior offices support during the vetting exercise.

7.1.6 Authoritarian Management System and Demystification of the Court Process

Hitherto, there existed an entrenched authoritarian management system, beginning with the office of the Chief Justice down to the registrars and heads of stations. This often led to a breakdown of communication between the senior officers and their juniors. Judges of the Court of Appeal often did not mix with judges of the High Court, and High Court judges did not mix with magistrates. In addition, there exist huge differences in salary and privileges between the Chief Justice, judges of the Court of Appeal and High Court and Registrar on the one hand, and magistrates on the other. For example, judges have official vehicles and bodyguards, while magistrates use public transport and have to take care of their own security. These differences are even more pronounced between judicial officers in rural stations and their urban counterparts. This state of affairs leads to discontent and apathy.

Authoritarian systems thrive on obscurity and mystification. Reform of the judiciary is essentially a demystification process, making citizens familiar with its processes, and instituting systems of accountability for judicial officers. The degree to which courts become transparent, is the same degree to which ordinary citizens will feel confident in using them.

“Reform of the judiciary is essentially a demystification process, making citizens familiar with its processes, and instituting systems of accountability for judicial officers.”

7.1.7 Delays

Justice delayed is justice denied, so the axiom goes. Yet the Board noted many instances of delay, caused by poor case-list management, absenteeism, poor health of officers and sheer laziness. Poor coordination among disparate court officials also led to delays.

There were other delays occasioned by systemic inadequacies over which a judge had no control.

7.1.8 Ignorance of Citizens

The Board observed that access to justice was also hampered by citizens' ignorance of both their rights and procedures of the criminal justice system. In matters of arbitration of disputes, for example, some citizens chose to file cases with administrative chiefs and police, instead of with the courts.

The National Council on Administration of Justice should consider doing more civic education on rights and how to use the courts, services of the police, and the devolved court system.

7.1.9 Political Interference

Political interference has been a major hindrance to judicial fairness. The political class has often influenced postings and promotion of judicial officers. In many instances, there has been outside interference with allocation of cases. A result of this culture has been the existence of cartels peddling justice in the corridors of the judiciary. Also, ethnic considerations have often been used in recruitment, promotion and posting of judges and magistrates to specific stations.

7.1.10 Poor Coordination among Court Officials

The Board noted that the various stakeholders in the administration of justice often worked in a disjointed fashion. Lack of coordination among different court systems and departments led to conflict, duplication and waste.

The judiciary was also dogged by problems ranging from poor work ethic among staff to outdated filing systems and unpredictable case allocation and case listing. Often, files went missing. The Board noted that computerisation of court records was long overdue.

7.1.11 Temperament

Judicial officers who appeared before the Board accused of being temperamental blamed pressures of work. Others were simply evasive on this question. The problem

could very well be linked to insufficient leave, frustration with unpredictable promotion practices and opaque training policy.

The judiciary should consider providing professional help for those of its members who require training in anger management.

7.1.12 Arrogance

The Board found several judges arrogant, domineering, high-handed and inflexible. This impacted negatively on access to justice, as the citizens felt cowed by the unfriendly atmosphere of the courts.



Board Secretariat team with the CEO during the Justice Cup Tournament - 25 July, 2012.

7.2 Way Forward

7.2.1 Extension of the Vetting Process

The vetting process needs to be extended beyond the judicial officers to include all persons functioning in the courts and supportive sectors: the police, the prosecution, advocates, prison officers, probation officers and paralegals.

Many officials interacted in a corrupt way with litigants. There were numerous instances of documents being deliberately misfiled or altered, and of money paid for court fees or fines being misappropriated. In one matter, court officials acknowledged, without apparent shame, that they possessed cell phones paid for by a prisoner.

7.2.2 Commonwealth Judges

Urgent attention needs to be given to a system that would facilitate efficient appointment of Commonwealth judges who have been identified as meeting the requisite criteria. Delays in getting parliamentary approval resulted in potential appointees taking up other work. Such delays severely hampered the productivity of the Board, and placed an undue burden on Commonwealth judges who remained after the terms of their colleagues had expired, as the Act requires that a Commonwealth judge be present in each interviewing panel.

7.2.3 The Legal Profession

Establishing a culture consistent with constitutional values in the whole of the judiciary will require that all stakeholders with an influence on access to justice be willing to change attitudes and practices accordingly. The legal profession needs to consider a structured self-examination exercise in relation to:

(a) *Misconduct*

There were many statements from the public that lawyers participated directly in corrupt activities. There were strong indications that, particularly in rural areas,

judicial officers had an unduly cozy relationship with well-established legal firms, so much so that when a particular judicial officer moved to another station, the firm would open up a branch there. Also, evidence received by the Board suggests that some lawyers would collude with judicial officers to achieve particularly high awards in insurance matters with an appropriate percentage going to the judicial officer concerned.

(b) *Litigation culture*

With respect to this, the Board suggests that:

- The obsession with procedural technicalities should be discouraged.
- There should be less use of interlocutory procedures and stay orders, which contribute to endless litigation without substantive matters being resolved.
- Substantive justice should be the goal. In commercial and family disputes, for example, mediation, conciliation and arbitration should be encouraged.

7.2.4 Training of Judicial Officers

For many years, judges and magistrates were thrown – so to speak - into the deep end, with no induction and no continuous training. While the Board was aware that the Judicial Training Institute had been doing extraordinary work in recent times, far more needs to be done. For example, insufficient attention has been given to the problems of judgment writing. The Board also noted with some concern that some of the recently appointed members of the Land and Environmental Division of the High Court appeared to have very weak foundational knowledge in land and environmental law.

Judges will need training in emerging areas of law, for example, information technology, refugee law, and of course, land and environment.

“The winds of change are blowing through the justice system.”

7.2.5 Abuse of Rights by City Council *Askaris*, Traffic Officers and other Security Personnel

Board members were particularly concerned about the manner in which the Nairobi City Council *askaris* abused the rights of, and become mechanisms for extortion from, ordinary members of the public. At one hearing, two members of the Board and a magistrate narrated how they had been subjected to undue harassment by traffic officers, security officials and *askaris*. The Board's view is that strong leadership needs to be given by senior magistrates to ensure that people are not placed in custody unduly for relatively minor offences, and that harassment of the public is stamped out.

7.2.6 Transforming Judicial Culture

In the course of the interviews and visits to different parts of the country, the Board noted the beginnings of distinct change in the judicial culture. Judicial officers appeared to have become far less remote and far more approachable.

In the Board's view, judicial officers should do more to ensure that the proceedings and their decisions are communicated to, and understood by those affected.

However, the Board also noted in a number of matters that judicial officers continued to be unduly passive, when justice required that they be more proactive.

7.2.7 Conclusion

The winds of change are blowing through the justice system. The Board believes that the vetting process has made a significant contribution to this development. It appreciates the extensive support for its work given by the public. The Board has now begun vetting magistrates. Unfortunately, many of the problems referred to in this Report continue to exist. Nevertheless, the Board is confident that it will complete its mandate and assist in the noble task of restoring public confidence in the judiciary.

ENDNOTES

CHAPTER ONE

- 1 See Article 1(1) of the Constitution of the Republic of Kenya (2010).
- 2 See Article 263 of the Constitution.
- 3 The People's Choice: The Report of the Constitution of Kenya Review Commission (2002) at 52.
- 4 The committee was chaired by Honourable Justice Ringera.
- 5 The report of the Integrity and Anti-corruption Committee of the Judiciary, 2003 (the Ringera Report) at 46.
- 6 Ibid.
- 7 International Commission of Jurists (ICJ) Report, Kenya: Judicial Independence, Corruption and Reform, April 2005 at 17-26.
- 8 International Legal Assistance Consortium (ILAC), 'Restoring Integrity: An assessment of the needs of the justice system in the Republic of Kenya' at 52.
- 9 Final Report of the Task Force on Judicial Reform (Ouko Report) (2010) at 73.
- 10 The Independent Review Commission (IREC) Report (Kriegler Commission Report) stated that "... during the 2007 general election period in Kenya, a material contributor to the tension at Kenyatta International Conference Centre (KICC), broadcast live to the country, was the absence of an effective Electoral Dispute Resolution (EDR) mechanism to resolve the mounting challenges to the integrity of the results from Kibaki strongholds. The response by Electoral Commission of Kenya (ECK) Chairman Kivuitu and Minister of Justice Martha Karua, directing challengers to the courts, merely served to exacerbate matters. ODM representatives, adverting to the appointment of five new judges a few days earlier, made plain their distrust of the judiciary and insisted on their challenges being resolved there and then, if necessary delaying the announcement of the final result" (the commission was headed by Hon. Justice Johann Kriegler).
- 11 Six months after the contested presidential election led to widespread post-election violence, a Gallup Poll conducted across all provinces in Kenya suggested that confidence in the judicial system had declined from 55% in 2007 to only 36 % in 2008. When the poll was repeated in April 2009, just 27% of Kenyans expressed confidence in the judicial system, half the percentage that had expressed confidence in 2007. (Gallup, Lacking Faith in Judiciary, Kenyans Lean toward The Hague. Available

online at <http://www.gallup.com/poll/122051/lacking-faith-judiciary-kenyans-lean-toward-hague.aspx>.

- 12 Under Agenda Item IV (Long Term Issues and Solution Matrix of Implementation Agenda) of the Kenya National Dialogue and Reconciliation (KNDR), comprehensive reform of the Constitution and key governance institutions including the judiciary were identified as part of the long term solutions to the crisis that followed the disputed elections. Similarly, the Medium Term Plans (2008-2012) identified judicial reform as an important aspect of the economic, social and political pillars of Vision 2030.
- 13 Vetting of Judges and Magistrates in Kenya, International Commission of Jurists Kenya Section, 2012, p. 5.
- 14 Article 159(1).
- 15 Article 159 (2) (a-e).
- 16 Article 160(1). The Constitution also guarantees security of tenure by providing that no office of a Judge shall be abolished while there is a substantial holder, that the remuneration and benefits payable to the Judges shall not be varied to the disadvantage of that Judge and that a member of the judiciary is not liable in action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function (Article 160(2-5))
- 17 The Judicial Service Commission is established under Article 171 with the mandate to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice (Article 172). However, appointments to the office of the Chief Justice and Deputy Chief Justice by the President must not only be in accordance with the recommendation of the Judicial Service Commission, but are also subject to the approval of the National Assembly (Article 166(1)(a)).
- 18 The Supreme Court is established under Article 163(1) with exclusive original jurisdiction to hear and determine disputes relating to elections to the office of President arising under
- 19 Article 140 among other powers (see Article 163 (3-9)).
- 20 Article 10(1-2) declares that the following national values and principles of governance are binding on all state organs (including the judiciary) when applying or interpreting the Constitution.
 - a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people,

- b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised,
- c) Good governance, integrity, transparency and accountability, and
- d) Sustainable development. (Article 10(2)).

21 The Committee of Experts on Constitutional Review, Final Report of 11 October 2012, para 7.5.4.

22 Ibid

23 The Committee of Experts on Constitutional Review, Final Report of 11 October 2012, para 6.4.1, p. 72 states that there was consensus that: “(a) A new Constitution should create a fresh start for Kenya establishing the rule of law, protection of human rights, and respect for everyone irrespective of their gender, ethnicity, disability, age , religion, culture or political persuasion. (b) The institutions and office bearers in the new constitution must have the confidence of the people and be accountable to them.”

24 This phrase was commonly used during the Yellow Ribbon Campaign of 2002. In the face of opposition, advocates associated with the LSK sported yellow ribbons as a demonstration of support for the constitutional reforms drafted by Constitution of Kenya Review Commission, particularly those dealing with transformation of the judiciary, which was widely acknowledged as being corrupt.

25 Article XXVII.2.

26 The Committee of Experts on Constitutional Review, Final Report of 11 October 2012, para 6.4.4.1, p. 76.

27 J Priban, ‘Oppressors and Their Victims: The Czech Lustration Law and the Rule of Law’ in A Mayer-Rieckh and P de Greiff (eds) *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council, 2007, available at <http://www.ssrc.org/publications/view/57EFEC93-284A-DE11-AFAC-001CC477EC70/>).

28 See I Markovits ‘Children of a Lesser God: GDR Lawyers in Post-Socialist Germany’ (1995-1996) 94 Mich LR 2270; D Kommers ‘Transitional Justice in East Germany’ (1997) 22 Law and Social Inquiry 829; C Wilde ‘The Shield, the Sword, and the Party: Vetting the East German Public Sector’ in A Mayer-Rieckh and P de Greiff (eds) *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council, 2007, available at <http://www.ssrc.org/publications/view/57EFEC93-284A-DE11-AFAC-001CC477EC70/>). This was part of a larger programme of vetting

all public officials which the Federal Republic of Germany (previously West Germany) insisted upon in the Treaty of Unification with the East German state, although democratic activists in the East had made similar demands before the merger

- 29 Kommers (n28) 833.
- 30 Wilde (n28) 368-369.
- 31 Kommers (n28) 838.
- 32 See D Pimentel 'Restructuring the Courts: In Search of Basic Principles for the Judiciary of Post-War Bosnia and Herzegovina' (2008) 9 Chicago Journal of International Law 107; A Mayer-Rieckh 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina' in A Mayer-Rieckh and P de Greiff (eds) Justice as Prevention: Vetting Public Employees in Transitional Societies (New York: Social Science Research Council, 2007, available at <http://www.ssrc.org/publications/view/57EFEC93-284A-DE11-AFAC-001CC477EC70/>). The state of Bosnia- Herzegovina, consisting of the territories and enclaves of former warring parties brought together by the 1995 Dayton Peace Accord, was governed under international supervision of the United Nations.
- 33 Mayer-Rieckh (n32) 197. The original period had to be extended by five months.
- 34 Mayer-Rieckh (n10) 200.
- 35 Mayer-Rieckh (n32) 201. It should be noted that the total number of judgeships was also reduced, as a result of the restructuring of the court system and mergers of local courts. There was a relative shortage of new applicants who were sufficiently qualified, unlike the situation in East Germany. Opinion polls suggest that there was still a significant improvement of public confidence in the judiciary, which rose from a low of 41% to at least 60% during the period of the reforms. Mayer-Rieckh (n11)202. This improvement may not have been entirely due to the reappointment process, since other important institutional changes were made at the same time.
- 36 Mayer-Rieckh (n32) 197.
- 37 Mayer-Rieckh (n32) 197.
- 38 Ibid at 8.15.1
- 39 Section 23:1

-
- 40 Art.23(1)
- 41 Art 159(2) provides: in exercising judicial authority the courts and tribunals shall be guided by the following principles
- a) Justice shall be done to all irrespective of status;
 - b) Justice shall not be delayed,
 - c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - d) Justice shall be administered without undue regard to procedural technicalities; and
 - e) The purpose and principles of this Constitution shall be protected and promoted.
- 42 Section 5
- 43 Section 18(1)
- 44 Section 18(2)
- 45 These were appointed by the President in consultation with the Prime Minister. After a competitive interview process, the Public Service Commission convened a selection committee with responsibility to interview and select at three candidates qualified for appointment as Chairperson and eighteen candidates of whom at least six were lawyers, qualified for appointment as members. The names were forwarded to the President and Prime Minister, who nominated the Chairperson and five other members, whom the National Assembly considered and approved. The act stipulated that the process should ensure that the Board reflects the regional and ethnic diversity of the people of Kenya and that not more than two-thirds of the members were of the same gender. See sections 7-9
- 46 Section 17
- 47 The Vetting of Judges and Magistrates Regulations, 2011 were published through Legal Notice No 189 of 2011.
- 48 Section 20
- 49 Section 19 (2)

-
- 50 Section 19(5)
- 51 Section 21(1)
- 52 Section 21(2)
- 53 Section 22(1)
- 54 Section 22(2)
- 55 Section 22(3)
- 56 Section 33(1)
- 57 See section 9(5).
- 58 The three non-citizen members were to be appointed by the President in consultation with the Prime Minister and subject to approval from the National Assembly. See section 9(13).

CHAPTER TWO

- 59 The Act came into force on 22nd March, 2011
- 60 The first team included the following Board members: Roseline Odede, Meuledi Iseme and Justice Chomba.
- 61 The second team included the following Board members: Prof. Ngotho wa Kariuki, Abdirashid Abdullahi and Justice Albie Sachs.
- 62 The third team included the following Board members: Justus Munyithya, Sharad Rao and Chief Justice Georgina Wood.
- 63 The Notices to the public were published on 14th November and 2nd December 2011. The public was required to submit their forms by 31st December 2012.
- 64 The Notice to file response is set under the Vetting of Judges and Magistrate (procedure) regulation schedule as JMVB 2 under regulation 10(2)
- 65 The Notice to Appear is set out under the Regulation Schedules as JMVB 4

-
- 66 Regulation 10(3) - Where a summary of the complaint or complaints has been served, the judge or magistrate shall lodge a response within the period specified by the Board in the notice.
- 67 Regulation 10 (4)
- 68 Section 19(5)
- 69 See Fourth Announcement, paras 38- 56 for an analysis and interpretation of section 22(2) of the Act.
- 70 Section 17 (1) - the chairperson may, for the purpose of ensuring the expeditious disposal of matters, constitute three or more panels to work concurrently in the vetting of judges and magistrates;
- 71 Section 17(2)
- 72 Refer to the Annexure for a table listing the participants in each interview.
- 73 Section 21 (1)
- 74 Section 22(2)

CHAPTER THREE

- 75 International Centre for Transitional Justice (ICTJ) and International Commission for Jurists (ICJ), 'Strategy for Civil Society Support to Kenya's Judicial Vetting Process' at 4.
- 76 The Act provides in section 18(2)(d) that the Board shall consider:
- "fairness, the elements of which shall include—
- (i) a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and
- (ii) open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views".
- 77 Thus one judge informed the Board that she had given up Criminal Court work while in practice because of all the corruption in that area.
- 78 The Act provides in section 18(2)(c) that the Board shall consider:

“integrity, the elements of which shall include—

- (i) a demonstrable consistent history of honesty and high moral character in professional and personal life;
- (ii) respect for professional duties, arising under the codes of professional and judicial conduct; and
- (iii) ability to understand the need to maintain propriety and the appearance of propriety”.

79

80 The Act. Part III. 18 (e) Temperament, the elements of which shall include-

- i) history of courtesy and civility in dealing with others;
- ii) ability to maintain composure under stress; and
- iii) ability to control anger and maintain calmness and order.

