REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ & President; Mwilu, DCJ & Vice-President; Ibrahim; Ojwang; Wanjala; Njoki; and Lenaola, SCJJ)

PETITION NO. 5 OF 2015

—BETWEEN—

REPUBLIC..... APPELLANT

—AND—

1. KARISA CHENGO
2. JEFFERSON KALAMA KENGHA
3. KITSAO CHARO NGATI
..... RESPONDENTS

(Being an appeal from the Judgment of the Court of Appeal at Malindi (Okwengu, Makhandia & Sichale, JJA) dated 8th May, 2015 in Criminal Appeal Nos. 44, 45, and 76 of 2014)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal raises a fundamental issue which has, for sometime now, engaged the Judges of the three superior Courts in this country: whether or not the Judges of the High Court, Judges of the Environment and Land Court (ELC) and Judges of the Employment and Labour Relations Court (ELRC)

have jurisdiction to sit in any and/or all of the three Courts. Given the huge backlogs in our Courts, the determination of this issue is of great significance in the administration of justice in this country. The appeal also raises another equally important issue: whether or not failure to assign legal counsel, at State expense, to defend an indigent person charged with a capital offence is a violation of his or her constitutional right to a fair trial and renders his trial a nullity.

B. BACKGROUND

Relevant Facts

[2] The facts giving rise to this appeal are fairly straightforward. The respondents were charged in various Magistrates' Courts, with the offence of robbery with violence, contrary to Section 296(2) of the Penal Code (Chapter 63, Laws of Kenya); and the 3rd respondent faced an additional charge of rape contrary to Section 3(1)(a) of the Sexual Offences Act (Act No. 3 of 2016). Upon trial, they were all convicted and sentenced to death, while the 3rd respondent was in addition also convicted on the charge of rape — though the sentence on this particular charge was held in abeyance.

[3] In an effort to deal with the backlog of criminal appeals in the High Court, the former Chief Justice, Dr. Willy Mutunga, declared the 14th to 18th October, 2013 to be a "Judicial Service Week" dedicated to the hearing of criminal appeals in the High Court and by Gazette Notice No. 13601, dated 4th October, 2013, empanelled Judges of the ELC and ELRC to sit with Judges of the High Court, to hear and determine criminal appeals during that week. Meoli J. of the High Court at Malindi, with *Angote J.* of the ELC, heard and dismissed the respondents' appeals. Aggrieved by that decision, the respondents preferred a second appeal to the Court of Appeal.

[4] Before the Court of Appeal, although various grounds of appeal were raised, only two common elements ran through them: that the proceedings before the High Court were a nullity for want of jurisdiction; and that having failed to provide each of the respondents with legal counsel at State expense, the State contravened their constitutional right to legal representation at State expense as required by **Article 50(2)(h)** of the Constitution thus rendering their trial a nullity.

[5] The Court of Appeal in its determination, held that though the High Court, the ELRC, and the ELC are Courts of equal status, they are different Courts standing in their distinct autonomies, each exercising a special dedicated jurisdiction. The Court of Appeal further held that it was only the High Court that was vested with jurisdiction to hear and determine criminal appeals from the Magistrates' Courts. It therefore upheld the respondents' contention that *Angote J.,* having been appointed as a Judge of the ELC, had no jurisdiction to sit on their appeals. Consequently, the Court of Appeal declared the proceedings of that mixed bench a nullity and directed that the respondents' appeals be re-heard by Judges of competent jurisdiction. This Petition is an appeal by the Director of Public Prosecutions (DPP) against that decision.

[6] On the second issue raised, the Court of Appeal held that under the Constitution, the right to a fair trial includes the right "*to have an advocate assigned to an accused person by the State at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly*". Under the Constitution, the Court of Appeal further held, an accused person is entitled to legal representation at the State's expense, only where substantial injustice would otherwise be occasioned in the absence of such legal representation. Substantial injustice would, for instance, result in cases where

a person is charged with an offence punishable by death, and such person is unable to afford legal representation.

[7] The Court of Appeal further stated that the right to legal representation at State expense under **Article 50(2)(h)** of the Constitution is to be progressively realized. Though the respondents were entitled to legal representation at State expense, Parliament having at that time not enacted the relevant enabling Statute contemplated by **Article 261** and the Fifth Schedule to the Constitution, to actualize it, and the respondents having themselves actively participated in their trial, they suffered no substantial injustice and their right to legal representation was, in the circumstances, not violated. The Court of Appeal therefore dismissed that ground of appeal. That decision is the basis of the 1st and 3rd respondents' cross-appeals in this Petition.

[8] In that context, while the Appellant has listed several grounds of appeal in this Petition, the gravamen of his appeal is a plea to this Court to find that the Court of Appeal erred in holding that Judges of the three superior Courts referred to above only have jurisdiction to sit in the Courts that they were appointed to and none other.

[9] As we have already stated, the 1st and 3rd respondents' notices of cross-appeal raise one major issue: whether or not the Judges of the Court of Appeal misdirected themselves when they held that **Article 50(2)(h)** of the Constitution does not make it mandatory for persons charged with an offence attracting the death penalty to be granted legal representation at State expense.

C. PARTIES' SUBMISSIONS

(a) Submissions by the Appellant

[10] The appellant urged that under **Article 162(1)** of the Constitution, the Superior Courts are the Supreme Court, Court of Appeal, High Court, and Courts envisaged in clause (2) of Article 162 of the Constitution namely, the ELRC and ELC, which bear such jurisdiction as shall be determined by Parliament.