81 At the time of going to press submissions had been made and highlighted but the Board had not yet made any decision

82 The Act provides in section 18(2)(f) that the Board shall consider:

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

83 The Act. Part III. 18 (a)

Professional Competence, the elements of which shall include -

- i) intellectual capacity;
- ii) legal judgment
- iii) diligence
- iv) substantive and procedural knowledge of the law;
- v) organisational and administrative skills; and

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

84 Article 159(2)(a)-(e).

85 Article 159(1).

CHAPTER FOUR

86 Such appointments gave effect to Part II of the Act on Establishment, Membership, Functions and Powers of the Judges and Magistrates Vetting Board.

87 The process of appointing Board members was governed by sections 8 and 9 of the Act. The first recruitment process did not yield enough candidates and the Act had to be amended to allow for another round of recruiting.

88 See section 7(b) of the Act

89 For full details on challenges and/ or problems encountered by the Board, refer to Chapter Five of the Report.

90 Refer to chapter one

91 Article 23(1)

92 Art. 159(2) provides: In exercising judicial authority the courts and tribunals shall be guided by the following principles;

- a) Justice shall be done to all irrespective of status;
- b) Justice shall not be delayed,
- c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- d) Justice shall be administered without undue regard to procedural technicalities; and
- e) The purpose and principles of this Constitution shall be protected and promoted.

93 Section 5

94 Section 18(1) provides: The Board shall, in determining the suitability of a judge or magistrate, consider— (a) whether the judge or magistrate meets the constitutional criteria for appointment as a judge of the superior courts or as a magistrate; (b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and diligence; (c) any pending or concluded criminal cases before a court of law against the judge or magistrate; (d) any recommendations for prosecution of the judge or magistrate by the Attorney-General or the Kenya Anti-Corruption Commission; and (e) pending complaints or other relevant information received from any person or body, including the - (i) Law Society of Kenya; (ii) Kenya Anti-Corruption Commission; (iii) Advocates Disciplinary Committee; (iv) Advocates Complaints Commission; (v) Attorney-General; (vi) Public Complaints Standing Committee; (vii) Kenya National Human Rights and Equality Commission; (viii) National Intelligence Service; (ix) Police; or (x) Judicial Service Commission. For full details on the criteria for determining suitability under the Act, refer to Section 18).

95 There are two rules of natural justice viz: audi alterem partem (right to be heard) and nemo iudex in re causa sua (right to be heard by a fair and impartial tribunal)

96 See the Universal Declaration of Human Rights(UDHR) (1948), the International Covenant on Civil and Political Rights (ICCPR)(1976),and the African Charter on Human and People's Rights (ACHPR)(1981)

97 See Article 10 and 159

98 These Notices were accompanied by a Complaint File containing details of all the complaints and any other incriminating information that had been received and preferred against the judge.

99 These were Justice Ibrahim and Justice Nambuye. See the Sixth Announcement of the Board, available at www.jmvpb.or.ke.

100 As per Section 19(2) of the Act

101 Transparency is one of the National Values and Principles enshrined in Article 10 of the Constitution.

CHAPTER FIVE

- 102 Although the vetting process has not been completed, the Board has successfully completed the vetting of Judges.
- 103 Section 10(1) requires the Chairperson to convene the first meeting of the Board within seven days
- 104 Section 23(3) states that the Board shall have a preparatory period of Two months during which it shall undertake all tasks necessary to ensure that it is able to work effectively from the commencement of its operations.
- 105 The Regulations are included as Annexure B. For a detailed understanding of the procedure adopted by the Board, refer to Chapter 1 and 2 of the Report.
- 106 As a matter of fact, it took around five calendar Months before the Board members could receive their first salaries.
- 107 This conviction is based on the fact that after the Board subsequently conducted public sensitization meetings, it noted an increase in the number of complaints lodged by the public and other organizations.
- 108 Section 23(1) of the Vetting of Judges and Magistrates Act 2012.
- 109 The original section 23(2) provided:
- a) the vetting of the Judges of the Court of Appeal and the High Court shall be finalized within three months;
 - b) the vetting of magistrates shall be finalised within six months; and
 - c) all the requests for reviews granted under section 22 shall be considered after the vetting of all judges and magistrates under paragraphs (a) and(b) and shall be finalised within one month.
- 110 The Board commenced the first vetting exercise on 23th February 2012 and the three month period for vetting Court of Appeal judges expired on 23th May 2012.
- 111 The Board adopted this approach because uncertainties had arisen regarding the effect of section 23(2), not only concerning the three-month period stipulated in respect of judges, but also the provision in section 23(2)(c) that “requests for reviews granted under section 22 shall be considered

after the vetting of all judges and magistrates under paragraphs (a) and (b)”.

112 The Board explained this to the public in its Second Announcement on 20th July 2012, para 8-9.

113 The amendment was signed by the President on the 6th of July 2012 and gazetted on the 12th of July 2012 in Kenya Gazette Notice No.72 (Acts. No. 12).The amendment deleted section 23(2) of the Vetting of Judges and Magistrates Act and inserted the following two subsections in its place:

(2) (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) (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.

114 The transfer of the vetting of magistrates to the Judicial Service Commission was widely criticized. The Board was the only body legally mandated to vet all judges and magistrates. The Board after consultations with key stakeholders including the JSC, the AG, the CIC and LSK, resolved to recommend and support a parliamentary amendment restoring the Board’s mandate to vet the magistrates.

115 Vetting of Judges and Magistrates (Amendment) Act 2012.

116 The amendment repeals section 23(2) of the principal Act.

117 Section 22(3)

118 Section 12(7)

119 The Court was invited to determine the following issues;

- i) whether section 23 of the Sixth Schedule is in conflict with the substantive provisions of the Constitution and should therefore be declared null and void;
- ii) whether the VJMA violates the principle of separation of powers and independence of the judiciary;
- iii) Whether the provisions of the VJMA are unconstitutional for violating the provisions of the Bill of Rights.

-
- 120 The judges involved Justice Omollo, Justice Nyamu, Justice Bosire, Justice O’Kubasu and later on Justice Gacheche and Justice Nambuye.
- 121 The vetting process has been also challenged previously in Court. The decision of the High Court in Milimani Law Courts Petition No. 146 of 2011 Mong’are vs. Attorney General Minister for Justice and Constitutional Affairs, the Judges and Magistrates Vetting Board and the Judicial Service Commission dismissed a substantive challenge to vetting on 18 November 2011. A ruling of the Court of Appeal in Civil Application No.NAI. 265 of 2011 (UR. 175/2011) Mong’are vs. Attorney General Minister for Justice and Constitutional Affairs, the Judges and Magistrates Vetting Board and the Judicial Service Commission on the 21st of February 2012 lifted a three week “stay” of vetting that it had initially granted when approached for leave to appeal. This case has not progressed further to date.
- 122 High Court Judicial Review Application No. JR 295 of 2012 In the Matter of an Application for Leave to Apply for Judicial Review by Honourable Lady Justice Jeanne Gacheche dated 24th July 2012. The Judges and Magistrates Vetting Board was named as first respondent and the Judicial Service Commission as second respondent. The Attorney-General was enjoined as an interested party.
- 123 The decision of 24th July 2012 was given by Justice Mabeya.
- 124 Eldoret High Court Constitutional Petition No. 11 of 2012. The Judges and Magistrates Vetting Board, the Attorney-General and the Judicial Service Commission were named as respondents. Justice Ibrahim and Justice Nambuye were enjoined as interested parties.
- 125 It is notable that Justice Warsame issued this ruling. At the time he was due to be vetted.
- 126 Justice Warsame was one of the two judges in favour of the stay (together with Justice G.V. Odunga) and at this point he was still to be vetted. As will be seen later in the announcement, he has now in fact been vetted. Justice Kimondo issued a dissent.
- 127 High Court of Kenya at Nairobi, Eldoret High Court Constitutional Petition No. 11 of 2012 Centre for Human Rights and Democracy, Richard Etyan’ga Omanyala and Bishop Francis Ranogwa Oziova vs. Judges and Magistrates Vetting Board, Attorney-General and the Judicial Service Commission, 25 Septemeber 2012.
- 128 Namely:
- » High Court Judicial Review Application No. 295 of 2012 (filed on 20th July 2012): Hon. Lady Justice Jeanne W. Gacheche vs. The Judges and Magistrates Vetting Board and the Judicial Service Commission(together with the Attorney General, the Law Society of Kenya, the

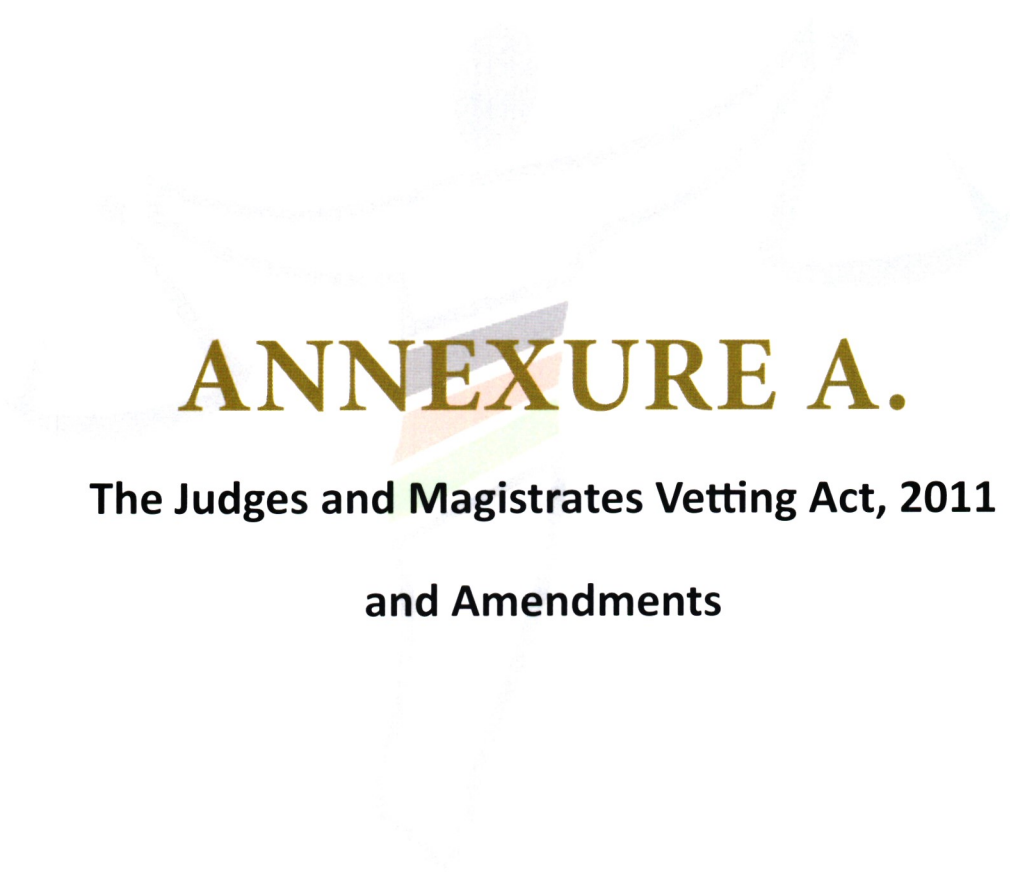
Kenya Magistrates and Judges Association and Hon Justice Emmanuel O’Kubasu, enjoined as interested parties). The judge who was the applicant in this case sought orders quashing the proceedings of the Board; prohibiting the Board from commencing or continuing with her vetting or from making a Determination; and prohibiting the Board from serving her with notices since the time for vetting had expired and had not been extended in accordance with the Act or the Constitution of Kenya.

- » Eldoret Constitutional Petition No. 11 of 2012 (filed on 13th August 2012): The Centre for Human Rights and Democracy, Richard Etyan’ga Omanyala and Bishop Francis Ranogwa Ozioya vs. The Judges and Magistrates Vetting Board and the Judicial Service Commission (together with Hon. Justice Mohammed Ibrahim and Hon. Justice Roselyn Nambuye who were enjoined as interested parties). The petition sought declaratory orders including that section 22 of the Vetting of Judges and Magistrates Act 2011 (the provision that the Board’s decision would be final, subject to applications for internal review) contravened the Constitution, and that the proceedings and decisions made by the Vetting Board between 23rd May 2012 and 12th July 2012 were unconstitutional, invalid, illegal, null and void.
- » Nairobi Constitutional Petition No. 433 of 2012 (filed on 26th September 2012): Hon. Justice Riaga Omollo vs. The Judges and Magistrates Vetting Board, the Attorney General and the Judicial Service Commission. The petitioner seeks declaratory orders against the Respondents that the Determination of 25th April 2012 and the decision on request for review dated 20th July 2012 violated the Petitioner’s fundamental rights and freedoms, and that the provisions of section 22 of the Act contravened the Constitution.
- » Nairobi Constitutional Petition No. 434 of 2012 (filed on 26th September 2012): Hon. Justice Samuel Bosire vs. The Judges and Magistrates Vetting Board, the Attorney General and the Judicial Service Commission. The judge petitioner sought declaratory orders including that the Board’s proceedings on 26th March 2012 and the Determination of 25th April 2012 violated the Petitioner’s fundamental rights and freedoms, and that the provisions of section 22 of the Act contravened the Constitution.
- » Nairobi Constitutional Petition No. 438 of 2012 (filed on 27th September 2012): Joseph G. Nyamu vs. The Judges and Magistrates Vetting Board and the Attorney General (together with the Judicial Service Commission as an interested party). The petitioner argued that all actions, decisions, processes and events consequential upon the findings of the Vetting Board of 25th April 2012 and 20th July 2012 should be stayed pending the determination of his petition. The petitioner also sought various declaratory orders to the effect that these findings of the Board in his matter were ultra vires and unconstitutional.

-
- 129 The five-member bench included Justices Havelock, Mutava, Nyamweya, Ogola and Mabeya.
- 130 The LSK, which is the 3rd Interested Party in Petition No. 11/2012 made this challenge in its Notice of Motion dated 5/10/2012.
- 131 Justices Sichale, Kiage, Mohamed, Odek and Kantai.
- 132 See Vetting of Judges and Magistrates Act Section 9(13). The Boardmembers, in consultation with the P.S Ministry of Justice, National Cohesion and Constitutional Affairs, identified Hon. Justice Albie Sachs and Hon. Justice Frederick Chomba

CHAPTER SIX

- 133 The regions covered included Thika, Kericho, Machakos, Kisii, Kisumu, Malindi, Nyeri, Mombasa, Embu, Kwale, Nakuru, Meru, Voi, Nanyuki, Mombasa, Bungoma, and Eldoret.
- 134 Kwale, Mwingi, Kapsabet, Iten, Kilifi, Garissa, Nyando, Kitale, Narok, Bomet, Busia, Isiolo, Thika, Molo, Nyamira, Kitui, Chuka, EldamaRavin, and Kakamega were among the areas visited in January of 2013.



ANNEXURE A.

The Judges and Magistrates Vetting Act, 2011 and Amendments

SPECIAL ISSUE

Kenya Gazette Supplement No. 18 (Acts No. 2)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2011

NAIROBI, 22nd March, 2011

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THE VETTING OF JUDGES AND MAGISTRATES ACT

No. 2 of 2011

Date of Assent: 21st March, 2011

Date of Commencement: 22nd March, 2011

ARRANGEMENT OF SECTIONS

Clause

PART I—PRELIMINARY

- 1—Short title.
- 2—Interpretation.
- 3—Object and purpose of the Act.
- 4—Application.
- 5—Guiding principles.

PART II—ESTABLISHMENT, COMPOSITION, FUNCTIONS AND POWERS OF THE VETTING OF JUDGES AND MAGISTRATES BOARD

- 6—Establishment of the Board.
- 7—Membership of the Board.
- 8—Qualifications for appointment.
- 9—Procedure for appointment of members.
- 10—Election of deputy-chairperson.
- 11—Functions of chairperson.
- 12—Tenure and vacancy of office of chairperson and members.
- 13—Function of the Board.
- 14—Powers of the Board.
- 15—Secretary and secretariat.
- 16—Assisting counsel and staff.

PART III—VETTING PROCEDURES

- 17—Panels.
- 18—Relevant considerations.
- 19—Vetting procedure.
- 20—Order of priority.
- 21—Determination.
- 22—Review.

PART IV—GENERAL

- 23—Time frame.
- 24—Voluntary retirement and terminal benefits.
- 25—Allowances for members.

- 26—Annual estimates.
- 27—Funds of the Board.
- 28—Accounts and audit.
- 29—Protection from personal liability.
- 30—Oath or affirmation of office.
- 31—Disclosure of personal interest.
- 32—Conflict of interest.
- 33—Inherent powers of the Board.

SCHEDULE—OATH/AFFIRMATION OF THE OFFICE
OF CHAIRPERSON/DEPUTY
CHAIRPERSON/MEMBER/ SECRETARY

AN ACT of Parliament to provide for the vetting of judges and magistrates pursuant to section 23 of the Sixth Schedule to the Constitution; to provide for the establishment, powers and functions of the Judges and Magistrates Vetting Board, and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Vetting of Judges and Magistrates Act, 2011.

Short title.

2. In this Act, unless the context otherwise requires—

Interpretation.

“Board” means the Judges and Magistrates Vetting Board established by section 6;

“chairperson” means the chairperson of the Board appointed under section 9;

“deputy chairperson” means the deputy chairperson of the Board elected under section 10;

“effective date” means the 27th August, 2010;

“judge or magistrate” means a judge or magistrate to whom this Act applies in accordance with section 3, and includes the Registrar of the High Court and the Chief Court Administrator and their deputies, and persons seconded to administrative tribunals, in their capacity as judges or magistrates;

“member” means a member of the Board appointed under section 9, and includes the chairperson and the deputy chairperson;

“Minister” means the Minister for the time being responsible for matters relating to the Judiciary;

“secretary” means the secretary of the Board appointed under section 15;

“vetting” means the process by which the suitability of a serving judge or magistrate to continue serving in the Judiciary is determined in accordance with this Act.

Object and purpose of Act.

3. The object and purpose of this Act is to establish mechanisms and procedures for the vetting of judges and magistrates pursuant to the requirements of section 23 of the Sixth Schedule to the Constitution.

Application.

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

Guiding principles.

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

PART II—ESTABLISHMENT, MEMBERSHIP, FUNCTIONS AND POWERS OF THE JUDGES AND MAGISTRATES VETTING BOARD

Establishment of the Board.

6. (1) There is established an independent board to be known as the Judges and Magistrates Vetting Board.

(2) The Board shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; and
- (c) doing or performing all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may be lawfully done or performed by a body corporate.

Cap 446.

(3) The provisions of the State Corporations Act shall not apply to the Board.

7. The Board shall consist of nine members, comprising a chairperson, a deputy chairperson and seven other members, of whom—

(a) six shall be citizens of Kenya appointed in accordance with section 9 (1) to (12) and of whom three shall be lawyers; and

(b) three shall be non-citizens of Kenya appointed in accordance with section 9 (13).