[11] Citing Sections 2 of the Environment and Land Court Act (Environment and Land Court Act) and the Employment and Labour Relations Court Act both of which define the term "judge" as *"a person appointed in accordance with the provisions of Article 166(1)(b) of the Constitution"* and Article 166(2) of the Constitution (on the appointment of a Judge), Mr. Nderitu, learned counsel for the appellant, urged that, while it provides for specialized Courts, the Constitution does not contemplate a specialized cadre of Judges. He added that, since the Constitution does not provide a distinct procedure for the appointment of Judges of the specialized Courts, it cannot be the case that a Judge sitting in either of the specialized Courts, may not handle criminal appeals. He further urged that, since all Judges are appointed by the President on the advice of the Judicial Service Commission, it is to be deemed that they are Judges exercising the same powers, irrespective of the Courts to which they are appointed. In support of that contention, he cited the case of ***Kenya Medical Research Institute v. Attorney-General and 3 Others,*** Industrial Court Petition No. 31 of 2013; [2014] eKLR (paragraph 43), in which the Court, consisting of two Judges of the High Court and one Judge of the ELC, overruled the objection that its composition was unconstitutional and

held that the Constitution only creates different Courts but not different cadres of Judges.

[12] In that regard, counsel for the appellant dismissed the respondents' contention that the Constitution grants Judges of the High Court exclusive jurisdiction to hear and determine criminal appeals. In his view, since there is no express provision in any statute to the contrary, Judges appointed to the ELC and ELRC are also legally competent to hear criminal appeals. To support this argument, he relied on a comparative decision from Tanzania's High Court in ***East African Railways Corporation v. Anthony Sefu,*** Dar-es-Salaam HCCA No. 19 of [1971] EA 327, where it was held that "*it is a well-established principle that no statute shall be construed to oust or restrict the jurisdiction of the superior Courts in the absence of clear and unambiguous language to that effect.*" In the circumstances, counsel submitted that read together, **Section 359** of the Criminal Procedure Code, (Chapter 75, the Laws of Kenya) and **Article 165(3)(a)** of the Constitution should not be understood as conferring upon the High Court Judges exclusive appellate jurisdiction, to hear and determine criminal appeals.

[13] Counsel further submitted that as head of the Judiciary, the Chief Justice is mandated by **Article 161 (a)** of the Constitution and **Section 5** of the Judicial Service Act to administratively assign duties to all Superior Court Judges, as occasion demands. He was therefore entitled to empanel the Judges of the ELC and ELRC to hear criminal appeals and that in this case, as neither the professional qualifications nor the moral standing of *Angote J.* had been questioned, counsel submitted that the respondents had suffered no prejudice by the fact of him hearing their appeals.

[14] Counsel for the appellant furthermore dismissed as unconstitutional the respondents' contention that the Chief Justice should have appointed Commissioners of Assize, under the Commissioner of Assize Act (Chapter 12, Laws of Kenya), to deal with the backlog of criminal cases and argued that the said Act defines Commissioners of Assize as "acting Judges"—a designation which is not provided for in the Constitution.

[15] On the issue of the right to legal representation raised in the 1st and 3rd respondents' notices of cross-appeal, counsel for the appellant contended that **Article 50(2)(h)** of the Constitution does not automatically entitle an accused person charged with an offence the penalty of which is death to legal representation at State expense. He submitted that the right to a lawyer at State expense only arises after the Court has determined that "substantial injustice" would occur if the accused has no legal representation. He therefore urged that **Articles 25(c)** and **50(2)(h)** should harmoniously be interpreted, contending further that the Court of Appeal decision in ***David Macharia Njoroge v. Republic,*** Criminal Appeal No. 497 of 2007; [2011] eKLR that substantial injustice arises in instances where an accused person is charged with an offence punishable by the death penalty and is tried without legal representation is bad law.

[16] Counsel for the appellant in addition submitted that **Article 50(2)(h)** of the Constitution should be understood as bearing the intent that the right to legal representation is a progressive right and that the respondents' constitutional right to legal representation was not violated as the Legal Aid Act, 2016 (Act No. 6 of 2016), which was enacted to actualize impecunious litigants' right to legal representation at State expense, came into operation only on 10th May, 2016, long after the respondents' trial before the subordinate Court and the hearing of their appeals before the High Court. In conclusion,

counsel for the appellant submitted that the Court of Appeal's failure to nullify Gazette Notice No. 13601, dated 4th October, 2013, was fatal to the appeal before it.

[17] On those submissions, the appellant urged this Court to allow this appeal and dismiss the 1st and 3rd respondents' cross-appeals.

(b) Submissions by the 1st Respondent

[18] Ms. Otieno, learned counsel for the 1st respondent, lauded the Court of Appeal Judges for declaring the High Court proceedings as a nullity adding that, contrary to the contention by counsel for the appellant, once the Court of Appeal found that *Gazette Notice* No. 13601 was unconstitutional, it was otiose to make a specific order nullifying the same.

[19] Counsel further urged the point that by this Court's decision in ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank and Two Others,*** Sup. Ct. Civil Application No. 2 of 2011, a Court's jurisdiction flows from the Constitution, or legislation, or both. With regard to the issue of the jurisdiction of the Judges of the High Court, Judges of the ELC and Judges of the ELRC, counsel submitted that although the High Court, the ELC and the ELRC are Courts of equal status, to give focused attention to disputes falling under different categories, they are vested with separate and distinct jurisdictions. In this regard, she said, it was the intention of the drafters of the 2010 Constitution that the ELC was to concentrate on environment and land issues, and the ELRC on matters of labour and employment relations leaving all other matters to the High Court. In accordance with that view, the drafters of the Constitution set out the jurisdiction of the High Court in **Article 165** of the Constitution, and, in accordance with **Article 162(2)** of the Constitution,

left it to Parliament to spell out those of the ELC and ELRC in Acts it was to pass in that regard. Pursuant to that constitutional imperative, Parliament enacted the Environment and Land Act and outlined the jurisdiction of the ELC in **Section 13** thereof. It similarly passed the Employment and Labour Relations Court Act and set out the jurisdiction of the ELRC in **Section 12(1)** of that Act. We shall, later in this judgment, set out in detail, those jurisdictions.

[20] Regarding the jurisdiction of the individual Judges of the above three Courts, counsel relied on **Sections 43** and **44** of the Interpretation and General Provisions Act (Chapter 2, Laws of Kenya), and submitted that once a Judge has been appointed to a specific Court, he or she lacks power to exercise a jurisdiction which the Constitution has reserved to another superior Court. She argued further that the qualifications, experience, expertise and appointment of the Judges of the three Courts are separate and distinct. Narrowing down to *Angote, J.* Ms. Otieno submitted that, as is clear from *Gazette Notice* No. 14346 of 3rd October, 2013, *Angote, J.* was specifically appointed to the ELC, and took the oath of office for that Court and in the circumstances, he could only perform functions and duties reserved for the ELC, and not those of the High Court.

[21] Counsel urged that, a reading of **Sections 347 (a)** and **359** of the Criminal Procedure Code, makes it manifestly clear that criminal appeals lie from subordinate Courts to the High Court, thus denoting that it is the Judges of the High Court who should determine them and that *Angote, J.* had therefore no business sitting on criminal appeals filed in the High Court.

[22] To deal with the backlog of criminal appeals, counsel submitted that it would have been entirely lawful to assign the appellate task to Commissioners of Assize; since by the preamble, as well as **Section 2** of the Commissioner of Assize Act, the Chief Justice, in consultation with the Attorney-General, and the President, could have properly appointed Commissioners of Assize to determine criminal appeals and there was therefore no basis for involving Judges of the specialized Courts.

[23] Regarding the cross-appeal, learned counsel contested the Court of Appeal's finding that no substantial injustice had been occasioned to the respondents by the State's failure to accord them legal representation. She submitted that as an indigent, semi-literate and lay-person, the 1st respondent was unable to mount a credible defence and therefore the trial Court's failure to accord him his constitutional right to legal representation at State expense caused him to suffer grave prejudice. In support of this argument, learned counsel relied on the authority of ***David Macharia Njoroge*** (Supra), in which the Court of Appeal held that "*persons accused of capital offences where the penalty is loss of life, have the right to legal representation at State expense*".

[24] Counsel further submitted that the right to legal representation at State expense under Article 50(2)(h) of our Constitution is an echo of an international right found, *inter alia*, in **Article 14(3)(d)** of the International Covenant on Civil and Political Rights (the ICCPR) and **Article 7(1)(c)** the African Charter on Human and Peoples' Rights (the ACHPR).

[25] Counsel argued that, even prior to the promulgation of the current Constitution, as is manifest from the cases of ***Ouma & Another v. Republic*** [1991] KLR 539, ***Rono v. Rono & Another*** [2008] 1 KLR (G & F) 809, and

Mohamed s/o Salim v. Republic [1958] E.A. 202, the Courts recognized that a majority of the crime-suspects in Magistrates' Courts facing charges that attract the death penalty, are indigent and often times suffer substantial injustice when they are prosecuted without an advocate availed to them at State expense. In such cases, the Deputy Registrar applied certain criteria in selecting those who would be entitled to legal representation; but under the 2010 Constitution, the Chief Justice issued *Gazette Notice* No. 370 of 2016 of 1st July 2016, which outlines how legal aid should be operationalized but limited to capital offenders and children in need of protection of the law.

[26] Learned counsel furthermore submitted that as was decided by the Court of Appeal in the case of ***Moses Gitonga Kimani v. Republic,*** Criminal Appeal No. 69 of 2013, under Article 25 of the Constitution, the right to a fair trial, which includes legal representation at State expense where substantial injustice may be suffered, cannot be limited notwithstanding the fact that the Legal Aid Act had not been operationalized. In the circumstances, learned counsel submitted that failure to engage counsel for the respondents in this case had utterly vitiated their trial rendering it a nullity *ab initio;* and as such, the only remedy available to them is a retrial. If overruled on that submission, counsel urged this Court to find that the proceedings in the High Court were a nullity and order that the respondents' appeals be heard afresh before High Court Judges with competent jurisdiction who would address all matters of fact and law thereby arising.

(c) Submissions by the 2nd Respondent

[27] Mr. Mutua, learned counsel for the 2nd respondent also contested this appeal urging the point that while **Section 5** of the Judicial Service Act 2011 grants the Chief Justice powers of general control over the Judiciary, it does

not empower him to empanel Judges other than those of the High Court, to hear criminal appeals. Counsel therefore urged that the respondents' appeals be heard afresh before High Court Judges with competent jurisdiction and in his view, the force and effect of Gazette Notice No. 13601, dated 4th October, 2013, ceased upon the conclusion of the Judicial Service Week and the Court of Appeal's failure to nullify it was therefore inconsequential and never occasioned the appellant any prejudice.

(d) Submissions by the 3rd Respondent

[28] Mr. Ole Kina, learned counsel for the 3rd respondent, dismissed the contention by counsel for the appellant that Judges of the ELC and ELRC have jurisdiction to determine criminal appeals. He submitted that by dint of **Section 359** of the Criminal Procedure Code, the Court of Appeal was right in holding that criminal appeals are the preserve of the Judges of the High Court and reiterated the submissions by counsel for the 1st respondent that Judges of the ELC and ELRC who were interviewed for and appointed to those specialized Courts, could only exercise the jurisdiction vested in those Courts. He further argued that the Chief Justice had no powers to empanel Judges of the ELC and/or ELRC to hear criminal appeals and that his powers of general supervision of the Judiciary entail no more than providing managerial directions. He therefore faulted the Chief Justice for empanelling *Angote, J.* to sit with *Meoli, J.* and hear the respondents' appeals.