8. (1) A person shall be qualified for appointment as a member if such person-

(a) holds a degree from a university recognised in Kenya;

(b) has at least fifteen years' distinguished post-qualification experience in their field of study; and

(c) satisfies the requirements of Chapter Six of the Constitution.

(2) A person shall not be qualified for appointment as the chairperson or deputy chairperson unless such person has at least twenty years' or an aggregate of twenty years' experience as a judge of a superior court, a distinguished legal academic, a judicial officer or other relevant legal practice in the public or the private sector in Kenya.

(3) A person shall not be qualified for appointment as a member if such person-

(a) is a member of—

(i) Parliament; or

(ii) a local authority; or

(iii) the executive organ of a political party; or

(b) was serving as a judge or magistrate in Kenya on the effective date.

Procedure for
appointment of
members.

9. (1) The President, in consultation with the Prime Minister and with the approval of the National Assembly, shall appoint the nine members of the Board in accordance with the procedure set out in this section.

(2) Within seven days of the commencement of this Act, the President, in consultation with the Prime Minister shall, by notice in the Gazette, declare the vacancies in the Board under section 7(a) and call for applications.

(3) An application in respect of a vacancy declared under subsection (2) shall be forwarded to the Public Service Commission within fourteen days of the publication of the notice and may be made by -

- (a) any qualified person; or
- (b) any person, organization or group of persons proposing the nomination of any qualified person.

(4) The names of all applicants under subsection (3) shall be published in the Gazette.

(5) The Public Service Commission shall, within seven days of the expiry of the period prescribed under subsection (3), convene a selection Committee comprising one representative each of the—

- (a) Cabinet Office;
- (b) Office of the Prime Minister;
- (c) Ministry for the time being responsible for matters relating to the Judiciary;
- (d) office of the Attorney-General;
- (e) Ministry for the time being responsible for matters relating to the public service;
- (f) Public Service Commission;
- (g) Judicial Service Commission, not being a serving judge or magistrate; and

(h) Law Society of Kenya,

for the purpose of considering the applications, interviewing and selecting at least three candidates qualified for appointment as chairperson and eighteen candidates, of whom at least six shall be lawyers, qualified for appointment as members:

Provided that not more than two-thirds of the candidates shall be of one gender.

(6) The Public Service Commission shall, within seven days of the selection of candidates under subsection (5), forward the names of the selected candidates to the President and the Prime Minister for nomination.

(7) The President, in consultation with the Prime Minister shall, within seven days of receipt of the names of the selected candidates under subsection (6), nominate a chairperson and five other persons for appointment as members of the Board and forward the names to the National Assembly.

(8) The National Assembly shall, within fourteen days of the receipt of the nominees under subsection (7), consider all the nominations received and may approve or reject any nomination.

(9) Where the National Assembly—

- (a) approves the nominees, the Speaker shall, within three days of the approval, forward the names of the approved nominees to the President for appointment;
- (b) rejects any nomination, the Speaker shall, within three days of the rejection, communicate the decision to the President, who in consultation with the Prime Minister, shall submit a fresh nominee from amongst the candidates selected and forwarded by the Public Service Commission under subsection (6).

(10) If the National Assembly rejects all or any

subsequent nominee submitted by the President for approval under subsection (9), the provisions of subsections (1) to (8) shall, with necessary modifications, apply.

(11) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(12) In selecting, nominating, approving or appointing the chairperson and members of the Board, the selection Committee, the National Assembly, the President and the Prime Minister shall ensure that the Board reflects the regional and ethnic diversity of the people of Kenya and not more than two-thirds of the members are of the same gender.

(13) The President, in consultation with the Prime Minister and subject to the approval of the National Assembly shall, in respect of the vacancies in the Board under section 7(b), appoint three distinguished non-citizen serving or retired judges, each of whom has served as a Chief Justice or judge of a superior court in the Commonwealth, to be members of the Board.

Election of deputy
chairperson.

10. (1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Board at which the members shall elect the deputy chairperson of the Board from amongst their number.

(2) The chairperson and the deputy chairperson shall be of opposite gender.

Functions of
chairperson.

11. (1) The chairperson shall—

- (a) preside over all meetings of the Board;
- (b) be the spokesperson of the Board; and
- (c) supervise and direct the work of the Board.

(2) In the absence of the chairperson, the deputy chairperson shall perform the functions of the chairperson under subsection (1).

Tenure and vacancy
of office of
chairperson and
members.

12. (1) The term of office of the chairperson or a member shall be from the date of appointment and shall, unless the office falls vacant earlier owing to any reason specified in the Constitution or in subsection (2), terminate on the dissolution of the Board.

(2) The office of the chairperson or a member shall become vacant if the holder—

- (a) dies;
- (b) by a notice in writing addressed to the President, resigns from office;
- (c) is removed from office under subsection (3);
- (d) is convicted of an offence and sentenced to imprisonment for a term of six months or more, without the option of a fine;
- (e) is unable to discharge the functions of his office by reason of physical or mental infirmity;
- (f) is absent from three consecutive meetings of the Board without good cause; or
- (g) is adjudged bankrupt.

(3) The chairperson or a member may be removed from office for misbehaviour or misconduct incompatible with the functions of the Board.

(4) The President shall notify every resignation, vacancy or removal from office in the Gazette within seven days thereof.

(5) Where a vacancy occurs in the membership of the Board, the President shall, in consultation with the Prime Minister, nominate a candidate from the list of candidates forwarded by the Public Service Commission under section 9(6), for approval by the National Assembly.

(6) A member appointed to fill a vacancy under this section shall serve for the unexpired term of the member in respect of whom the vacancy arose.

Function of the Board

13. The function of the Board shall be to vet judges and magistrates in accordance with the provisions of the Constitution and this Act.

Powers of the Board

14. (1) Subject to section 18, the Board shall have all the powers necessary for the execution of its functions under the Constitution and this Act, and without prejudice to the generality of the foregoing, the Board shall have the power to—

- (a) gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;
 - (b) interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and
 - (c) hold inquiries for the purposes of performing its functions under this Act.
- (2) In the performance of its function, the Board—
- (a) may inform itself in such manner as it thinks fit;
 - (b) may receive on oath, written or oral statements;
 - (c) shall not be bound by strict rules of evidence; and
 - (d) shall not be subject to the direction or control of any person or authority.

Secretary and secretariat.

15. (1) There shall be a secretariat of the Board which shall be headed by a secretary who shall be competitively recruited and appointed by the Board in accordance with this section.

- (2) No person shall be qualified for appointment as a

secretary unless such person—

- (a) holds at least a degree from a university recognised in Kenya;
- (b) has at least ten years' post-qualification experience;
- (c) has demonstrated competence in the performance of administrative duties for not less than five years; and
- (d) was not serving as a judge or magistrate on the effective date.

(3) The secretary shall be the administrator of the secretariat and shall serve on a full-time basis.

(4) The secretary shall, among other things, be responsible to the chairperson for—

- (a) the day to day administration of the affairs of the Board;
- (b) the co-ordination of the Board's studies, reviews, research and evaluations;
- (c) the recording of the Board's proceedings;
- (d) providing the Board with accurate information on the status of facilities and services required for the proper conduct of the vetting process;
- (e) securing the maintenance and provision of facilities and services required for the discharge of the Board's functions;
- (f) providing the Board with accurate records and information regarding the judges and magistrates undergoing vetting;
- (g) maintaining accurate records on financial matters and resource use;

- (h) ensuring the drawing up and approval of the required budget;
- (i) the custody of all records and documents of the Board; and
- (j) performing any other duties as may be assigned by the Board from time to time.

(5) Subject to the provisions of the Constitution or any other written law, the Board may delegate such of its functions as are necessary for the day-to-day management of its processes.

Assisting counsel
and staff.

16. (1) The staff of the Board shall comprise -

- (a) such number of assisting counsel and staff as the Board may appoint to assist it in the discharge of its functions under the Constitution and this Act; and
- (b) such public officers as may, upon the request of the Board, be seconded to the Board.

(2) A public officer who is seconded to the Board under subsection (1) shall, during the secondment, be deemed to be an officer of the Board and subject to its direction and control.

PART III—VETTING PROCEDURES

Panels.

17. (1) The chairperson may, in order to ensure expeditious disposal of matters, constitute three panels comprising three members each, which shall work concurrently.

(2) The chairperson shall ensure that each panel constituted under subsection (1) consists of at least a non-citizen serving or retired judge, a lawyer and a non-lawyer.

Relevant
considerations.

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

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

- (b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and diligence;
 - (c) any pending or concluded criminal cases before a court of law against the judge or magistrate;
 - (d) any recommendations for prosecution of the judge or magistrate by the Attorney-General or the Kenya Anti-Corruption Commission; and
 - (e) pending complaints or other relevant information received from any person or body, including the—
 - (i) Law Society of Kenya;
 - (ii) Kenya Anti-Corruption Commission;
 - (iii) Advocates Disciplinary Committee;
 - (iv) Advocates Complaints Commission;
 - (v) Attorney-General;
 - (vi) Public Complaints Standing Committee;
 - (vii) Kenya National Human Rights and Equality Commission;
 - (viii) National Intelligence Service;
 - (ix) Police; or
 - (x) Judicial Service Commission.
- (2) In considering the matters set out in subsection (1) (a) and (b), the Board shall take into account the following—
- (a) professional competence, the elements of which shall include—
 - (i) intellectual capacity;

- (ii) legal judgment;
 - (iv) diligence;
 - (v) substantive and procedural knowledge of the law;
 - (vi) organizational and administrative skills; and
 - (vi) the ability to work well with a variety of people;
- (b) written and oral communication skills, the elements of which shall include -
- (i) the ability to communicate orally and in writing;
 - (ii) the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and
 - (iii) effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life;
- (c) integrity, the elements of which shall include—
- (i) a demonstrable consistent history of honesty and high moral character in professional and personal life;
 - (ii) respect for professional duties, arising under the codes of professional and judicial conduct; and
 - (iii) ability to understand the need to maintain propriety and the appearance of propriety;
- (d) fairness, the elements of which shall include—
- (i) a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and
 - (ii) open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views;

- (e) temperament, the elements of which shall include—
 - (i) demonstrable possession of compassion and humility;
 - (ii) history of courtesy and civility in dealing with others;
 - (iii) ability to maintain composure under stress; and
 - (iv) ability to control anger and maintain calmness and order;
- (f) good judgment, including common sense, elements of which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles;
- (g) legal and life experience, the elements of which shall include—
 - (i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and
 - (ii) broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of different ethnic and cultural backgrounds, and demonstrable interests in areas outside the legal field; and
- (h) demonstrable commitment to public and community service, the elements of which shall include the extent to which a judge or magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular.

No. 2*Vetting of Judges and Magistrates***2011**

Vetting procedure.

19. (1) The Board shall consider information gathered in the course of personal interviews with the affected judges and magistrates as well as their records.

(2) All information obtained by the Board during personal interviews and records of the judge or magistrate being vetted shall be confidential.

(3) Every judge or magistrate to be vetted shall be given sufficient notice.

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

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

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

Order of priority.

20. The first judges and magistrates to be vetted shall be the Court of Appeal Judges, followed by Judges of the High Court, the Registrar of the High Court, the Chief Court Administrator, Chief Magistrates and others magistrates, in that order.

Determination.

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

(2) Once informed of the decision under subsection (1), the judge or magistrate shall, subject to section 22, be deemed to have been removed from service.

(3) The decision to remove a judge or magistrate from service shall be made public.

Review.

22. (1) 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 the same panel within seven days of being informed of the final determination under section 21(1).

(2) 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 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 due diligence; or

(b) on some mistake or error apparent on the face of the record.

(3) The decision by the Board under this section shall be final.

PART IV—GENERAL

23.(1) The vetting process once commenced shall not exceed a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year.

Time frame

(2) Subject to subsection (1)—

(a) the vetting of the Judges of the Court of Appeal and the High Court shall be finalised within three months;

(b) the vetting of magistrates shall be finalised within six months; and

(c) all the requests for reviews granted under section 22 shall be considered after the vetting of all judges and magistrates under paragraphs (a) and (b) and shall be finalised within one month.

(3) Before the commencement of the period of one year specified in subsection (1), the Board shall have a

preparatory period of two months during which it shall undertake all tasks necessary to ensure that it is able to work effectively from the commencement of its operations.

(4) The Board shall stand dissolved within thirty days of the execution of its mandate upon which this Act shall lapse.

(5) During the period prescribed in subsection (4), the Board shall ensure that its affairs are wound up in an orderly manner and, in particular, shall ensure that—

- (a) those aspects of its work that will be of value to other institutions are preserved, documented and transferred to the relevant institutions; and
- (b) its files and records are preserved and transferred to the Kenya National Archives and Documentation Service.

Voluntary retirement
and terminal
benefits.

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.

Allowances for
members.

25. The Board shall pay to its members such allowances for expenses as may be determined by the Minister in charge of finance.

Annual estimates.

26. (1) The financial year of the Board shall be the period of twelve months ending on the 30th June in each year.

(2) At least three months before the commencement of each financial year, the Board shall cause estimates of the expenditure of the Board for that year to be prepared and submitted to the Minister who shall present them for consideration and approval by the National Assembly.

(3) The annual estimates shall make provision for all the estimated expenditure of the Board for that year.

27. (1) The expenses incurred by the Board in accordance with this Act shall be charged on and issued out of the Consolidated Fund, and the appropriation for the expenses shall be included in the Appropriation Bill introduced in the National Assembly to authorise the withdrawal from the Consolidated Fund.

Funds of the Board.

(2) Without prejudice to subsection (1), there may be made to the Board grants, gifts, donations or bequests towards the achievement of the objects of the vetting process specified in section 3.

(3) The Board shall not accept any grant, gift, donation or bequest made on any condition that the Board performs any function or discharges any duty or obligation other than duties under this Act.

28. (1) The Board shall cause to be kept proper books and records of accounts of its income, expenditure, assets and liabilities.

Accounts and audit.

(2) The annual accounts of the Board shall be prepared, audited and reported upon in accordance with the Public Audit Act, 2003.

No. 12 of 2003.

29. (1) No matter or thing done by a member of the Board, or any officer, employee or agent of the Board shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Board, render the member, officer, employee or agent personally liable to any action claim or demand whatsoever.

Protection from personal liability.

(2) The provisions of subsection (1) shall not relieve the Board of liability to pay compensation for damage to any person for any personal or proprietary interest sustained by the person as a result of the exercise of any

power conferred by this Act or by the failure, whether wholly or partially, of any works.

Oath or affirmation
of office.

30. The chairperson, the deputy chairperson, the members and the secretary shall, before assuming office, make and subscribe, before the Chief Justice, the respective oath or affirmation prescribed in the Schedule.

Disclosure of
personal interest.

31.(1) A member of the Board who has a direct or indirect personal interest in a matter being considered or to be considered by the Board shall, as soon as reasonably practicable after the relevant facts concerning the matter have come to their knowledge, disclose the nature of the interest to the Board.

(2) A disclosure of any such interest in a matter shall be recorded in the minutes of the meeting of the Board and the member shall not be present while that matter is being dealt with by the Board and shall not take part in any deliberations or vote relating to the matter.

Conflict of interest.

32. A person who serves on the Board as the chairperson, deputy chairperson, member or secretary shall be precluded from being appointed as a judge or judicial officer for a period of five years from the close of the vetting process.

Inherent powers of
the Board.

33. (1) Subject to the provisions of this Act, the Board may regulate its own procedure and make regulations generally for the better carrying into effect the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), such regulations may provide for among others—

- (a) the conduct of the Board's operations and proceedings;
- (b) the manner of receiving and processing complaints;
- (c) any summary procedure the Board may adopt under sections 19 and 23 and;

(d) the steps that may be taken by the Board before a determination.

(3) The chairperson may issue directions for the just, efficient and economical determination of proceedings in relation to the procedures provided for by the regulations made under subsection (1).

(4) Nothing in this Act shall limit or otherwise affect the power of the Board conferred by the Constitution or under this Act, either on its own motion or on the application of a judge or magistrate, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Board.

SCHEDULE**(s. 30)**

**OATH/AFFIRMATION OF THE OFFICE OF
CHAIRPERSON/DEPUTY CHAIRPERSON/
MEMBER/SECRETARY**

I having been appointed (the Chairperson/Deputy Chairperson/Member/Secretary) of the Judges and Magistrates Vetting Board under the Vetting of Judges and Magistrates Act, 2011, do solemnly (swear/declare and affirm) that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice.

(SO HELP ME GOD).

Sworn/Declared by the said

Before me this Day of

.....

Chief Justice.

SPECIAL ISSUE

Kenya Gazette Supplement No. 34 (Acts No. 6)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2011

NAIROBI, 19th May, 2011

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PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

**THE VETTING OF JUDGES AND MAGISTRATES
(AMENDMENT) ACT**

No. 6 of 2011

Date of Assent: 17th May, 2011

Date of Commencement: 19th May, 2011

**AN ACT of Parliament to amend the Vetting of Judges and
Magistrates Act, 2011**

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Vetting of Judges and Magistrates (Amendment) Act, 2011. Short title.

2. The Vetting of Judges and Magistrates Act, 2011, hereinafter referred to as the “principal Act”, is amended in section 2 by inserting the following new definition in proper alphabetical sequence -

“pending complaint” means a complaint filed or registered with any person or body ~~as mentioned in section 18(e)~~ at least fourteen ~~days~~ ~~before~~ ~~the~~ ~~judge or magistrate is vetted”.~~

3. Section 9 of the principal Act is amended –

Amendment of section 9 of No. 2 of 2011.

 - (a) by deleting subsection (2) and substituting therefor the following new subsection-

(2) Within seven days of the commencement of this Act, the President, in consultation with the Prime Minister shall, by notice in the Gazette and in at least two newspapers of national circulation, declare vacancies in the Board under section 7(a) and call for applications.

- (b) by inserting the following new subsection immediately after subsection (13) -

(14) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may, by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

SPECIAL ISSUE

Kenya Gazette Supplement No. 72 (Acts No. 12)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2012

NAIROBI, 12th July, 2012

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The Statute Law (Miscellaneous Amendments) Act, 2012529

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The Statute Law (Miscellaneous Amendments) Act, 2012

The Vetting of Judges and Magistrates Act, 2011 (No. 2 of 2011).	S.23(2)	Delete and substitute therefor the following new subsections – (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 28 th 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.
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SPECIAL ISSUE

Kenya Gazette Supplement No. 198 (Acts No. 43)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2012

NAIROBI, 14th December, 2012

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The Vetting of Judges and Magistrates (Amendment) Act, 20121915

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

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**THE VETTING OF JUDGES AND MAGISTRATES (AMENDMENT)
ACT**

No. 43 of 2012

Date of Assent: 13th December, 2012

Date of Commencement: 14th December, 2012

**AN ACT of Parliament to amend the Vetting of Judges
and Magistrates Act, 2011**

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Vetting of Judges and Magistrates (Amendment) Act, 2012.