[29] As regards legal representation under Article 50(2)(h) of the Constitution, Mr. Ole Kina submitted that the Court of Appeal misapprehended the import of **Article 25** of the Constitution and instead he contended that the said right is not aspirational but one which crystallized upon the coming into operation of the 2010 Constitution.

[30] Counsel further argued that the right to a fair trial commences upon arrest and it was therefore the duty of the Police to inquire from the 3rd respondent whether he had the financial means to engage a lawyer and advise him of his constitutional right to legal representation at State expense if he was unable to afford it. He submitted in that context that the term 'promptly' in **Article 50(2)(h)** of the Constitution entailed the accused being notified of his entitlement to that right not only upon his arrest but also upon his first appearance before a judicial officer. In his view therefore, and on the authority of the Court of Appeal decision in ***David Macharia*** (Supra)**,** there is no controversy as to the category of accused persons who may suffer substantial injustice if they are not accorded legal representation: they are all the indigent ones who cannot afford to engage counsel to represent them.

[31] In conclusion, counsel cited the case of ***Reid v. Jamaica Communication*** No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989 (1994) in support of the argument that if the Court of Appeal's decision on the competence of the first appellate Court is overturned, then the 3rd respondent should be set free forthwith given the period of his incarceration. He contended that a re-trial 5 years after the initial allegation against him had been made, would violate the 3rd respondent's right to an expeditious trial under Article 50(2)(d) and (e) of the Constitution.

D. ISSUES FOR DETERMINATION

[32] From the averments in the Petition and the written as well as oral submissions presented to us by counsel for the parties, the emerging issues for our determination are:

(a) whether Judges appointed to specialized Courts, that is, the ELC and the ELRC, have jurisdiction to hear and determine criminal appeals;

(b) whether the respondents' right to fair trial was infringed by failure to accord them legal representation at the expense of the State; and

(c) *what remedies would fall due, in these circumstances?*

E. ANALYSIS

(a) Judges of Specialized Courts: Can they hear and determine Criminal Appeals?

[33] As is already clear, this petition raises the issue of whether the appeal proceedings before the High Court were a nullity, having been presided over, *inter alia,* by Angote J, a Judge appointed to the ELC, as one of two Judges who were empanelled by the Chief Justice by *Gazette Notice* No. 13601, to hear the respondents' appeals. The determination of this issue calls for the interpretation of the Constitutional and other statutory provisions on the issue of jurisdiction of the three superior Courts as well as that of the individual Judges appointed to those Courts.

[34] The starting point, in the resolution of this appeal, is, in the circumstances, to determine the meaning of the term "jurisdiction". We will then examine the jurisdiction of the three superior Courts and that of the individual Judges of those Courts, and end with a determination of whether or not the respondents were accorded a fair trial in that context.

[35] In the above regard, we note that in almost all the legal systems of the world, the term "jurisdiction" has emerged as a critical concept in litigation. **Halsbury's *Laws of England* (4th Ed.) Vol. 9 at page 350** thus defines "jurisdiction" as "*...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."* John Beecroft Saunders in his treatise **Words and Phrases Legally Defined Vol. 3, at page 113** reiterates the latter definition of the term 'jurisdiction' as follows:

> ***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".***

From these definitions, it is clear that the term "jurisdiction", as further defined by **The Black's Law Dictionary, 9th Edition**, is the Court's power to entertain, hear and determine a dispute before it.

[36] The Constitution of Kenya, 2010 has pronounced itself clearly on the jurisdictional competencies of various Courts of law in Kenya. The drafters of the Constitution, it appears, had the intention of clearly demarcating the jurisdictions of the said Courts so as to pre-empt *lacunae* and conflicts. Besides the Constitution, there are several statutes which demarcate the jurisdictions of various Courts and tribunals, for example the jurisdiction of the Supreme Court, the apex Court in the land, is set out in **Article 163(3)(4)** in the following words;

> ***"(3) The Supreme Court shall have—***
>
> ***(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and***
>
> ***(b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from—***
>
> ***(i) the Court of Appeal; and***
>
> ***(ii) any other Court or tribunal as prescribed by national legislation.***
>
> ***(4) Appeals shall lie from the Court of Appeal to the Supreme Court—***
>
> ***(a) as of right in any case involving the interpretation or application of this Constitution; and***

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”

Clause 5 thereof states that a certificate of the Court of Appeal may be reviewed by the Supreme Court, and either be affirmed, varied or overturned. **Sections 12** to **19** of the Supreme Court Act, No. 7 of 2011 also have legal principles relating to the jurisdiction of the Supreme Court.

[37] The jurisdiction of the Court of Appeal, we further note, and as founded on **Article 164(3)** of the Constitution is “*to hear appeals from (a) the High Court; and (b) any other Court or tribunal as prescribed by an Act of Parliament.*” Two of the Acts of Parliament vesting in the Court of Appeal jurisdiction to hear and determine appeals from other Courts are the Environment and Land Court Act at **Section 13(1)** – to hear appeals from the Environment and Land Court and the Employment and Labour Relations Act, at **Section 12(1)** – to hear appeals from the Employment and Labour Relations Court.

[38] The Constitution has, on its part, elaborately set out the jurisdiction of the High Court and states in **Article 165(3)** that:

“(3) Subject to clause (5), the High Court shall have —

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

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

[39] **Article 162(2)** on the other hand empowers Parliament to "*establish Courts with the status of the High Court to hear and determine disputes relating to —*

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

Clause (3) thereof authorizes Parliament to *"determine the jurisdiction and functions of the Courts contemplated in clause (2)."*

[40] Pursuant to **Article 162(3)** of the Constitution, Parliament then enacted the Environment and Land Court Act **Section 13(1)** of which outlines the ELC's jurisdiction as follows:

"(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court [the ELC] shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

"(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution."

[41] Section 12(1) of the Employment and Labour Relations Court Act further provides for the jurisdiction of the ELRC in the following terms:

"(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade union organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements."

[42] How are these provisions to be interpreted in the context of the Appeal before us?

[43] We find clear merits in the Court of Appeal's stand that the Constitution, in **Articles 159(2)(e)** and **259,** has definitively signalled the principles of interpretation applicable in the determination of contested issues. Article 259(1) of the Constitution thus requires interpretation of the charter in a manner that advances national values and principles, and promotes the rule of law, good governance and protection of human rights; while Article 159(2)(e) requires that the exercise of judicial authority be undergirded by the principle that the purpose and the principles of the Constitution are to be safeguarded.

[44] Constitutions are, in general, the product of economic, political, social and even religious compromises—as a result of long-drawn out claims and petitions. The ultimate object always being sought, is the durable accommodation of all the people in the land hence the fact that the language, phraseology, content and spirit of any Constitution, are rooted in a historical context. Thus in constitutional interpretation, as this Court signalled in ***In Re***

the Matter of the Interim Independent Electoral Commission, Sup. Ct. Application No. 2 of 2011; [2011] eKLR, regard is to be paid to the legal, linguistic and philosophical context, the history, usage as well as the purpose of a particular constitutional provision, or of a right being claimed. In that case we had thus remarked [para. 86]:

> ***"The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural, and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence in Kenya."***

[45] We have underlined the said principle in several other cases; for instance, ***In the Matter of the National Land Commission,*** Sup. Ct. Advisory Opinion No. 2 of 2014; [2015] eKLR, where we stated at para. 281 that:

> ***"The Constitution is to be interpreted in a holistic manner that entails reading it alongside other provisions, and considering the historical perspective, purpose, and intent of the provisions in question***."

[46] From the above perspective, we are therefore obliged to take into account the history and context as well as the various constitutional provisions that are in dispute in this matter and in that regard, the Court of Appeal's view that the Committee of Experts, which formulated and harmonised the Constitution, had conceived of specialised Courts, such as a constitutional Court, a Land and Environment Court, and an employment Court is well founded. The Parliamentary Select Committee on Constitutional Review (PSC), however, resolved to delete all references to the constitutional Court — and the Committee of Experts subsequently agreed with that proposal but was not agreeable to the PSC's proposal to have Parliament solely determine the status, jurisdiction and nature of the proposed specialised Courts through legislation; and so the general Constitutional provisions on the Land and Environment Court, as well as the Employment and Labour Relations Court, were retained in the draft Constitution subject to Parliament determining the specific jurisdictions and functions of the said Courts. That proposal was ratified at the 2010 Referendum.

[47] Explaining its rejection of the PSC proposal to establish the two superior Courts merely by ordinary legislation and with no anchorage in the Constitution, the Committee of Experts in its Final Report thus observed [at para 8.11.3 on pg. 123]:

> ***"First, such provisions would give Parliament a blank cheque to establish Courts whose level and jurisdiction might supplant the superior Courts established in the Constitution. Further, this would not signal establishment of specialized Courts on employment and land/environment, and would not solve the competing jurisdictional***

issues that have historically existed between the High Court and the Industrial Court."

In addressing the latter historical controversy, the Committee of Experts reinstated the provision allowing Parliament to establish, by legislation, employment and land/environment Courts with a status equivalent to the High Court as had been provided for in the earlier drafts of the Constitution including the 2005 Referendum draft by the Constitution of Kenya Review Commission (CKRC).

[48] The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in the Constitution for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment and of the ELRC as covering matters of employment and labour relations but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in the Constitution of a statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court.

[49] The historical background informing the provision to stem the said rivalry is clear from the High Court decision in ***United States International University v. Attorney-General*** [2012] eKLR, in which

Majanja, J. found that despite the clear wording of **Section 65** of the former Constitution that Parliament may establish Courts subordinate to the High Court and Courts martial and that a Court so established shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law; *"[t]he status of the Industrial Court [the current ELRC] in relation to the High Court has been somewhat controversial in view of conflicting decisions of the High Court."* For instance, while in the case of ***Mecol Limited v. the Attorney-General and Others***, Nairobi HC Misc. App. 1784 of 2004, and in ***Brookside Dairy Limited v. Attorney General and the Industrial Court,*** Nairobi Petition No. 33 of 2011, the High Court took the view that the Industrial Court was a subordinate Court subject to the supervisory jurisdiction of the High Court under Section 65 of the former Constitution, in ***Kenya Guards and Allied Workers Union v. Security Guards Services and 38 Others***, Nairobi HC Misc. 1159 of 2003, the Court expressed a contrary view on the basis of legislative policy favouring finality of labour disputes.