Short title.

2. Section 2 of the Vetting of Judges and Magistrates Act (in this Act referred to as “the principal Act”) is amended by renumbering the existing provision as subsection (1) and inserting a new subsection as follows—

Amendment of
section 2 of
No. 2 of 2011.

(2) Despite subsection (1), after the first elections under the Constitution, references in this Act to the expression “Minister” shall be construed to mean “Cabinet Secretary”.

3. Section 7 of the principal Act is amended by—

Amendment of
section 7 of No.
2 of 2011.

(a) by renumbering the existing provision as subsection (1);

(b) by inserting the following new subsection immediately after the new subsection (1)–

(2) Notwithstanding subsection (1), the Board may, for the purpose of the vetting of 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.

Amendment of
section 12 of
No. 2 of 2011

4. Section 12 of the principal Act is amended by inserting the following new subsection immediately after subsection (6)–

(7) No act or proceedings of the Board shall be invalid by reason only of a vacancy in the membership of the Board.

Amendment to
section 17 of
No. 2 of 2011

5. Section 17 of the principal Act is amended –

(a) by deleting subsection (1) and substituting therefor the following new subsection –

(1) The chairperson may, for the purpose of ensuring the expeditious disposal of matters, constitute three or more panels to work concurrently in the vetting of judges and magistrates;

(b) by inserting the following new subsection immediately after subsection (2) –

(2) Notwithstanding subsection (1), the vetting of judges shall be undertaken solely by the members of the Board appointed under section 7(1).

Amendment of
section 18 of
No. 2 of 2011

6. Section 18(1) of the principal Act is amended in paragraph (e)–

(a) by deleting subparagraph (ii) and substituting therefor the following new subparagraph–

(ii) Ethics and Anti-Corruption Commission;

(b) by deleting subparagraph (iii) and substituting therefor the following new subparagraph-

(iii) Advocates Disciplinary Tribunal;

(c) by deleting subparagraph (vi) and substituting therefor the following new subparagraph-

(vi) Commission on Administrative Justice; and

(d) by deleting subparagraph (ix) and substituting therefor the following new subparagraph-

(ix) National Police Service Commission.

7. Section 22 of the principal Act is amended by inserting the following new subsections immediately after subsection (2)-

Amendment of section 22 of No.2 of 2011.

(3) A judge or a magistrate, who requests for review shall, pending the decision of the Board under this section, be suspended from office.

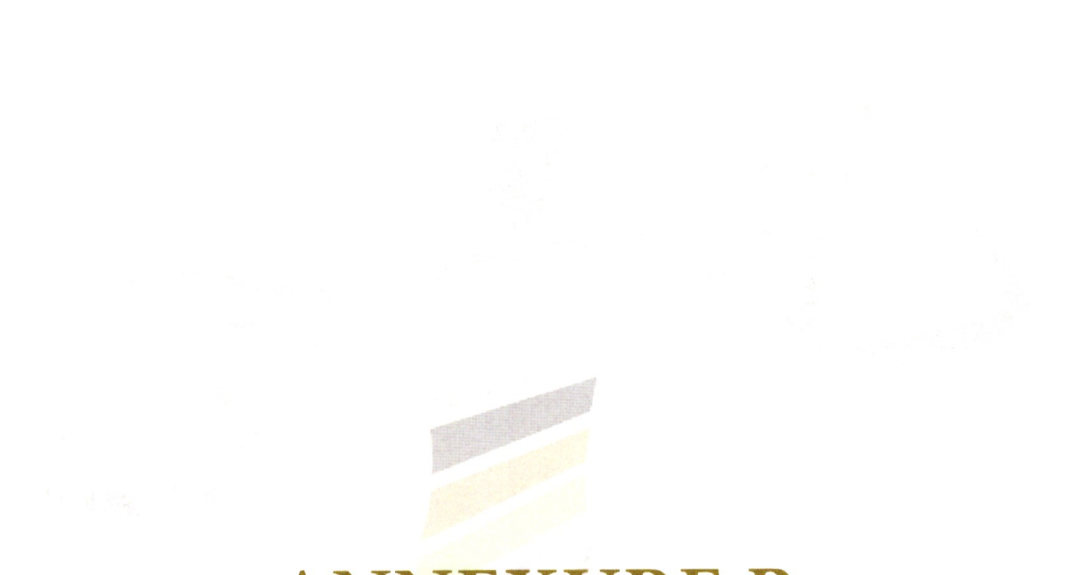
(4) A removal or a process leading to the removal of a magistrate from office under this Act shall not be subject to question in, or review by, any court.

8. Section 23 of the principal Act is amended by deleting subsections (2) and (3) and substituting therefor the following new subsections-

Amendment of section 23 of No.2 of 2011.

(2) The vetting process, once commenced, shall be concluded not later than the 31st December, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.

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



ANNEXURE B.

Regulations

THE VETTING OF JUDGES AND MAGISTRATES ACT, 2011

(No. 2 of 2011)

IN EXERCISE of the powers conferred by section 33 of the Vetting of Judges and Magistrates Act, 2011, the Judges and Magistrates Vetting Board makes the following Regulations:—

THE VETTING OF JUDGES AND MAGISTRATES (PROCEDURE) REGULATIONS, 2011

Citation.

1. These Regulations may be cited as the Vetting of Judges and Magistrates (Procedure) Regulations, 2011.

Purpose.

2. The purpose of these Regulations is to regulate the procedures of the Judges and Magistrates Vetting Board for the better carrying into effect the provisions of the Act and to provide a fair and just vetting process for the judges and magistrates.

Interpretation

3. In these Regulations—

“the Act” means the Vetting of Judges and Magistrates Act, 2011;

“Board” means the Judges and Magistrates Vetting Board established under section 6 of the Act and includes a Panel or a Member where the context so requires;

“Chairperson” means the Chairperson of the Board appointed under Section 9 of the Act, or any person for the time being designated to act as chairperson;

“the Constitution” means the Constitution of the Republic of Kenya promulgated on 27th August, 2010;

“document” includes any written, printed, or electronic matter that provides information or evidence or that serves as an official record in respect of any proceedings before the Board;

“Judiciary” means the structure and system of courts, tribunals and courts martial established under Chapter Ten of the Constitution and shall for the purposes of these Regulations include the Judicial Service Commission and such other adjudicative body as may be established under Article 169 (1) (d) of the Constitution;

“member of the public” means any person not contemplated by section 18 (1) (e) of the Act and includes a natural person, a company or association or body of persons incorporated or unincorporated;

“panel” means a division of the Board and shall include at least a noncitizen serving or retired judge, a lawyer and a non-lawyer;

“party” means a party to any proceedings under the Act and includes a person claiming through or under a party;

“pending complaint” means a complaint and or any adverse information filed or registered with any person or body referred to in section 18 (1) (e) of the Act;

“response” means the formal expression of an answer to the summary of a complaint against a judge or magistrate;

“Secretary” means the Secretary of the Board and includes any person empowered to carry out the functions of the Secretary;

“Secretariat” means the secretariat of the Board;

“vetting” means the process by which the suitability of a serving judge or magistrate to continue serving in the Judiciary is determined as provided in the Act.

Purposes and principles of the Constitution and substantive justice to apply.

4. (1) The procedure to be followed by the Board shall be as provided in these Regulations.

(2) The Board shall be guided by the following principles in fulfilling its mandate.

(a) the purposes, values and principles of the Constitution shall be protected and promoted;

(b) justice shall be done to all, irrespective of status; and

(c) all matters before the Board shall be decided according to substantive justice, without undue regard to technicalities of procedure and without undue delay.

Saving of inherent powers of the Board.

5. Nothing in these Regulations shall limit or otherwise affect the inherent power of the Board either on its own motion or on the application of judge or magistrate to make such orders as may be necessary for the fair and expeditious disposal of a case or to do justice to the parties, or to prevent an abuse of its process.

Chairperson to co- ordinate work of the Board.

6. The Chairperson shall co-ordinate the work of the Board and shall be responsible for—

(a) constituting of such Panel or Panels of the Board as shall be necessary for the fair and expeditious disposal of the business of the Board;

(b) assigning the business of the Board to the members;

(c) overseeing and generally directing the operations of the Board; and

(d) such other functions as are necessary for the attainment of the mandate conferred by the Constitution and the Act.

All matters arising from vetting process to be heard.

7. (1) The Board shall hear and determine all matters arising from the vetting process and maintain a file or record relating to each judge or magistrate.

(2) An objection alleging that the Board is exceeding the scope of its jurisdiction shall be raised as soon as the matter alleged to be beyond the scope of its jurisdiction arises in the proceedings.

Board to call for complaints and other relevant information.

8. (1) Subject to paragraph (3) the Board shall, as soon as is reasonably practicable—

(a) write to each person or body referred to in section 18 (1) (e) of the Act and to such other person or body as it may consider necessary seeking information on the existence of any complaint or other relevant information filed with such person or body against a judge or

magistrate; and

(b) place an advertisement in at least two daily newspapers with nationwide circulation inviting members of the public to file any complaints or other relevant information against the judges or magistrates within the period specified in the advertisement.

(2) The Board shall specify the period within which any person or body referred to in section 18 (1) (e) of the Act shall confirm the existence of any complaint or other relevant information filed with such person or body against a judge or magistrate.

(3) Notwithstanding regulation 12 (2), where there are reasonable grounds to believe that there exists a complaint or other relevant information against a judge or magistrate filed with a person or body referred to in section 18 (1) (e) of the Act and that such complaint or information has not, after the expiry of the period specified by the Board, been brought to the attention of the Board, the Board may issue a summons to the person or principal officer of the body, with a view to satisfying itself of the existence or non-existence of such complaint or other information.

(4) A complaint by any person or body other than the persons or bodies referred to in by section 18 (1) (e) of the Act shall be in Form JMVB1 set out in the Schedule.

Service of Notices.

9. (1) Any notices issued under these Regulations shall be served upon a judge or magistrate—

(a) through personal service;

(b) through the Chief Registrar of the Judiciary; or

(c) through advertising in at least two daily newspapers with nationwide circulation:

Provided that the advertised version of the Notice to appear may be collectively addressed to a number of judges or magistrates.

(2) Where a Notice is served through an advertisement, a copy of the newspaper advertisements shall be placed in the file of the judge or magistrate concerned.

(3) Where a Notice is served personally or through the Chief Registrar, the Secretary shall record the same in the file of the judge or magistrate concerned stating the time and manner in which the Notice was served.

(4) A judge or magistrate shall file a notice of address of service in Form JMVB3 set out in the Schedule.

Judge or magistrate to complete questionnaire on suitability to serve in Judiciary.

10. (1) A judge or magistrate who is subject to vetting shall fully and truthfully supply all the information required regarding their suitability to continue serving in the Judiciary in Form JMVB 5 set out in the Schedule.

(2) Where a complaint or any adverse information has been received by the Board against a judge or magistrate, the summary of the complaint (or complaints, as the case may be) shall be served upon the judge or magistrate in Form JMVB 2 set out in the Schedule.

Response to complaint.

(3) Where a summary of the complaint or complaints has been served, the judge or magistrate shall lodge a response within the period specified by the Board in the notice.

Response to be in summary form.

(4) The Response shall contain a summary of the material facts, on which the judge or magistrate wishes to rely in answer to the complaint or complaints, which shall be as brief as the nature of the case admits:

Provided that the judge or magistrate may annex to the response true certified copies of any documentary evidence.

(5) A judge or magistrate who wishes to cross-examine any of the persons who have lodged a complaint shall indicate the intention at the time of lodging the response.

Time for lodging questionnaire and response.

(6) The questionnaire on Pertinent Information Regarding Suitability to Continue Serving in the Judiciary and the response to the summary of complaint or complaints shall be lodged with the Board within the period specified in the notice.

Preservation, inspection of property.

11. Subject to the Act, the Board may make any order for the purpose of preserving, inspecting, staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of any property or evidence relating to any proceedings before the Board.

Board may make pre-trial orders or directions.

12. The Board may make orders—

(a) requiring a judge or magistrate to appear before it on a date or time specified in a notice to appear in Form JMVB 4 set out in the Schedule.

(b) for the filing and admissibility of documents that it considers irrelevant, frivolous or lacking in probative value;

(c) for the filing of written submissions; and

(d) for any other matter that the Board considers appropriate, without prejudice to the Board's power as may be necessary for the ends of justice or to prevent abuse of its process.

Judge or magistrate, when in default in relation to vetting proceedings.

13. A judge or magistrate is in default if they fail to—

(a) comply with a notice of the Board;

(b) file or serve a document as directed by the Board or as required under these Regulations; or

(c) do any act required to be done by these Regulations.

Consequences of default.

14. If a judge or magistrate is in default, the Board may make such orders as the circumstances require that.

Board may adjourn proceedings or make final determination if judge or magistrate absent.

15. Without prejudice to section 33 (4) of the Act, if a judge or magistrate is absent during the hearing of the vetting proceedings, the Board may—

(a) adjourn the hearing to a specific date; or (b) hear and make a final determination on the vetting proceedings in relation to the judge or magistrate.

Complainant to personally attend proceedings.

16. A person who has lodged a complaint against a judge or magistrate, may be required to attend the vetting proceedings as may be determined by the Board.

Requirements as to delivery of documents to the Board.

17. (1) A document may be lodged at the Secretariat by—

(a) delivering it to the registry; or (b) sending it to the registry by registered post, or by courier service providing proof of delivery; or

(c) with fax or by e-mail with the permission of the Board.

(2) A document is deemed lodged on the date it is received and stamped by the Board.

(3) The sender of a document to the registry by fax shall produce the original document or the transmission report if directed by the Board.

Sittings of the Board, when and where held.

18. The Board shall sit at such times and place as it may determine.

Extension of time.

19. A time fixed by these Regulations or by any decision of the Board may be extended with leave of the Board.

Powers of the Board in relation to service.

20. Nothing in these Regulations affects the power of the Board, if the circumstances so permit and in the interests of justice to—

(a) authorize service of a document in a manner that is not expressly provided for in these Regulations; or

(b) find that a document served in a manner not expressly provided for in these Regulations has been duly served;

Representation by Advocate.

21. (1) A judge or magistrate may be represented by an advocate at their own expense.

(2) Representation by an advocate shall not dispense with the personal attendance of the judge or magistrate during the vetting proceedings.

Decisions of the Board to be in writing.

22. (1) The decisions of the Board shall be recorded in writing, signed by the Panel who heard the matter and sealed.

(2) Where a panelist is, for reasons beyond the control of the Board, is unable to sign the decision, the reason shall be recorded, and the decision signed by the other panelists.

Board may proceed in absence of a Judge or Magistrate.

23. The Board may 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.

Absence of a Board member.

24. If by reason of death, illness, resignation from the Board, or for any other reason, a member is unable to continue sitting in part- heard vetting proceedings, the Chairperson may assign another member to the proceedings and order either the rehearing or continuation of the proceedings

from that point.

Board to keep full records of proceedings.

25. The Board shall cause to be made and preserved a full and accurate record of all its proceedings including handwritten or typed transcripts and, where applicable, audio and video recordings.

SCHEDULE

FORM JMBV. 1

(r. 8(4))

PRIVATE AND CONFIDENTIAL

THE JUDGES AND MAGISTRATES VETTING BOARD

FORM FOR SUBMITTING INFORMATION

Section One: Contact Details.

(Please complete in block letters)

1. (a) Full name:

.....

(b) Identification No.

.....

2. Address

.....

3. Telephone

.....

4. Any Other Contact

Details.....

Submissions of information relating to a judge or magistrate is NOT restricted to a person or body directly affected and may be availed by anyone who wishes to submit information that is relevant to the Board to consider.

Section Two –Details of Judge or Magistrate to Whom Information Relates.

5. Name of the Judge or Magistrate

.....

6. Station serving presently:

.....

Station serving at when complaint arose:

.....

7. Postal & Physical Address (If Known)

.....

8. Telephone numbers (If Known)

.....

9. Are you making this complaint?

(a) As a litigant against a judge or magistrate who has dealt with your case/matter?.....

.....

(b) On behalf of another person whose case or matter was dealt with by the judge or magistrate you are complaining about?.....

(c) As a person with information on the conduct of the judge or magistrate you are complaining about?.....

.....

10. Were there any advocates on record in the matter/case? Yes/No

.....

If yes give their names and the party(s) they were representing.....

.....

.....

11. If the Judge or Magistrate you are complaining about was dealing with or has dealt with your case or matter, answer these questions:

(a) Have you already raised your complaint in writing either with the Judge or magistrate himself or a senior officer in the Judiciary or any other organization or entity? If so, give details

.....

.....

.....

.....

If yes, enclose copies of all relevant correspondence: Enclosed/ Not enclosed.

(i) If not, please briefly advise why you have not raised the matter.

.....

.....

.....

(b) Is the matter you are complaining about finalized?

.....

If so, have you received a fair ruling or judgment in your estimation

.....

(please attach a copy if possible)

12. Have you at any time asked the judge or magistrate to withdraw from handling the matter?

.....

.....

If yes, briefly explain what transpired upon such application.

.....

.....

.....

Section Three– What exactly is your Complaint?

13. Please say briefly what you are dissatisfied with and why, and or what you think the Judge or Magistrate had failed to do (Attach any evidence in your possession)

.....
.....
.....
.....

14. Are there any other persons privy to these facts who can support your averments. Please give their names, telephone, e-mail, postal and physical contacts:

(a)

.....

(b)

.....

(c)

.....

(d)

.....

(Please attach a separate sheet if space provided is not sufficient)

I, _____ of _____
declare that the facts contained in this Statement are true to the best of my knowledge, belief and information. I confirm that I may be called to testify and or provide further information.

Name:

Signature.....

Date:.....

THE JUDGES AND MAGISTRATES VETTING BOARD
NOTICE TO FILE RESPONSE.

To:
.....
.....
.....

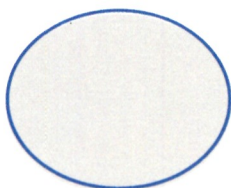
WHEREAS the Board has received the following complaint or complaints against you:

.....
.....
.....

NOW THIS NOTICE IS TO REQUIRE YOU:

(i) To file response to the complaints outlined above within thirty (30) days from the date of this notice.

Given under my hand and the seal of the Board thisday of 20....



BY ORDER OF THE BOARD.

Please confirm:

I WISH TO HAVE MY PROCEEDINGS CONDUCTED IN PUBLIC Yes/No

I DO NOT WISH TO HAVE MY PROCEEDINGS CONDUCTED IN PUBLIC Yes/No

PRIVATE AND CONFIDENTIAL

THE JUDGES AND MAGISTRATES VETTING BOARD

NOTICE OF ADDRESS FOR SERVICE.

TAKE NOTICE that the address for service of

.....
 (name in full), (Functional Title), a judge/magistrate
 served with a Notice to Appear under Regulation 14 (1) of the Vetting of Judges and Magistrates
 (Practice and Procedure) Regulations, 2011, is care of
 (give physical address of the judge or magistrate's place of
 residence, or his duty station or his advocate's place of business, as the case may be),

P.O. Box
 (Number) (Town/City) (Postal Code)

Daytime telephone number:

Mobile telephone number:

E-mail Address:

Dated at this day of, 20

Signed: Judges or Magistrates

PRIVATE AND CONFIDENTIAL

THE JUDGES AND MAGISTRATES VETTING BOARD

NOTICE TO APPEAR

TAKE NOTICE that you are required to appear before the Board for Vetting on the
day of 20..... of O'clock in
 thenoon. The hearing shall be held at

TAKE NOTICE that the Board may proceed to make such determination or action as it deems just

and prudent, your absence notwithstanding.

DATED at this day of, 20

.....
BY ORDER OF THE BOARD

FORM JMV.B.

5(r. 10(1))

PRIVATE AND CONFIDENTIAL

THE JUDGES AND MAGISTRATES VETTING BOARD

VETTING QUESTIONNAIRE TO BE COMPLETED BY ALL PERSONS TO BE VETTED

Section I: BIODATA	
Name of Judge /Magistrate:	Date of Birth:
Citizenship	Marital Status
Post Office Address:	E-mail:
Mobile Phone Number:	Daytime Telephone:
ID/Passport Number:	PIN Number:
Date of First Appointment to the Judiciary:	PJ Number:
Position of first Appointment	Duty Station
Current Position and Date promoted	Duty Station:
Previous Positions held in the Judiciary/ Public Office	Date(s)
Length of time served in the judiciary	
Years:	
Months	
Other Relevant work experience	
Please attach your curriculum vitae.	
Section II:	
The Board in determining the suitability of a judge or magistrate is required to consider the criteria set out in Section 18(1) & (2) of the Judges and Magistrates Vetting Act : Please respond briefly to each of the respective criteria set out below:	

1. Whether you meet the constitutional criteria for appointment as a Judge/Magistrate.
2. Your past work record, including prior judicial pronouncements, competence and diligence. Please attach five of your past judgments/ pronouncements.

3. Whether there are any pending or have there been any concluded criminal or civil cases against you.

Please give details.
4. Whether to your knowledge there is any recommendation to have you charged for any criminal offence.
Please give details.
5. Whether to your knowledge there are any complaints that have been made against you to any professional or public body about your conduct as a judge or magistrate. Please give details.
6. Your professional and development competence. The elements under these are:
 - Intellectual Capacity,
 - Legal Judgment, Diligence,
 - Substantive and Procedural Knowledge of the Law,
 - Organisational and administrative skills ,
 - Ability to work well with a variety of people.
7. Your written and oral communication skills. The elements of which shall include:
 - the ability to communicate orally and in writing,
 - the ability to discuss factual and legal issues in clear, logical and accurate legal writing and
 - effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life;
8. Your integrity, the elements of which shall include:
 - a demonstrable consistent history of honesty and high moral character in professional and personal life;
 - respect for professional duties, arising under the codes of professional and judicial conduct
 - the ability to understand the need to maintain propriety and the appearance of propriety.
9. Your fairness, elements of which include:
 - a demonstrable ability to be impartial to all persons and commitment to equal justices under the law;
 - open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views.

-
10. Your temperament whose elements include:
- demonstrable possession of compassion and humility;
 - history of courtesy and civility in dealing with others;
 - ability to maintain composure under stress,
 - ability to control anger and maintain calmness and order.

11. Good judgment including common sense, elements of which shall include:
- a sound balance between abstract knowledge and practical reality and in particular demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles.
12. Your legal and life experiences elements of which shall include:
- the amount and breadth of legal experience and the suitability of that experience for the position including trial and other courtroom experience and administrative skills;
 - broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of different ethnic and cultural backgrounds and demonstrable interests in areas outside the legal field.
13. Commitment to public and community service the elements of which shall include:
- the extent to which a judge or magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular.

Section Three:

Wealth Declaration

PLEASE ATTACH WEALTH DECLARATION FORM PSC 2, OBTAINABLE

AT www.publicservice.go.ke

I DECLARE THAT THE INFORMATION I HAVE SUPPLIED IS TRUE,
CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE
INFORMATION AND BELIEF.

NAME:

SIGNATURE:

DATE:

Note.—Please note that this Questionnaire is not exhaustive and the Board may require you to provide further information in writing or orally at the interview.

Made on the 30th November, 2011.

SHARAD RAO,
Chairperson, Judges and Magistrates Vetting Board.



ANNEXURE C.

Guiding Document for Board Hearings

Welcome – Judge welcomed. Chair states name of judge for the record. – Chair asks counsel to give his or her name for the record. – Chair introduces the members of the Board.	
Proceedings in private – Chair states for the record that the judge has opted to have proceedings conducted in private. – Chair introduces everyone else who is present in the room and asks whether the judge has any objection.	Section 19(5) of the Vetting of Judges and Magistrates Act 2011 provides that: <i>‘The hearing by the Board shall not be conducted in public, unless the concerned judge or magistrate requests a public hearing.’</i>
Jurisdiction of the Board – Chair recalls that the Board members are appointed under the Vetting of Judges and Magistrates Act 2011. – Chair enquires whether the judge objects to the jurisdiction of the Board. – Chair enquires whether the judge objects to any particular member of the Board sitting in the hearing.	Designed to prevent objections being raised later.

Overview of the vetting criteria

- Chair notes the constitutional standard for vetting (section 23(1) of the Sixth Schedule). Judges may continue to serve only if they are suitable to do so in accordance with Articles 10 and 159. These provisions set out constitutional values and principles, including the rule of law, integrity, transparency, human rights, equal justice and justice without delay.
- The Chair explains that the Act provides criteria that help the Board to decide whether a judge is capable of living up to this standard of suitability.
- The criteria are found in section 18(1) of the Act. These matters fall under two heads.
- The first head consists of general considerations of suitability, and this includes subsection (1)(a), *‘whether the judge ... meets the constitutional criteria for appointment as a judge of the superior courts’* under the **new** Constitution and subsection (1)(b), *‘the past work record of the judge’*.
- The second head consists of specific complaints about the judge, by which we mean any pending or concluded criminal or civil cases, recommendations for prosecution and all other complaints listed in subsection (1)(c)-(e).

Section 23(1) of the Sixth Schedule of the Constitution required Parliament to pass legislation that would provide for *‘vetting ... 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.’*

See note provided on the question of using the appointment criteria from the old or the new Constitution.

Summary of proceedings so far – Chair records that the judge has provided information through the questionnaire and notes the date this was returned, wealth declaration, and any other material the Board has requested. – Chair notes that the Board also has regard to general and individual findings contained in the Ringera Report, the Ndung'u Report on acquisition of land, and the Ouko Report. – Chair records the date the judge was served with a hearing notice and summary of complaints, and the date of the judge's response and any further exchange with the Board.	– When was judge served with Notice to Appear and Notice to File Response? – When did judge file his or her response? – When was the Vetting Questionnaire returned?
Complaints – Chair explains that Board proposes to begin with specific complaints and then return to the general considerations of suitability. – Complaints will be taken be taken in the order listed in the summary. – The Chair will begin by explaining the complaint as stated in the summary. – If the complaint relates to a witness, the witness will be questioned first, followed by questioning of the judge.	

Witnesses – Witness called, states name and occupation, takes the oath or affirmation. – Assisting counsel takes the witness through his testimony. – Chair, followed by other Board members, may also question the witness. – Judge, do you wish to put any questions to the witness? – Board members may ask further questions, but these should be confined to matters arising from the answers the witness has given to the judge's questions. – Witness excused before the Board questions the judge.	The format is not examination, cross-examination and re-examination. Rather, it is inquisitorial. Witness should not be present for questioning of the judge, in the interests of confidentiality.
---	--

General considerations

- Chair to explain the structure of general considerations in more detail. There are two matters to be considered: section 18(1)(a), *‘whether the judge ... meets the constitutional criteria for appointment’* under the **new** Constitution and subsection (1) (b), *‘the past work record of the judge’*.
- The Act suggests that these two criteria should be considered together. Section 18(2) provides that *‘in considering the matters set out in subsection (1) (a) and (b), the Board shall take into account’* a list of eight factors. These are *professional competence, written and oral communication skills, integrity, fairness, temperament, good judgment, legal and life experience, and demonstrable commitment to public and community service*.
- The Chair may state the opinion of the Board that certain factors have been adequately addressed in the judge’s written response.

Possible areas to consider include:

- Written and oral communication skills (based on written Response and oral interview by the JSC)
- Legal and life experience (based on CVs and answers to questionnaire)
- Commitment to community and public service (based on CVs and answers to questionnaire)

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

- (i) intellectual capacity*
- (ii) legal judgment;*
- [no (iii) appears in the statute]
- (iv) diligence;***
- (v) substantive and procedural knowledge of the law;*
- (vi) organizational and administrative skills; and*
- (vi) the ability to work well with a variety of people*

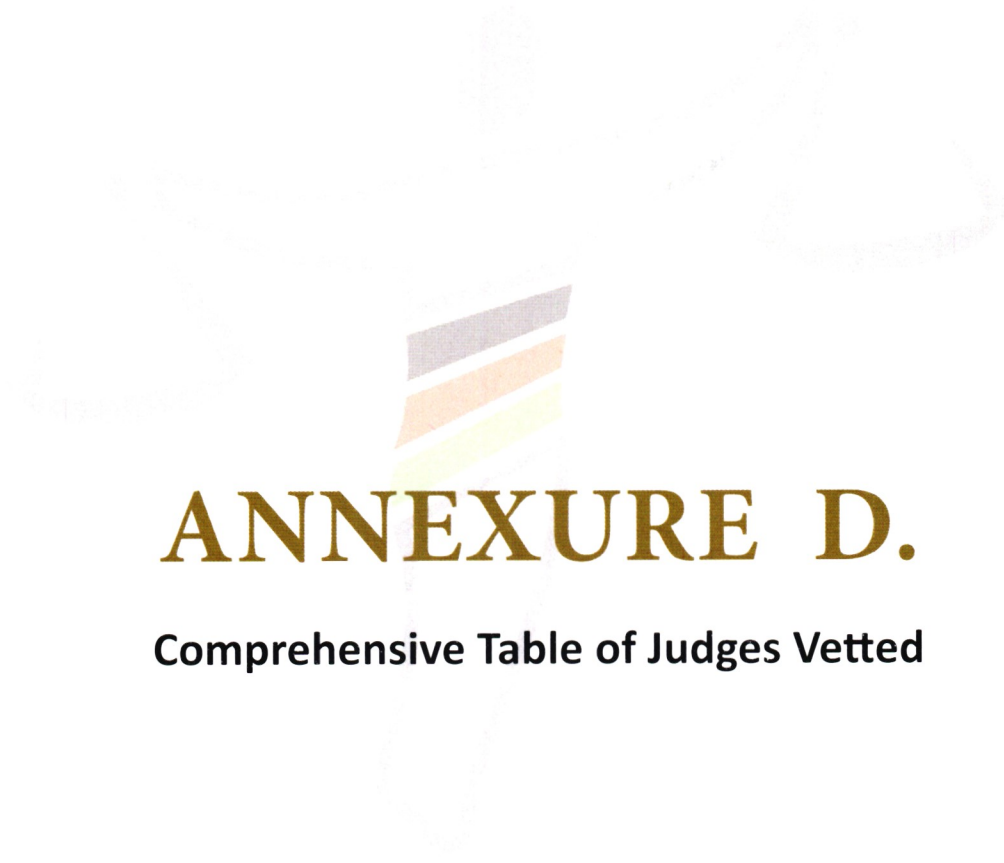
An important factor here is *diligence*. Board members may question judges on delays in delivering judgment. Article 159 of the Constitution, which is part of the definition of suitability requires *‘justice without delay’*.

Other questions can be taken from (A)-(H) of the vetting toolkit. Some of the questions in the toolkit seek detailed information from the judge. However, natural justice would require advance notice of these questions.

<i>(b) written and oral communication skills, the elements of which shall include -</i> <i>(i) the ability to communicate orally and in writing;</i> <i>(ii) the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and</i> <i>(iii) effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life;</i>	Members to ask questions where appropriate.
<i>(c) integrity, the elements of which shall include -</i> <i>(i) a demonstrable consistent history of honesty and high moral character in professional and personal life;</i> <i>(ii) respect for professional duties, arising under the codes of professional and judicial conduct; and</i> <i>(iii) ability to understand the need to maintain propriety and the appearance of propriety;</i>	Following the wording of the Act, Board members may ask the judge to demonstrate that he or she has consistently maintained high moral standards of conduct. There may be a need to refer to specific complaints again here. The Act refers to '<i>the need to maintain propriety and the appearance of propriety</i>' and this may be relevant to complaints that a judge should, or should not, have disqualified himself or herself. The Board may ask the judge general questions about corruption in the judiciary. Does the judge recognize the extent of the problem in the past, and what does he propose to do about it in future? Questions may be asked about financial propriety, as outlined in section (M) of the vetting toolkit and appendices. These questions will usually be based on documents the Board has received, e.g. wealth declaration. Where a question would require the judge to give new and more detailed information, natural justice may require advance notice.

(d) fairness, the elements of which shall include— <i>(i) a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and</i> <i>(ii) open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views;</i>	The Board may ask questions about past human rights abuses. In addition to questions about a judge's individual record, general questions may be asked about past human rights abuses and the record of the judiciary at the time. The judge may be asked to comment on how he or she would act to prevent human rights abuses in future.
(e) temperament, the elements of which shall include— <i>(i) demonstrable possession of compassion and humility;</i> <i>(ii) history of courtesy and civility in dealing with others;</i> <i>(iii) ability to maintain composure under stress; and</i> <i>(iv) ability to control anger and maintain calmness and order; temperament</i>	Board members to ask questions where appropriate. Section (O) of the vetting toolkit provides questions that can be used to probe how the judge would deal with particular kinds of stressful situations.
(f) good judgment, including common sense, elements of which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles;	Board members to ask questions where appropriate. Section (P) of the vetting toolkit provides some questions which test the judge's conception of his or her duty to the public.

<i>(g) legal and life experience, the elements of which shall include—</i> <i>(i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and</i> <i>(ii) broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of different ethnic and cultural backgrounds, and demonstrable interests in areas outside the legal field.</i>	Board members to ask questions where appropriate. See section (Q)(1) of the vetting toolkit. In many cases it will be convenient to refer to the judge's answer to the questionnaire.
<i>(h) demonstrable commitment to public and community service, the elements of which shall include the extent to which a judge or magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular.</i>	Board members to ask questions where appropriate. See section (Q)(2) of the vetting toolkit. In many cases it will be convenient to refer to the judge's answer to the questionnaire.
Conclusion – After the discussion on general considerations of suitability, the Chair closes proceedings and advises the judge that the Board will deliberate. When it has reached a determination, the Board will inform the judge.	



ANNEXURE D.

Comprehensive Table of Judges Vetted

Table of Judges Vetted

S/N	JUDGE	DATES	JUDGES' COUNSEL	BOARD MEMBERS PANEL	ASSISTING COUNSEL	RESEARCHER	TECHNICAL CONSULTANTS	BOARD CLERK
1	HON JUSTICE SAMUEL RIAGA OMOLLO	23.02 2012	MR OCHIENG' ODUOL	MR. SHARAD RAO	MR JOSEPH G M'LIMBINE		MS REBECCA ELVIN	MS ALICE KISUMBA
		17 07 2012	MR CALVIN OJIAMBO	MS ROSELINE ODEDE HON JUSTICE FREDERICK CHOMBA	MRS MARYKAREN C SOROBIT MR DAVID WACHIRA		MR JAN VAN SMIT	
				HON CHIEF JUSTICE GEORGINA WOOD MR JUSTUS MUNYITHYA	MRS JACQUELINE MANANI MRS JEMIMAH KELI			
				MR ABDIRASHID ABDULLAHI PROF NGOTHO WA KARIUKI HON JUSTICE ALBIE SACHS MRS. MEULEDI ISEME MR REUBEN CHIRCHIR	MR EVANS NJARAMBA GICHUKI			
2	HON JUSTICE JOSEPH NYAMU	24 02 2012	MR KIBE MUNGAI	MR. SHARAD RAO	MR JOSEPH G M'LIMBINE	MS RARIN LEKIYEYO	MS REBECCA ELVIN	MS SHEILA ODAWA
		09 03 2012	MR LUCAS LEPERS NAIKUNI	MS ROSELINE ODEDE	MRS MARYKAREN C SOROBIT		MR JAN VAN SMIT	MS. DUALE BISHARA
		12 03 2012		HON. JUSTICE FREDERICK CHOMBA	MR DAVID WACHIRA			
		17 07 2012		HON CHIEF JUSTICE GEORGINA WOOD MR. JUSTUS MUNYITHYA MR ABDIRASHID ABDULLAHI PROF NGOTHO WA KARIUKI HON JUSTICE ALBIE SACHS MRS. MEULEDI ISEME MR REUBEN CHIRCHIR	MRS JACQUELINE MANANI MRS JEMIMAH KELI MR EVANS NJARAMBA GICHUKI			
3	HON JUSTICE PHILIP TUNOI	28 02 2012	MR PHILIP MURGOR	MR. SHARAD RAO	MR JOSEPH G. M'LIMBINE			MS ALICE KISUMBA
		01 03.2012	MR KATWA KIGEN	MS ROSELINE ODEDE	MRS MARYKAREN C. SOROBIT			
			MR STEVEN MWENESI	HON JUSTICE FREDERICK CHOMBA	MR DAVID WACHIRA			
			MR MICHAEL MUBEKA	HON CHIEF JUSTICE GEORGINA WOOD	MRS JACQUELINE MANANI			
			MS JACQUELINE KIBOGY	MR JUSTUS MUNYITHYA	MRS JEMIMAH KELI			
				MR ABDIRASHID ABDULLAHI PROF. NGOTHO WA KARIUKI HON JUSTICE ALBIE SACHS MRS MEULEDI ISEME MR REUBEN CHIRCHIR	MR EVANS NJARAMBA GICHUKI			