[50] It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of "*equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other".* Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another. In their words:

"By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and *vice versa****. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word 'status'. The intentions of the framers of the Constitution in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court."***

[51] Flowing from the above, it is obvious to us that s*tatus* and *jurisdiction* are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from the Constitution, or legislation (see ***In Re the Matter of the Interim Independent Electoral Commission,*** **at paras. 29 and 30; and** ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others,*** Sup.Ct. Civil Application No. 2 of 2011 [para. 68]). In this instance, the jurisdiction of the specialized Courts is prescribed by Parliament, through the said enactment

of legislation relating, respectively, to the ELC and the ELRC. Such legislation is to be interpreted in line with relevant constitutional provisions hence our position in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji and Two Others,*** Sup. Ct. Civil Application No. 5 of 2014; [2014] eKLR, where we examined the constitutional provisions alongside legislative provisions on elections, and held [para. 77] that "*the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution." In the instant case too, we take guidance from the Constitution, as we interpret it alongside the relevant statute law, pertaining to the specialized Courts.*

[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As **Article 165(5)** precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.

[53] Having so found, which of the three Courts has jurisdiction to hear criminal appeals? Counsel for the appellant urged that the High Court does not have "exclusive" original jurisdiction to hear criminal and civil appeals but

such a contention is clearly untenable because **Article 165(3)(e)** of the Constitution provides that the High Court shall have *"any other jurisdiction, original or appellate, conferred on it by legislation."* The Criminal Procedure Code is, clearly, legislation of such a kind, which confers upon the High Court appellate jurisdiction to determine criminal appeals hence the wording of Section 347(1) that:

> ***"(1) Save as is in this Part provided—***
>
> ***(a) a person convicted on a trial held by a subordinate Court of the first or second class may appeal to the High Court…";***

and Section 359(1) of the same Act that:

> ***"(1) Appeals from subordinate Courts shall be heard by two Judges of the High Court, except when in any particular case the Chief Justice, or a Judge to whom the Chief Justice has given authority in writing, directs that the appeals be heard by one Judge of the High Court."***

[54] These provisions are the platform upon which the respondents rest their case; that two Judges of the High Court ought to have determined their appeals. We agree, and hold that, in light of **Article 165(3)(e)** of the Constitution, as read together with the above provisions of the Criminal Procedure Code, (although the latter was enacted prior to the promulgation of the 2010 Constitution), it clearly fell within the mandate of Judges of the High Court to determine the respondents' appeals. It is in this respect, bearing in mind that *Angote, J.* was appointed a Judge of the Environment and Land

Court and not a Judge of the High Court, that he could not properly hear and determine the respondents' criminal appeals. That being our view of the matter, we concur with the Court of Appeal that the High Court, comprised of *Meoli, J.* of the High Court and *Angote, J.* of the ELC, was improperly constituted, and had no jurisdiction to hear and determine the appellants' criminal appeals.

(b) The Jurisdiction of a Judge of the Three Superior Courts

[55] The next question then is, whether the Constitution and the Acts of Parliament referred to above contemplated a special cadre of Judges, for the specialized Courts because in issue in this Petition is the controversy regarding the constitutional powers or roles of a Judge, appointed and serving in either of the Courts created by **Article 162(2)** of the Constitution. In other words can such a Judge exercise the powers of the High Court under **Article 165(1)** and determine matters such as criminal appeals, as and when designated, assigned or empanelled by the Chief Justice, in exercise of his administrative or supervisory powers over the judiciary.

[56] Before this Court, as earlier stated, counsel for the appellant asserted that since the Constitution does not provide a distinct procedure for the appointment of Judges of the specialized Courts, and since the President appoints Judges on the advice of one and the same Judicial Service Commission, it is not tenable that a Judge sitting in either of the specialized Courts cannot entertain criminal appeals. Instead, according to him, it should be deemed that they are Judges exercising the same powers, irrespective of the Courts to which they were/are appointed.

[57] Counsel for the respondents on the other hand concurred with the Court of Appeal holding that when a Judge is appointed to a particular superior Court, say the High Court, that *ipso facto* ousted his or her jurisdiction to hear matters reserved for another Court, such as the ELC or ELRC and held that the Chief Justice has no authority to empanel a Judge to sit in a Court other than that to which that Judge was appointed. Accordingly, a contrary course of action is a nullity, because it runs counter to the Constitution.

[58] The determination of this issue requires not only a closer examination of the provisions on the jurisdiction of the Superior Courts and that of the Judges appointed to those Courts but also the manner and instruments of the appointment of the Judges of those Courts.

[59] As we have stated, **Section 2** of both the Employment and Labour Relations Court Act, and the Environment and Land Court Act, defines a Judge as *"a person appointed in accordance with the provisions of Article 166(1) (b) of the Constitution"*. Article 166(1)(a) stipulates that the President shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendations of the Judicial Service Commission, and subject to the approval of the National Assembly. Article 166(1)(b) adds that *"[t]he President shall appoint all other Judges, in accordance with the recommendation of the Judicial Service Commission"*.

[60] Article 166(2) specifically provides for the appointment of a Judge of any of the superior Courts, in the following terms:

"(2) Each Judge of a superior Court shall be appointed from among persons who—

(a) hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;

(b) possess the experience required under clauses (3) to (5) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and

(c) have a high moral character, integrity and impartiality."

[61] Clauses (3) and (4) respectively state the qualifications required for appointment of the Judges of the Supreme Court and those of the Court of Appeal whom we are not concerned with in this appeal.

[62] As regards the qualifications for appointment of the Judges of the High Court, it is specifically provided in Article 166 (5) that:

"(5) Each Judge of the High Court shall be appointed from among persons who have —

(a) at least ten years' experience as a superior Court Judge or professionally qualified magistrate; or

(b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or

(c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years."

[63] Thus, as to any special condition regarding the position of Judges of the specialized Courts, the Constitution is silent. The Employment and Labour Relations Court Act is also silent on any special qualification for the appointment of Judges of the ELRC. However, **Section 7** of the Environment and Land Court Act has additional criteria for the appointment of Judges of the ELC. They are that:

"(1) A person shall be qualified for appointment as Judge of the Court if the person—

(a) possesses the qualifications specified under Article 166(2) of the Constitution; and

(b) has at least ten years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land" [emphasis supplied].

[64] The said requirements have been carried out in the Judicial Service Commission's advertisements for appointment of Judges of the ELC and incorporated in the oath taken by Judges appointed to that Court.

[65] Learned counsel for the 1st respondent in addressing the above controversy submitted that the appointment of *Angote, J.* was specific to the Environment and Land Court as is clear from Gazette Notice No. 14346 which read as follows:

> ***"GAZETTE NOTICE NO. 14346, THE CONSTITUTION OF KENYA APPOINTMENT OF JUDGES OF THE ENVIRONMENT AND LAND COURT OF KENYA***
>
> ***"IN EXERCISE of the powers conferred by Article 166 (1) (b) as read with Article 162 (2) (b) and (3) of the Constitution of Kenya, I, Mwai Kibaki, President and Commander-in-Chief of the Kenya Defence Forces, acting in accordance with the advice of the Judicial Service Commission, appoint—***
>
> ***...***
>
> ***Oscar Amugo Angote and...as Judges of the Environment and Land Court of the Republic of Kenya, with effect from 1st October, 2012"*** **(Emphasis supplied)**

The Gazette Notice for the appointment of *Meoli, J.* also specifically stated that she was appointed a Judge of the High Court.

[66] The Court of Appeal analysed the foregoing *Gazette Notice* alongside the one for the appointment of *Meoli, J.* and held as follows [p. 30]:

> ***"We have seen the Gazette Notice[s] by which the appointment of the two Judges in this matter was made by the President in accordance with the advice of the Judicial Service Commission. Such Gazette Notice[s] in***

our view play two roles; first, [they are] supposed to give notice to the public that a certain individual has been appointed as a Judge to that specific Court…. The second purpose of the Gazette Notice[s] is to play an evidentiary role" [Emphasis supplied].

[67] In our view, it is clearly manifest from the Gazette Notices and from the above decision of the Court of Appeal that the President, in exercise of his duty as outlined in Article 166(1)(b), and in appointing Judges as recommended by the Judicial Service Commission, appoints Judges of the High Court, the ELC and ELRC separately, and not on the basis of a general scheme covering Judges of the superior Courts.

[68] It is only after the appointments have taken place, that the Chief Justice exercises his general administrative powers over the Judiciary — such power being limited by Article 166(1)(b) to tasks such as the empanelling of Judges within the Courts to which they belong. Consequently, the appointing mandate and the empanelling mandate are to be distinguished.

(b) Judges' Oaths of Office: What is the Materiality of their Terms?

[69] The nature of oaths taken by public officers has been the subject of intens academic discourse. For instance James Endell Tyler in his article, *'Origin, Nature and History of Oaths', 12 Law Mag. Quart. Rev. (1934) (at page 227)* thus comments, as regards different types of legal oaths taken in the United Kingdom:

"The legal oaths administered in this country are of two kinds. 1. Judicial oaths, or those administered in Courts of justice, or for purposes connected with litigation. These oaths are taken in attestation of the truth of some statement made by the witness; and a party who swears falsely is liable to a prosecution for perjury. 2. Promissory oaths, such as the king's coronation oath, the oaths taken by members of both houses of parliament, by members of the universities of Oxford and Cambridge, and of the inns of Court, and all the oaths of office, including those of jurors: these are taken in attestation, not of the truth of a statement, but of the sincerity of a promise; and no indictment of perjury lies for the breach of them."

[70] Further, in his article: '*Oaths and Affirmations of Public Office*' 25 Monash U.L. Rev. (1999), at page 132), Enid Campbell, opined that as regards a promissory oath, ***"what is promised by the taker of a promissory oath or affirmation often relates to the duties of a particular public office, for example that of a Judge of a particular Court. The person taking such an oath or affirmation may also be required to take an oath or affirmation of allegiance."*** Locally, such a position is reaffirmed in relation to the applicable oaths of office, taken by Judges after their appointments. This issue was raised in the submissions of counsel for the respondents in urging the point that Judges are bound by the oaths of allegiance which they swore, at the time of appointment.

[71] Counsel for the 1st respondent in particular submitted that a Judge's oath of office pertains to a specific Court, and that there is no general oath for Judges. In this regard *Angote, J.* took his oath as a Judge of the Environment and Land Court, and not that of the High Court. Learned counsel for the appellant on his part saw that issue as inconsequential contending that subscribing to an oath of office is merely an administrative issue that cannot be "*used to subvert the Constitution*."

[72] With respect, counsel for the appellant's contention is not legally tenable. We concur with the Court of Appeal's perception that the oath of allegiance, taken by a Judge upon appointment, does indeed reflect his or her constitutional mandate. As the Court of Appeal had observed [pg. 32]:

> ***"[O]nce a Judge is appointed, he takes the oath of office to the specific Court he has been appointed to (sic). He is also given an appointment letter specifying that he has been appointed as a Judge of the Supreme Court, the Court of Appeal, the High Court, ELRC or ELC. Having been so appointed, it requires no gainsaying that a Judge can only exercise the jurisdiction conferred to the Court [to which] he is so appointed. "***

[73] The above position also has manifest merits, especially in view of the terms of **Article 74** of the Constitution, which requires that all State Officers shall take an oath of office, hence its provision that:

> ***"Before assuming a State office, acting in a State office, or performing any functions of a State office, <u>a person shall take and subscribe the oath or affirmation of</u>***

office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament." [Emphasis supplied]

[74] As we know, **Article 260** of the Constitution defines State Officers as those who hold State offices; and Judges and Magistrates are classified as State officers. The Third Schedule to the Constitution then sets out the format of the oaths that the Chief Justice, Judges of the Supreme Court, Court of Appeal and High Court shall take, as follows:

"OATHS FOR THE CHIEF JUSTICE /PRESIDENT OF THE SUPREME COURT, JUDGES OF THE SUPREME COURT, JUDGES OF THE COURT OF APPEAL AND JUDGES OF THE HIGH COURT.