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4	HON. JUSTICE ERASTUS GITHINJI	06.03.2012		MR. SHARAD RAO MS. ROSELINE ODEDE HON. JUSTICE FREDERICK CHOMBA HON. CHIEF JUSTICE GEORGINA WOOD MR. JUSTUS MUNYITHYA MR. ABDIRASHID ABDULLAHI PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR MR. SHARAD RAO	MR. JOSEPH G. M'LIMBINE MRS. MARYKAREN C. SOROBIT MR. DAVID WACHIRA MRS. JACQUELINE MANANI MRS. JEMIMAH KELI MR. EVANS NJARAMBA GICHUKI			MS. SHEILA ODAWA MS. ALICE KISUMBA
5	HON. JUSTICE ALNASHIR VISRAM	07.03.2012		MS. ROSELINE ODEDE HON. JUSTICE FREDERICK CHOMBA HON. CHIEF JUSTICE GEORGINA WOOD MR. JUSTUS MUNYITHYA MR. ABDIRASHID ABDULLAHI PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR MR. SHARAD RAO	MR. JOSEPH G. M'LIMBINE MRS. MARYKAREN C. SOROBIT MR. DAVID WACHIRA MRS. JACQUELINE MANANI MRS. JEMIMAH KELI MR. EVANS NJARAMBA GICHUKI	MRS. MERCY KYALO		MS. DUALE BISHARA
6	HON. JUSTICE EMMANUEL O'KUBASU	08.03.2012 21.03.2012 27.03.2012 17.07.2012	MR. STEVEN MWENESI	MR. REUBEN CHIRCHIR MR. SHARAD RAO MS. ROSELINE ODEDE HON. JUSTICE FREDERICK CHOMBA HON. CHIEF JUSTICE GEORGINA WOOD MR. JUSTUS MUNYITHYA MR. ABDIRASHID ABDULLAHI PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR	MR. JOSEPH G. M'LIMBINE MRS. MARYKAREN C. SOROBIT MR. DAVID WACHIRA MRS. JACQUELINE MANANI MRS. JEMIMAH KELI MR. EVANS NJARAMBA GICHUKI	MS. WINNIE RUTO	MS. REBECCA ELVIN MR. JAN VAN SMIT	MS. ALICE KISUMBA

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7	HON. JUSTICE ONYANGO OTIENO	15.03.2012	MR. OCHIENG' ODUOL	MR. SHARAD RAO	MR. JOSEPH G. M'LIMBINE	MS. JACQUELINE KATEE		MS. ALICE KISUMBA
				HON. JUSTICE FREDERICK CHOMBA	MRS. MARYKAREN C. SOROBIT			
		28.03.2012		HON. CHIEF JUSTICE GEORGINA WOOD	MR. DAVID WACHIRA			MS. SHEILA ODAWA
				MR. JUSTUS MUNYITHYA	MRS. JACQUELINE MANANI			
				MR. ABDIRASHID ABDULLAHI	MRS. JEMIMAH KELI			
				PROF. NGOTHO WA KARIUKI	MR. EVANS NJARAMBA GICHUKI			
				HON. JUSTICE ALBIE SACHS				
8	HON. JUSTICE PHILIP NYAMU WAKI	20.03.2012	MR. GEORGE ORARO	MRS. MEULEDI ISEME				
				MR. REUBEN CHIRCHIR				
				MR. SHARAD RAO	MR. JOSEPH G. M'LIMBINE			
				HON. JUSTICE FREDERICK CHOMBA	MRS. MARYKAREN C. SOROBIT			
				HON. CHIEF JUSTICE GEORGINA WOOD	MR. DAVID WACHIRA			
				MR. JUSTUS MUNYITHYA	MR. EVANS NJARAMBA GICHUKI			
				MR. ABDIRASHID ABDULLAHI				
9	HON. JUSTICE SAMUEL BOSIRE	26.03.2012	MR. OCHIENG' ODUOL	PROF. NGOTHO WA KARIUKI				
				HON. JUSTICE ALBIE SACHS				
		17.07.2012	MR. KELVIN ODHIAMBO	MRS. MEULEDI ISEME				
				MR. REUBEN CHIRCHIR				
				MR. SHARAD RAO	MR. DAVID WACHIRA			
				MS. ROSELINE ODEDE	MRS. JACQUELINE MANANI		MS. REBECCA ELVIN	MS. DUALE BISHARA
				MR. JUSTUS MUNYITHYA	MRS. MARYKAREN C. SOROBIT			
10	HON. LADY JUSTICE KALPANA RAWAL	15.05.2012	MR. STEVEN MWENESI	MR. ABDIRASHID ABDULLAHI	MR. JOSEPH G. M'LIMBINE	MS. SONA OKASHAKA		
				PROF. NGOTHO WA KARIUKI	MR. EVANS NJARAMBA GICHUKI			
		12.07.2012	MR. GEORGE ORARO	HON. JUSTICE ALBIE SACHS				
				HON. JUSTICE FREDERICK CHOMBA				
				MRS. MEULEDI ISEME				
		18.07.2012		MR. REUBEN CHIRCHIR				
				MR. JUSTUS MUNYITHYA	MRS. MARYKAREN C. SOROBIT		MS. REBECCA ELVIN	MS. DUALE BISHARA
				HON. JUSTICE ALBIE SACHS		MS. SONA OKASHAKA		
				MRS. MEULEDI ISEME		MS. JEPTUM BARGORIA		
				PROF. NGOTHO WA KARIUKI				
				HON. JUSTICE FREDERICK CHOMBA				
				MR. REUBEN CHIRCHIR				

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11	HON. JUSTICE JACKTON BOMA OJWANG	26.04.2012		MR. JUSTUS MUNYITHYA MR. ABDIRASHID ABDULLAHI PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR	MRS. MARYKAREN C. SOROBIT	MRS. IRENE KIWOL MR. MBELA ISAAC		MS. SHEILA ODAWA
12	HON. LADY JUSTICE JEANE GACHECHE	23.07.2012 07.09.2012 12.09.2012	MR. STEVEN MWENESI MR. OLUOCH OLUNYA MS. WANGUI KIMANI	MR. JUSTUS MUNYITHYA PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR	MRS. MARYKAREN C. SOROBIT	MS. SONA OKASHAKA MS. JACQUELINE KATEE MS. JEPTUM BARGORIA	MR. JAN VAN SMIT	MS. ALICE KISUMBA
13	HON. LADY JUSTICE HANNAH MAGONDI OKWENGU	03.05.2012	MS. CATHERINE WANGUI KIMANI MS. SHEILA NYAKUNDI MR. JAMES OCHIENG' ODUOL	MS. ROSELINE ODEDE MR. ABDIRASHID ABDULLAHI HON. JUSTICE ALBIE SACHS MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR MR. SHARAD RAO	MR. JOSEPH G. M'LIMBINE	MS. WINNIE RUTO		MS. ALICE KISUMBA
14	HON. LADY JUSTICE ROSELINE NAMBUYE	09.05.2012 21.05.2012 07.09.2012 12.09.2012 11.12.2012	MR. STEVEN MWENESI MR. PETER SIMANI MS. SHEILA NYAKUNDI (TRAINEE ADVOCATE)	HON. CHIEF JUSTICE GEORGINA WOOD MR. JUSTUS MUNYITHYA MRS. MEULEDI ISEME HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR MS. ROSELINE ODEDE	MR. DAVID WACHIRA MRS. MARYKAREN C. SOROBIT MRS. JACQUELINE MANANI MR. EVANS NJARAMBA GICHUKI	MS. RARIN LEKIYEYO MS. JEPTUM BARGORIA	MR. JAN VAN SMIT	MS. DUALE BISHARA MS. SHEILA ODAWA MS. ALICE KISUMBA
15	HON. JUSTICE PAUL KARIUKI KIHARA	08.05.2012	MR. KIOKO KILUKUMI	HON. JUSTICE FREDERICK CHOMBA PROF. NGOTHO WA KARIUKI MRS. MEULEDI ISEME MR. JUSTUS MUNYITHYA	MR. EVANS NJARAMBA GICHUKI	MRS. IRENE KIWOL		MS. SHEILA ODAWA
16	HON. JUSTICE JOHN WYCLIFFE MWERA	11.09.2012 14.09.2012 21.09.2012 09.11.2012 12.11.2012	MR. ISMAEL ABBAS HON. CHIEF JUSTICE GEORGINA WOOD MR. ABDIRASHID ABDULLAHI MR. REUBEN CHIRCHIR	MRS. JACQUELINE MANANI	MRS. EDELQUINN A. ODHAMBO			MS. ALICE KISUMBA

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17	HON. JUSTICE MSAGHA MBO-GOLI	23.07.2012	MR. JAMES OCHIENG' ODUOL	MS. ROSELINE ODEDE HON. JUSTICE FREDERICK CHOMBA MR. ABDIRASHID ABDULLAHI MR. REUBEN CHIRCHIR MR. SHARAD RAO MS. ROSELINE ODEDE HON. CHIEF JUSTICE GEORGINA WOOD MS. ROSELINE ODEDE HON. JUSTICE FREDERICK CHOMBA PROF. NGO THO WA KARIUKI MR. JUSTUS MUNYITHYA MR. REUBEN CHIRCHIR MR. SHARAD RAO HON. JUSTICE ALBIE SACHS MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR MR. SHARAD RAO MS. ROSELINE ODEDE MRS. MEULEDI ISEME HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR HON. JUSTICE FREDERICK CHOMBA MR. ABDIRASHID ABDULLAHI MR. SHARAD RAO	MR. EVANS NIARAMBA GICHUKI	MRS. IRENE KIWOL		MS. SHEILA ODAWA
18	HON. JUSTICE DAVID KENANI MARAGA	16.05.2012	MR. JAMES OCHIENG' ODUOL		MRS. JACQUELINE MANANI MR. DAVID WACHIRA MR. JOSEPH G. M'LIMBINE MR. JOSEPH G. M'LIMBINE	MRS. EDELQUINN A. ODHAMBO		MS. SHEILA ODAWA
19	HON. LADY JUSTICE LESIIT JESSIE WANJIKU	23.05.2012	MR. BERNARD MWANGI MBAI			MS. WINNIE RUTO MS. RARIN LEKIYEYO		MS. ALICE KISUMBA MS. SHEILA ODAWA
20	HON. JUSTICE MUGA APONDI	16.07.2012	MR. KIMANI MUHORO		MR. DAVID WACHIRA	MS. JEPTUM BARGORIA		MS. SHEILA ODAWA MS. ALICE KISUMBA
21	HON JUSTICE MOHAMMED IBRAHIM	07.11.2012 21.11.2012 07.12.2012 27.04.2012 30.04.2012 12.09.2012 05.12.2012	MR. PHEROZE NOW-ROJEE MR. FREDERICK NGATIA MR. FREDERICK ATHUOK		MR. JOSEPH G. M'LIMBINE MRS. JACQUELINE MANANI MRS. MARYKAREN C. SOROBIT MRS. JEMIMAH KELI MR. EVANS NIARAMBA GICHUKI	MS. WINNIE RUTO MS. JEPTUM BARGORIA MR. MBELA ISAAC MRS. IRENE KIWOL		MS. DUALE BISHARA MS. SHEILA ODAWA
22	HON. LADY JUSTICE WANJIRU KARANJA	22.05.2012 13.07.2012	MR. PHEROZE NOWRREE	MR. ABDIRASHID ABDULLAHI HON. JUSTICE ALBIE SACHS MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR	MRS. JEMIMAH KELI	MRS. MERCY KYALO MS. REBECCA ELVIN		MS. DUALE BISHARA MS. ALICE KISUMBA

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23	HON. LADY JUSTICE MARTHA KARAMBU KOOME	02.05.2012	MR. GEORGE ORARO	MR. SHARAD RAO	MRS. JEMIMAH KELI	MRS. MERCY KYALO		MS. DUALE BISHARA
		17.05.2012		MS. ROSELINE ODEDE MR. JUSTUS MUNYITHYA MR. ABDIRASHID ABDULLAHI PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR MS. ROSELINE ODEDE	MRS. JACQUELINE MANANI MR. DAVID WACHIRA MRS. MARYKAREN C. SOROBIT MR. JOSEPH G. M'LIMBINE			
24	HON. JUSTICE PETER GEORGE HATARI WAWERU	26.07.2012		PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR	MRS. JEMIMAH KELI			MS. DUALE BISHARA
		06.11.2012						
25	HON. LADY JUSTICE MARY ANG'AWA	07.08.2012	MR. PHEROZE NOW-ROJEE	MR. JUSTUS MUNYITHYA	MR. JOSEPH G. M'LIMBINE	MS. RARIN LEKIYEYO		MS. ALICE KISUMBA
		08.08.2012	MR. HENRY ONGICHO	MR. ABDIRASHID ABDULLAHI		MS. JACQUELINE KATEE		
		07.11.2012		HON. JUSTICE FREDERICK CHOMBA MR. REUBEN CHIRCHIR				
26	HON. JUSTICE NICHOLAS OMBIJA	30.07.2012	MR. PHEROZE NOW-ROJEE	MR. JUSTUS MUNYITHYA MRS. MEULEDI ISEME HON. JUSTICE FREDERICK CHOMBA	MRS. JACQUELINE MANANI	MRS. EDEQUINN A. ODHIAMBO		MS. SHEILA ODAWA
				MS. ROSELINE ODEDE				
27	HON. LADY JUSTICE JOYCE NUKU KHAMINWA	08.08.2012	DR. JOH KHAMINWA	HON. JUSTICE FREDERICK CHOMBA	MRS. MARYKAREN C. SOROBIT	MS. SONA OKASHAKA		MS. ALICE KISUMBA
		07.09.2012	MR. EVANS ONDIEKI	HON. JUSTICE FREDERICK CHOMBA		MS. JEPTUM BARGORIA		MS. DUALE BISHARA
		14.01.2013	MR. CONRAD MALOBA(PUPIL)	MRS. MEULEDI ISEME				
				MR. REUBEN CHIRCHIR				
28	HON JUSTICE DAVID ONYANCHIA	02.08.2012	MR. WILLIAM MOGAKA	MR. JUSTUS MUNYITHYA	MR. EVANS NJARAMBA GICHUKI	MRS. IRENE KIWOOL		MS. SHEILA ODAWA
		06.09.2012	MR. NYANGA'U MASORE	PROF. NGOTHO WA KARIUKI		MS. JACQUELINE KATEE		
				HON. JUSTICE FREDERICK CHOMBA				
29	HON. LADY JUSTICE ROSELINE WENDOH	18.09.2012	PROF. ALBERT MUMIMA	MS. ROSELINE ODEDE	MRS. JACQUELINE MANANI	MRS. EDEQUINN A. ODHIAMBO		MS. SHEILA ODAWA
			MR. CHARLES AGWARA	PROF. NGOTHO WA KARIUKI				
				HON. JUSTICE ALBIE SACHS				

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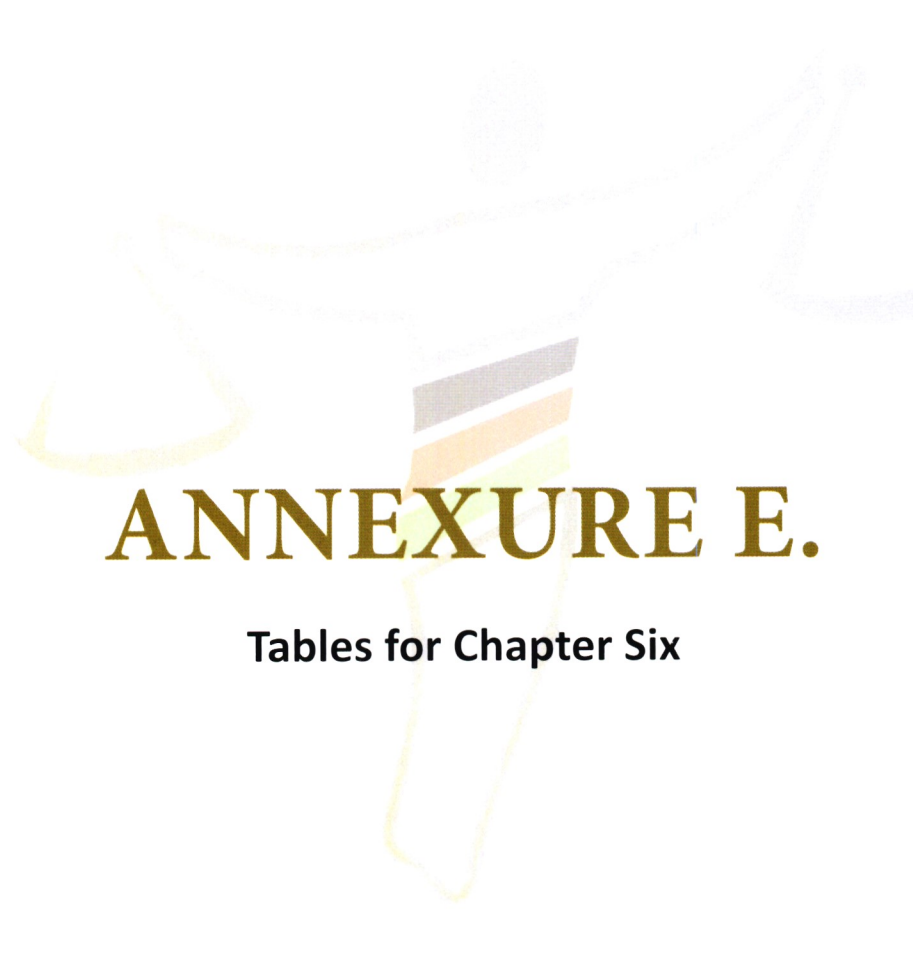
S/N	JUDGE	DATES	JUDGES' COUNSEL	BOARD MEMBERS PANEL	ASSISTING COUNSEL	RESEARCHER	TECHNICAL CONSULTANTS	BOARD CLERK
30	HON. JUSTICE DANIEL MUSINGA	20.09.2012	MR. KIOKO KILUKUMI	MR. SHARAD RAO	MRS. MARYKAREN C. SOROBIT	MS. SONA OKASHAKA		MS. ALICE KISUMBA
31	HON. JUSTICE G.B.M.KARIUKI	13.09.2012	MR. STEVEN MWENESI	HON. CHIEF JUSTICE GEORGINA WOOD MR. ABDIRASHID ABDULLAHI MS. ROSELINE ODEDE	MRS. JEMIMAH KELI	MRS. MERCY KYALO		MS. ALICE KISUMBA
32	HON. JUSTICE GEORGE MATATIA ABALEKA DULU	19.09.2012		HON. JUSTICE FREDERICK CHOMBA MR. ABDIRASHID ABDULLAHI MR. REUBEN CHIRCHIR MS. ROSELINE ODEDE	MR. DAVID WACHIRA			MS. DUALE BISHARA
33	HON. JUSTICE JOSEPH K.SERGON	13.09.2012	MR. CECIL MILLER	PROF. NGOTHO WA KARIUKI HON. JUSTICE FREDERICK CHOMBA MR. REUBEN CHIRCHIR MR. SHARAD RAO	MR. DAVID WACHIRA	MS. SONA OKASHAKA		MS. SHEILA ODAWA
34	HON. LADY JUSTICE MUGO MURUGI	17.09.2012 19.09.2012 24.09.2012 08.11.2012 27.11.2012	MR. PETER WENA	PROF. NGOTHO WA KARIUKI HON. CHIEF JUSTICE GEORGINA WOOD MR. REUBEN CHIRCHIR HON. JUSTICE ALBIE SACHS MR. SHARAD RAO	MRS. JEMIMAH KELI MR. EVANS NJARAMBA GICHUKI	MRS. IRENE KIWOOL		MS. SHEILA ODAWA
35	HON. JUSTICE FESTUS AZAN-GALALA	03.12.2012	MS. BERNEDETTE QUADROS	HON. JUSTICE FREDERICK CHOMBA MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR MR. SHARAD RAO	MRS. MARYKAREN C. SOROBIT	MS. SONA OKASHAKA	MS. REBECCA ELVIN	
36	HON. JUSTICE ISAAC LENAOLA	20.11.2012 28.11.2012	MR.CHACHA ODERA	HON. JUSTICE FREDERICK CHOMBA MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR MR. SHARAD RAO				MS. SHEILA ODAWA
37	HON. JUSTICE ISAAK LENAOLA	22.11.2012		HON. JUSTICE FREDERICK CHOMBA MR. ABDIRASHID ABDULLAHI MR. REUBEN CHIRCHIR MR. JUSTUS MUNYITHYA	MR. DAVID WACHIRA	MS. JEPTUM BARGORIA	MS. REBECCA ELVIN MS. TARA MENON	
	HON. JUSTICE FREDERICK AN-DAGO OCHIENG'	25.09.2012	MR. FRED OJIAMBO	HON. JUSTICE FREDERICK CHOMBA MR. ABDIRASHID ABDULLAHI MR. REUBEN CHIRCHIR MR. JUSTUS MUNYITHYA PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR	MR. JOSEPH G. M'LIMBINE	MS. RARIN LEKIYEYO		MS. ALICE KISUMBA
			MR. PETER MBUTHIA GACHUHI					

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38	HON. JUSTICE KIMARU LUKA KIPROTICH	15.11.2012	MR. JAMES OCHIENG' ODUOL MR. NELSON HAVI	MR. SHARAD RAO HON. JUSTICE FREDERICK CHOMBA MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR	MR. DAVID WACHIRA	MS. JEPTUM BARGORIA		MS. SHEILA ODAWA
39	HON. JUSTICE MATHEW ANYARA EMUKULE	14.11.2012 19.12.2012	MR.TOM ODUWO KOPERE	MR. JUSTUS MUNYITHYA PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR	MR. DAVID WACHIRA	MS. JEPTUM BARGORIA		MS. ALICE KISUMBA MS. SHEILA ODAWA
40	HON. LADY JUSTICE RUTH SITATI	4.12.2012	MR. FRED OJIAMBO	MS. ROSELINE ODEDE MRS. MEULEDI ISEME HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR	MR. JOSEPH G. M'LIMBINE	MS. JACQUELINE KATEE		MS. ALICE KISUMBA
41	HON. JUSTICE MILTON MAKHAN-DIA	25.09.2012	MR. KENNEDY OGETO MR.MURIUKI MUGAMBI	MS. ROSELINE ODEDE HON. JUSTICE FREDERICK CHOMBA MRS. MEULEDI ISEME MR. JUSTUS MUNYITHYA	MRS. JACQUELINE MANANI	MRS.EDELQUINN A. ODHAMBO		MS. SHEILA ODAWA
42	HON. LADY JUSTICE PHILOMENA MWILU	04.12.2012	MR. FREDERICK NGATIA	MR. ABDIRASHID ABDULLAHI HON. JUSTICE FREDERICK CHOMBA MR. REUBEN CHIRCHIR	MRS. MARYKAREN C. SOROBIT	MS. SONA OKASHAKA		MS. DUALE BISHARA
43	HON. LAADY JUSTICE MAUREEN ADERO	22.11.2012	MR. PETER GACHUHI	MR. JUSTUS MUNYITHYA HON. JUSTICE ALBIE SACHS PROF. NGOTHO WA KARIUKI MR. REUBEN CHIRCHIR	MRS. JEMIMAH KELI			MS. ALICE KISUMBA
44	HON. JUSTICE MOHAMMED WARSAME	26.11.2012	MR. AHMEDNASIR ABDULLAHI MR. ROGER SAGANA	MR. SHARAD RAO MRS. MEULEDI ISEME HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR	MRS. JACQUELINE MANANI	MRS.EDELQUINN A. ODHAMBO		MS. SHEILA ODAWA
45	HON. JUSTICE AGGREY OTSIYULA MUCHELULE	29.11.2012	MR. FRED ATHUOK	MR. JUSTUS MUNYITHYA MR. ABDIRASHID ABDULLAHI HON. JUSTICE FREDERICK CHOMBA MR. REUBEN CHIRCHIR	MR. JOSEPH G. M'LIMBINE	MS. JACQUELINE KATEE		MS. SHEILA ODAWA

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46	HON. JUSTICE WILLIAM OUKO	27.11.2012	MR. JAMES OCHIENG' ODUOL	MS. ROSELINE ODEDE PROF. NGOTHO WA KARIUKI HON. JUSTICE ALBIE SACHS MR. REUBEN CHIRCHIR	MRS. MARYKAREN C. SOROBIT	MS. SONA OKASHAKA		MS. DUALE BISHARA
47	HON. LADY JUSTICE ABIDA ALI-ARONI	10.12.2012 18.12.2012	MR. FREDERICK NGATIA MRS. JUDY THONGORI	MR. SHARAD RAO HON. JUSTICE FREDERICK CHOMBA MRS. MEULEDI ISEME MR. REUBEN CHIRCHIR	MR. DAVID WACHIRA	MS. JEPTUM BARGORIA		MS. DUALE BISHARA
48	HON. LADY JUSTICE FLORENCE MUCHEMI	20.11.2012	MRS. MWIHAKI NJUGUNA MR. DANIEL NDUNG'U	MR. JUSTUS MUNYITHYA HON. JUSTICE ALBIE SACHS MR. ABDIRASHID ABDULLAHI MR. REUBEN CHIRCHIR	MRS. JACQUELINE MANANI	MRS. EDELOUINN A. ODHIAMBO		MS. ALICE KISUMBA
49	HON. JUSTICE LEONARD NIAGI	18.09.2012 13.11.2012	MR. PHEROZE NOW-ROJEE HON. JUSTICE FREDERICK CHOMBA MR. ABDIRASHID ABDULLAHI MR. REUBEN CHIRCHIR	MR. JUSTUS MUNYITHYA	MR. EVANS NJARAMBA GICHUKI	MRS. IRENE KIWOOL		MS. DUALE BISHARA MS. SHEILA ODAWA
50	HON. JUSTICE SAID JUMA CHITEMBWE	29.11.2012	MR. CHARLES WAWERU GATONYE MR. KARANIA MWANGI MR. PATRICK OCHWA	MS. ROSELINE ODEDE HON. JUSTICE ALBIE SACHS PROF. NGOTHO WA KARIUKI MR. REUBEN CHIRCHIR	MR. EVANS NJARAMBA GICHUKI	MRS. IRENE KIWOOL		MS. SHEILA ODAWA
51	HON. JUSTICE JOSEPH R. KARANIA	06.12.2012 13.12.2012	MR. NICHOLAS SUMBA MR. EVANS ORUENJO	MR. JUSTUS MUNYITHYA HON. JUSTICE ALBIE SACHS PROF. NGOTHO WA KARIUKI MR. REUBEN CHIRCHIR	MRS. JEMIMAH KELI			MS. DUALE BISHARA
52	HON. LADY JUSTICE HELLEN OMONDI	11.12.2012	MR. FRED OJIAMBO MR. FRED AWITI	MR. SHARAD RAO HON. JUSTICE ALBIE SACHS PROF. NGOTHO WA KARIUKI MR. REUBEN CHIRCHIR	MR. EVANS NJARAMBA GICHUKI	MRS. IRENE KIWOOL		MS. ALICE KISUMBA
53	HON. LADY JUSTICE MARY KASANGO	20.12.2012	MR. PETER WAIYAKI MR. MARTIN MUNYU	MS. ROSELINE ODEDE HON. JUSTICE FREDERICK CHOMBA MR. ABDIRASHID ABDULLAHI MR. REUBEN CHIRCHIR	MR. JOSEPH G. M'LIMBINE	MS. JACQUELINE KATEE		MS. ALICE KISUMBA



ANNEXURE E.

Tables for Chapter Six

Table A. Public Outreach, Areas Visited by JMVB Representatives - 2012

Region (Date) / Venue	Team	Participants (#)
Thika (25/1/12)	Justus Munyithya	
Municipal Hall	Lady Chief Justice G. Wood	Public (125)
Eaton Hotel	Bakari Sadiki Mohammed	Lawyers (24)
	Alice Kisumba	
Kericho (25/1/12)	Roseline Odede	
Municipal Hall	Meuledi Iseme	Public (13)
	Winnie Jeptum	Lawyers (24)
Machakos (25/1/12)	Prof Ngotho Wa Kariuki	
Town Hall	Justice Albie Sachs	Public (30)
	Abdirashid Abdullah	Lawyers (3)
	Edward Chemei	
	Winnie Ruto	
Kisii (26/1/12)	Roseline Odede	
County Hall	Meuledi Iseme	Public (72)
	Winnie Jeptum	Lawyers (10)
Kisumu (27/1/12)	Roseline Odede – B.M	
Jumuia Hall	Meuledi Iseme – B.M	Public (70)
	Winnie Jeptum – R.O	Lawyers (10)
Malindi (30/1/12)	Justus Munyithya	Public (138)
Town Hall	Lady Chief Justice G. Wood	Lawyers (21)
Eden Rock Hotel	Meuledi Iseme	
	Bakari Sadiki Mohammed	
	Alice Kisumba	

Nyeri (30/1/12) Town Hall	Prof Ngotho Wa Kariuki Justice Albie Sachs Abdirashid Abdullah Edward Chemei Winnie Ruto	Public (60) Lawyers (10)
Mombasa (31/1/12) Municipal Hall Royal Court Hotel	Sharad Rao Justus Munyithya Lady Chief Justice G. Wood Meuledi Iseme Justice Albie Sachs Bakari Sadiki Mohammed Alice Kisumba	Public (213) Lawyers (85)
Embu (31/1/12) County Hall	Prof Ngotho Wa Kariuki Abdirashid Abdullah Edward Chemei Winnie Ruto	Public (45) Lawyers (2)
Kwale (1/2/12) County Hall	Justus Munyithya Lady Chief Justice G. Wood Bakari Sadiki Mohammed Alice Kisumba	Public (147)
Nakuru (1/2/12) Municipal Hall	Roseline Odede Meuledi Iseme Winnie Jeptum	Public (50) Lawyers (25)
Meru (1/2/12) County Hall	Prof Ngotho Wa Kariuki Abdirashid Abdullah Edward Chemei Winnie Ruto	Public (70) Lawyers (5)

Voi (2/2/12) County Hall	Justus Munyithya Lady Chief Justice G. Wood Bakari Sadiki Mohammed Alice Kisumba	Public (41)
Nanyuki (2/2/12) Municipal Hall	Prof Ngotho Wa Kariuki Abdirashid Abdullah Edward Chemei Winnie Ruto	Public (10)
Mombasa (3/2/12) Shimo La Tewa prisons	Bakari Sadiki Mohammed Alice Kisumba	Remandees and Inmates
Bungoma (9/2/12) County Hall	Roseline Odede Meuledi Iseme Winnie Jeptum	Public (50) Lawyers (15)
Eldoret (10/2/12) Municipal Hall	Roseline Odede Meuledi Iseme Winnie Jeptum	Public (70)

Table B. Public Outreach, Areas Visited by JMVb Representatives - 2012

Region (Date) / Venue	Team	Participants (#)
Kwale (10/1/13) County Hall	Justus Munyithya Mary Karen Kigen Sorobit Bakari Sadiki Mohammed	Public (131)
Mwingi (10/1/13)	Abdirashid Abdullah	Public (47)

D.C Hall	Jemimah Keli Isaac Mbela	Lawyers (2)
Kapsabet (10/1/13) County Hall	Roseline Odede Fredrick Chomba Jackie Manani Winnie Jeptum	Public (101)
Iten (10/1/13) County Hall	Meuledi Iseme Gitonga M'limbine Edward Chemei	Public (60) Lawyers (1)
Kilifi (11/1/13) County Hall	Justus Munyithya Mary Karen Kigen Sorobit Bakari Sadiki Mohammed	Public (183)
Garissa (11/1/13) County Hall	Abdirashid Abdullah Jemimah Keli Isaac Mbela	Public (50)
Nyando (11/1/13) Multi-Purpose Institute	Roseline Odede Fredrick Chomba Jackie Manani Winnie Jeptum	Public (67)
Kitale (11/1/13) Museum Hall	Meuledi Iseme Gitonga M'limbine Edward Chemei	Public (160) Lawyers (2)
Narok (15/1/13) Municipal Hall	Roseline Odede Jackie Manani Winnie Jeptum	Media (8_

Bomet (16/1/13) Municipal Hall	Roseline Odede Jackie Manani Winnie Jeptum	Media (9)
Busia (16/1/13) County Hall	Justice Albie Sachs Meuledi Iseme Jemimah Keli Isaac Mbela	Public (58)
Isiolo (16/1/13) Agricultural Training Center	Prof Ngotho Wa Karuiki David Wachira Alice Kisumba	Public (150)
Thika (16/1/13) Town Hall	Justus Munyithya Fredrick Chomba Gitonga M'limbine Gichuki Njaramba Bishara Duale	Public (72) Lawyers (5)
Molo (16/1/13) Social Hall	Abdirashid Abdullah Mary Karen Kigen Sorobit Sheila Odawa	Public (100)
Nyamira (18/1/13) Borabu Hotel	Roseline Odede Jackie Manani Winnie Jeptum	Public (72)
Kitui (18/1/13) Multi-purpose Hall	Justus Munyithya Fredrick Chomba Gitonga M'limbine Bishara Duale	Public (70)

Chuka (18/1/13) Teachers Social Hall	Prof Ngotho Wa Karuiki David Wachira Alice Kisumba	Public (60) Lawyers (1)
Eldama Ravin (18/1/13) D.E.O's Hall	Abdirashid Abdullah Mary Karen Kigen Sorobit Sheila Odawa	Public (101)
Kakamega (18/1/13) Magharibi Hall	Justice Albie Sachs Meuledi Iseme Jemimah Keli Isaac Mbela	Public (69)

Table C. Summary of Complaints for Individual High Court Judges

SUMMARY OF COMPLAINTS FOR THE HIGH COURT JUDGES												
	PROFESSIONAL COMPETENCE	WRITTEN AND COMMUNICATION SKILLS	INTEGRITY	FAIRNESS	TEMPERAMENT	GOOD JUDGEMENT	DELAYED JUDGEMENT	DILIGENCE	BIAS	CORRUPTION	NOT SPECIFIED	TOTAL
1	17	0%	12	7	2	5		0%	0%	0%	1	44
2	39%	0%	27%	16%	5%	11%	0%	0%	0%	0%	2%	12
3	8	0%	2	0	1		1	0%	0%	0%	0%	20
4	67%	0%	17%	0%	8%	0%	8%	0%	0%	0%	0%	8
5	7	0%	5	0%	2	0%	3	0%	0%	0%	3	48
6	35%	0%	25%	0%	10%	0%	15%	0%	0%	0%	15%	20
7	4	0%	2	0%		0%	0%	0%	0%	0%	2	8
8	50%	0%	25%	0%	0%	0%	0%	0%	0%	0%	25%	2
9	15	0%	14	0%		11	6	0%	0%	0%	2	48
10	31%	0%	29%	0%	0%	23%	13%	0%	0%	0%	4%	20
11	6	0%	4	0%	0%	1	8	0%	0%	0%	1	44
12	30%	0%	20%	0%	0%	5%	40%	0%	0%	0%	5%	15
13	22	0%	8	8	1	3	1	0%	0%	0%	1	20
14	50%	0%	18%	18%	2%	7%	2%	0%	0%	0%	2%	44
15	5	0%	5	4		1	1	0%	0%	0%	0%	15
16	33%	0%	33%	27%	0%	0%	7%	0%	0%	0%	0%	11
17	5	0%	5	0%	0%	0%	9%	0%	0%	0%	0%	25
18	45%	0%	45%	0%	0%	0%	1	0%	0%	0%	5	27
19	7	0%	5	7	1	0%	0%	0%	0%	0%	20%	30
20	28%	0%	20%	28%	4%	0%	0%	0%	0%	0%	0%	27
21	13	0%	7	4		0%	3	0%	0%	0%	0%	30
22	48%	0%	26%	15%	0%	0%	11%	0%	0%	0%	0%	14
23	5	0%	3	2	0%	0%	16	0%	0%	0%	4	24
24	17%	0%	10%	7%	0%	0%	53%	0%	0%	0%	13%	14
25	5	0%	2	1	1	0%	2	0%	0%	0%	3	24
26	36%	0%	14%	7%	7%	0%	14%	0%	0%	0%	21%	24
27	11	0%	3	10	0%	0%	0%	0%	0%	0%	0%	24
28	46%	0%	13%	42%	0%	0%	0%	0%	0%	0%	0%	24

15	23	0%	12	9	0%	14	1	59
16	34	0%	20%	15%	0%	24%	2%	58
17	59%	0%	7	3	10	0%	2	13
18	10	0%	12%	5%	17%	0%	3%	13
19	77%	0%	1	1	1	0%	0%	13
20	11	0%	8%	0%	8%	0%	0%	13
21	85%	0%	5	12	0%	3	0%	0%
22			38%	92%	0%	23%	0%	
23								
24								
25	17	1	6	9	1	0.00%	0.00%	34
26	50.00%	2.94%	17.65%	26.47%	2.94%	0.00%	0.00%	48
27	13	0%	14	18	0%	0%	0%	19
28	27%	0%	29%	38%	0%	0%	0%	5%
29	2	0	5	7	2	0	0	
30	11%	0%	26%	37%	11%	0%	11%	
31								
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31	25	16	1	3	45
	56%	36%	2%	0%	0%
32	13	7	2	7%	0%
	59%	32%	9%	0%	0%
33	12	8	2	1	23
	52%	35%	9%	4%	0%
34	7	2	1	0%	10
	70%	20%	10%	0%	0%
35	16	6	3	2	27
	59%	22%	11%	7%	0%
36	16	6	3	2	27
	59%	22%	11%	7%	0%
37	20	14	4	3	41
	49%	34%	10%	7%	0%
38	6	7	1	0%	17
	35%	41%	6%	0%	0%
39	13	5	1	2	21
	62%	24%	5%	10%	0%
40	9	3	0%	16	28
	32%	11%	0%	57%	0%
41	6	4	0%	0%	10
	60%	40%	0%	0%	0%
42	5.00	3.00	4.00	0.00	12.00
	42%	25%	33%	0%	0%
43	14	2	2	1	19
	74%	11%	11%	5%	0%
44	20	11	3	2	36
	56%	31%	8%	6%	0%
TOTAL	468	245	151	97	1052
	44.487%	23.289%	14.354%	9.221%	2.757%
	1	33	23	5	29
	0.095%	3.137%	2.186%	0.475%	0.000%
				0	0.000%
				0	0.000%

Table D. Summary of Complaints for Individual Court of Appeal Judges

Summary of Complaints for Individual Court of Appeal Judges										
Vetting Criteria: Parameters: Complaints	Professional Competence	Written and Communication Skills	Integrity	Fairness	Temperament	Good Judgement	Diligence	Bias	Corruption	Total
1	10	0	6	6		10	7	1	1	41
	24%	0%	15%	15%	0%	24%	17%	2%	2%	
2	20	0	14	4	0	5	9	3	0	55
	36%	0%	25%	7%	0%	9%	16%	5%	0%	
3	9	0	6	3	0	0	0	0	1	19
	47%	0%	32%	16%	0%	0%	0%	0%	5%	
4	10	0	5	7	3		5	1	3	34
	29%	0%	15%	21%	9%	0%	15%	3%	9%	
5	9	0	6	5	5	5	3	0	0	33
	27%	0%	18%	15%	15%	15%	9%	0%	0%	
6	12	0	8	15	2	1	8	0	0	46
	26%	0%	17%	33%	4%	2%	17%	0%	0%	
7	18	0	8	17	4	21	8	0	0	76
	24%	0%	11%	22%	5%	28%	11%	0%	0%	
8	0	0	3	9	0	0	8	0	0	20
	0%	0%	15%	45%	0%	0%	40%	0%	0%	
9	8	0	6	11	1	0	8	5	0	39
	21%	0%	15%	28%	3%	0%	21%	13%	0%	
TOTAL	96	0	62	77	15	42	56	10	5	363
	26%	0%	17%	21%	4%	12%	15%	3%	1%	



ANNEXURE F.

Members and Gender Composition of the Secretariat

Members of the Secretariat and Gender Composition

	MEMBER OF SECRETARIAT	GENDER
	Secretary/ CEO	
1	Reuben Chirchir	Male
	Assisting Counsel	
2	David Wachira	Male
3	Marykaren Kigen-Sorobit	Female
4	Joseph G. M'limbine	Male
5	Evanson Njaramba Gichuki	Male
6	Jemimah W. Keli	Female
7	Jacqueline Manani	Female
	Principal Finance Officer	
8	Peter O. Ayugi	Male
	Accountant	
9	John Mwaro Kibinda	Male
10	Alice Wanjiku Mbugua	Female
11	Edward Munene Nyaga	Male
	Human Resource Officer	
12	Christine Chepkurui Rotich	Female
	Human Resource Assistant	
13	Yabesh Mokaya	Male
	Administrative Officer	
	Vacant	
	Office Clerk	
14	Mark Inonda	Male
	ICT Officer	
15	Andrew Opiyo	Male

Researchers

16	Mercy Ndanu Kyalo	Female
17	Rarin Lekiyeyo	Female
18	Edelquinn Odhiambo	Female
19	Sonah Okashaka	Female
20	Irene Kiwool	Female
21	Winnie C. Rutto	Female
22	Jacquelyn Katee	Female
23	Bakari S. Mohamed	Male
24	Isaac Mbela	Male
25	Edward Chemei	Male
26	Jeptum Bargoria	Female
27	Alex Muriuki Kiiru	Male

Legal Assistants

28	Sheila Odawa	Female
29	Alice Kisumba	Female
30	Duale Bishara Ahmed	Female
31	Faith Sialai	Female
32	Nairraba Solopian	Female
33	Ruth Gore	Female
34	Georgina Wabwire	Female
35	Jane Wanjiru Njoroge	Female
36	Lemein Johnson	Male
37	Tiksan Mohhamed	Female

Hansard Editors

38	Muthoni King'ang'i	Female
39	Elijah Bosire Nyairo	Male
40	Mwenda Mark Kubai	Male
41	Onesmus Musyoki Kilonzo	Male

42	Amos Esikokho Olendo	Male
Hansard Transcribers		
43	Teresia Nthenya Musyoki	Female
44	Joan Kamondia Waithera	Female
45	Martina Odhiambo Amolo	Female
46	Patricia Kioko	Female
47	Catherine Njeri Maina	Female
48	Eunice Ajuang	Female
49	Nimrod Onyango Ochieng	Male
50	Agnes Adhiambo Hongo	Female
51	Joseph Mburu Kamondia	Male
52	Johnstone Simiyu Machi	Male
53	Hydn Mukira Gethin	Female
54	Edgar Maingi	Male
55	Wakala Manase	Male
Process Servers		
56	Enos Mulima Lubutsi	Male
57	John Matata Matolo	Male
58	Collins Onyango Owuocha	Male
Supply Chain Management		
59	David Keter	Male
60	Trizah Cherono	Female
Public Communication Officer		
61	Rosemary Nchinyei Paring'iro	Female
Records Management Officer		
62	Ruth Kendi Gichuru	Female
63	Wandie Mwangi	Male
Administrative Assistants		
64	Catherine Andanje	Female

65	Grace Owuor	Female
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Office Assistants

66	Betha Atieno Omari	Female
67	Betty Chepkemoi	Female
68	Tabitha Wambui Ndirangu	Female

Casuals/Office Assistant

69	Ivan Kiptanui	Male
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Investigators

70	Andrew Omollo Swa	Male
71	Githinji Gilson Karaba	Male
72	Barasa Walumoli	Male
73	Samuel Murithi	Male
74	Bennedict Kemboi	Male
75	James Manyuru	Male
76	Jacob Wafula	Male

Security Officers

77	SSgt. Charles Mwangi	Male
78	Sgt. Darius Gitonga	Male
79	APC. Edward Kirwa	Male
80	Sgt. Panamas Chemboi	Male
81	APC. Naftali Waruta	Male
82	CPL. Jackson Maithya	Male
83	CPL. Mohammed Abdi	Male
84	Sgt. David K. Koech	Male
85	Sgt. Bonaya Godana	Male
86	APC. Ochieng Shikuku	Male
87	PC. Ken Kibet Sang	Male
88	APC. Evans Kaimenyi	Male
89	CPL. Solomon Kangiriwa	Male

90	CPL. Joseph Budi	Male
91	APC. Joseph Omoke	Male
92	APC. Christine Wambui	Female
93	CPL. Frances Mwangi	Male
94	APC. Christine Kitiba	Female
95	APC. Patrick Mbaluto	Male

Drivers

96	John O. Ogolla	Male
97	William A. Amollo	Male
98	James Osapiri	Male
99	Hannah M. Kiiru	Female
100	Titus K. Mutua	Male
101	Hussein A. Buthu	Male
102	Gilbert Kiprotich Molok	Male
103	Kennedy Owiti	Male
104	Daniel Sarama Galoro	Male
105	Welton Cheruiyot	Male
106	Willis Odhiambo	Male
107	Farid Kiplagat	Male
108	Joseph Kyalo Mutisya	Male
109	Weldon Kiplangat Sigei	Male
110	Alloys Odera	Male
111	Joseph Kilonzi Kaula	Male

Total		111
Male		69
Female		42



ANNEXURE G.

Extract from the Constitution of Kenya, 2010 (Article 159)

CHAPTER TEN—JUDICIARY

PART 1—JUDICIAL AUTHORITY AND LEGAL SYSTEM

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

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

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

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.

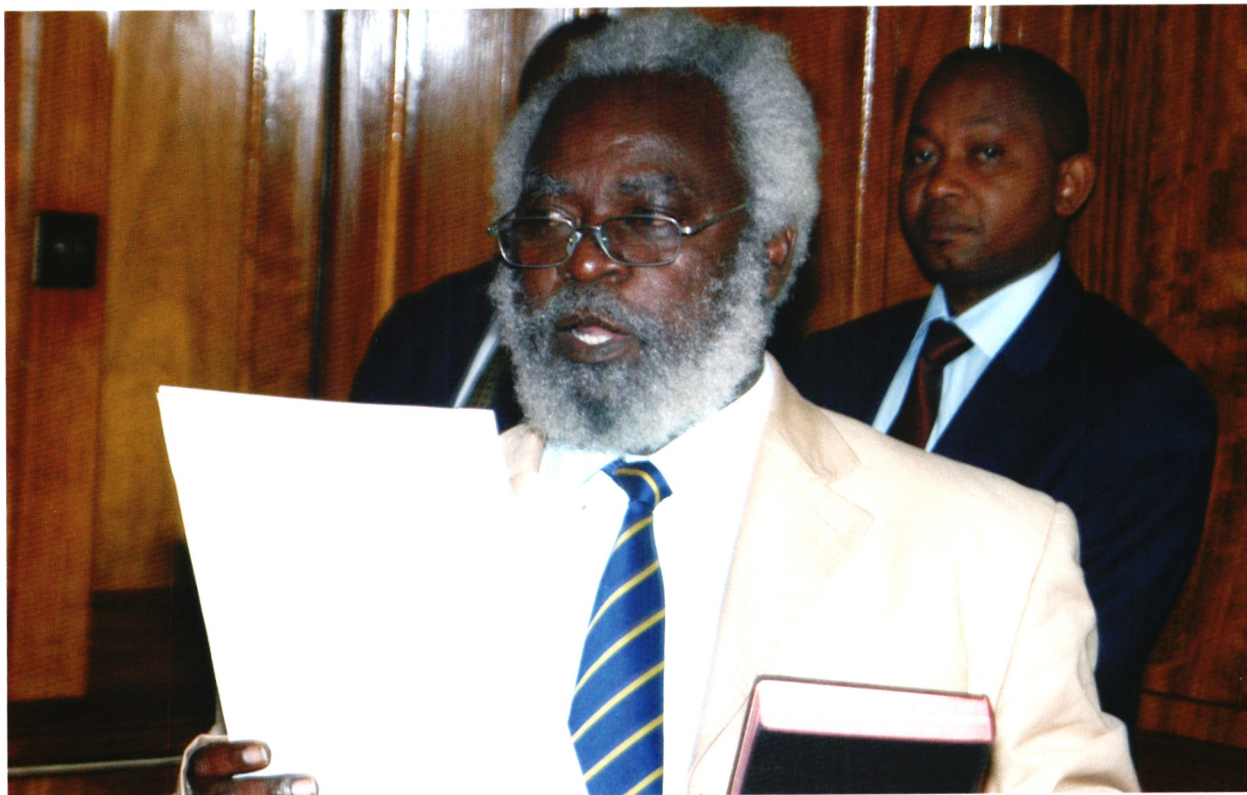
SWEARING IN OF BOARD MEMBERS



Mr. Sharad Rao



Ms. Roseline Odede, HSC



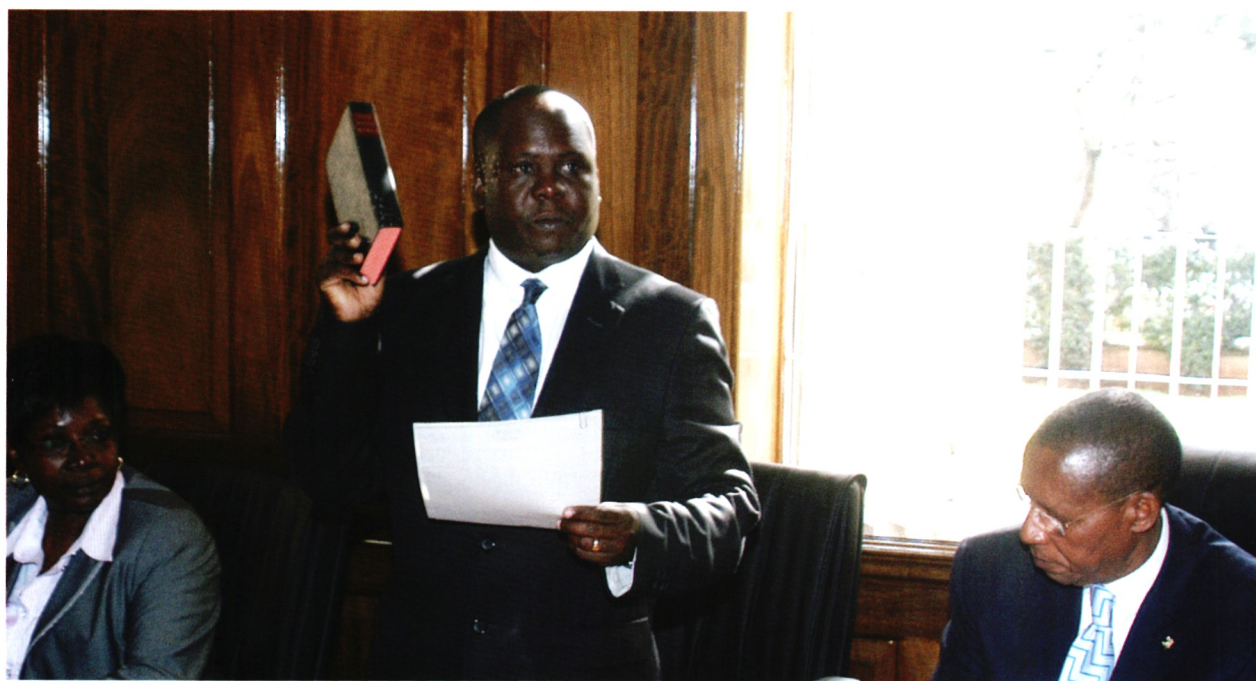
Prof. Ngotho Wa Kariuki



Mr. Abdirashid Abdullahi, MBS



Ms. Meuledi Iseme



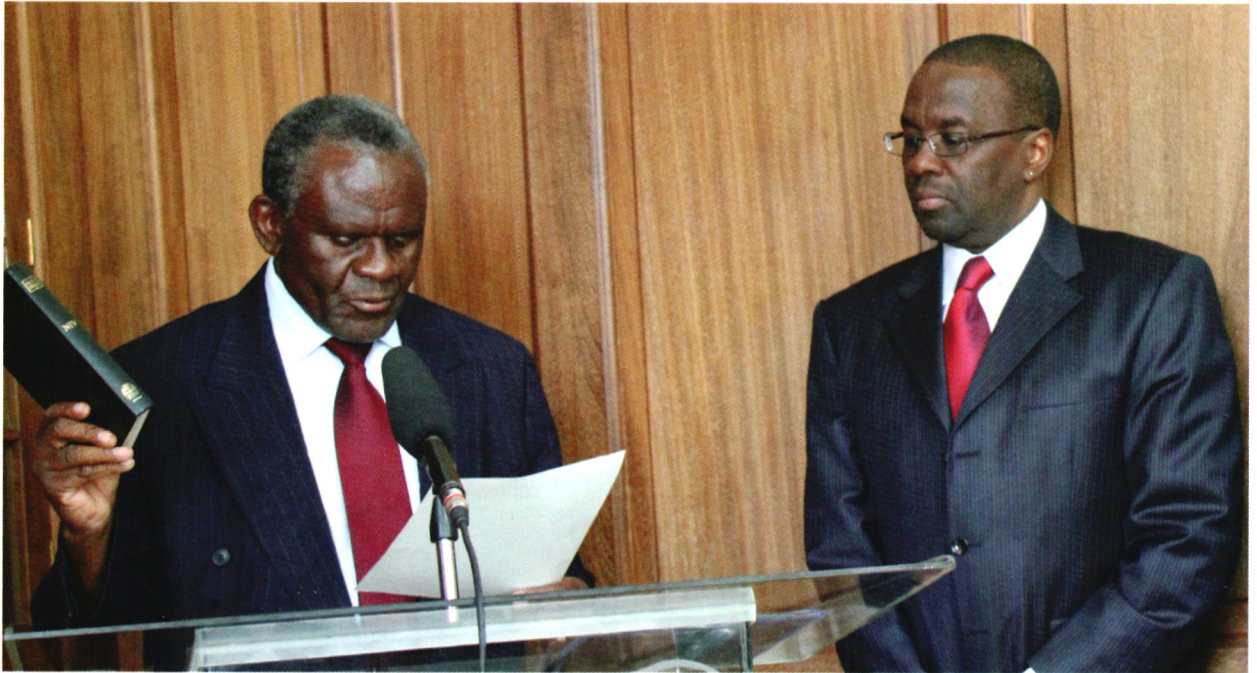
Mr. Justus Munyithya, HSC



Chief Justice Georgina Wood



Justice Albie Sachs



Justice Frederick Chomba



Mr. Reuben Chirchir

Netherlands Commits to Supporting Governance Reforms in Kenya

Aeneas Chuma, UNDP Resident Representative, has praised the Kingdom of the Netherlands for her commitment to support reforms in the Judiciary in Kenya.

“The contribution of the Government of the Kingdom of the Netherlands comes at a crucial time in the history of Kenya following the promulgation of the Constitution in August, 2010.

All the institutions that will receive support from this contribution have a critical role to play in ensuring that the aspirations of the Kenyan people are met,” said Mr. Chuma.

Mr. Chuma emphasised that the work of the Judges and Magistrates Vetting Board was important because an independent judiciary would be able to facilitate an efficient, effective and transparent administration of justice. He said it was equally vital for Kenya to have confidence in the judicial system.



Left to Right: Mr. Aeneas Chuma, UNDP Resident Representative, Mr. Sharad Rao, Chairman, Judges and Magistrates Vetting Board, IEBC Vice Chair Ms. Lilian Mahiri-Zaja, H.E. Joost Reintjes, Ambassador of The Kingdom of the Netherlands to Kenya, Mr. Peter Nguraiya, CEO, CIC, and Amb. David Mutemi, Director of Administration at the Ministry of Justice, National Cohesion and Constitutional Affairs.



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*Empowered lives.
Resilient nations.*