I, ..., (The Chief Justice/President of the Supreme Court, a judge of the Supreme Court, a judge of the Court of Appeal, a judge of the High Court) do (swear in the name of the Almighty God)/(solemnly affirm) to diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and

promoting fairness, independence, competence and integrity within it. (So help me God.)"

It is clear from this oath that immediately after stating his name, the Judge being sworn specifies the Court to which he/she is appointed.

[75] Although the Judges of the ELC and the ELRC are not expressly listed in the title or body of the above oath-format, or in other oaths listed under the Third Schedule, they are not precluded from taking an oath because Section 13 of the Sixth Schedule to the Constitution deals with oaths of allegiance in more general terms, as follows:

"On the effective date, the President and any State officer or other person who had, before the effective date, taken and subscribed an oath or affirmation of office under the former Constitution, or who is required to take and subscribe an oath or affirmation of office under this Constitution, shall take and subscribe the appropriate oath or affirmation under this Constitution."

[76] No less relevant, in such a broader context of oaths of office, is the Promissory Oaths Act (Chapter 100, Laws of Kenya), which applies to other persons required to take an oath of allegiance. Section 2 of the Act reads as follows:

"Subject to this Act, every person who is appointed to, or to act in, or assumes the functions of, any of the offices designated in the first column of the First Schedule shall, before entering upon the functions of

that office, take, before the person designated in relation thereto in the second column of that Schedule, the oaths specified in relation thereto in the third column thereof:

This provision refers to the taking of an oath in relation to an office and specifies in the Schedule the type of oath required for each office. For instance the Chief Justice and any other Judge should take the Oath of Allegiance and the Judicial Oath.

[77] The First Schedule to the Promissory Oaths Act also provides an exhaustive list of other persons who are required to take oaths of allegiance, some of whom are not listed in the Third Schedule to the 2010 Constitution. The list provides for persons including Judges of Appeal, and High Court or puisne Judges who must take the oath of allegiance or the judicial oath. The list also includes Magistrates, Commissioners of Assize, Registrars and Deputy Registrars. Again, although the specialized Court Judges are not listed in this Act (obviously because it was enacted in 1958, long before these Courts were established), they are required to take the Oath of office, their allegiance being to the ELC or ELRC.

[78] The effect of the above local and comparative analysis is that a particular Judge undertakes to perform stewardship of the particular office in respect of which he or she takes the oath, and not of a different office. The formal action-chain taken by relevant constitutional agencies, from advertisement, to appointment, and to oath-taking, is all linked, in each case, to a specific Court. The Judges do not take a general oath as superior Court Judges — but as either High Court Judges, specialized Court Judges, Court of Appeal Judges, or Supreme Court Judges. If indeed the Constitution intended that Judges

should swear oaths of allegiance to all superior Courts in general, then it would have expressly stated so; and if a common service-arrangement between the High Court and the specialized Courts existed, then it would be possible, by dint of sheer administrative directions, to designate Judges in the latter category, from time to time, to serve, say in the Family, Criminal, Commercial, or Civil Division, of the High Court.

[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters "*reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2)*".

[80] In this case, it therefore also follows that *Angote, J.,* appointed as a Judge of the Environment and Land Court, and not of the High Court, had no jurisdiction to determine criminal appeals. Consequently, we concur with the Court of Appeal that Gazette Notice No. 13601 of 4th October, 2013, by which the former Chief Justice empanelled him to sit and determine the criminal appeals in question, was unlawful and unconstitutional.

(c) Fair Trial and Fundamental Rights (Legal Representation)

[81] The issue of fair trial and fundamental rights also touches on the interpretation of the Constitution, and related legislation. It also has a bearing on the rights of accused persons to have their appeals determined according to law. Article 20(3) (b) of the Constitution thus requires Courts *"to adopt the interpretation that most favours the enforcement of a right or fundamental freedom*". So even if the learned former Chief Justice had intended for the accused persons a timeous process of trial, and we find that he did that in good faith, due regard ought to have been paid to the right of the accused person to a fair trial which in this case required that the respondents' criminal appeals be determined by the Judges of the High Court, as stipulated in the Constitution and the applicable laws.

[82] As we have found, the High Court was improperly constituted and had no jurisdiction to hear and determine the respondents criminal appeal. That finding of lack of jurisdiction would ordinarily dispose of not only this appeal, but also the cross-appeals. This is because the dismissal of an appeal on the issue of lack of jurisdiction should ordinarily lay bare the very foundation of the cross-appeal thus rendering it otiose. It is, however, not always the case that a dismissal of an appeal on lack of jurisdiction *ipso facto* uproots the foundation of the cross-appeal. In some instances, a cross-appeal is an appeal in its own right and in this case the 1st and 3rd respondents' cross-appeals on the issue of the right to legal representation are, for all intents and purposes, appeals in their own right. We therefore agree with the 3rd respondent's position that a disposal of the main issue—that of lack of jurisdiction of an ELC Judge sitting on a bench determining a criminal appeal—does not by itself, dispose of the cross-appeals. Whatever orders we shall make in the final

determination of this appeal, the issue of the respondents' right to legal representation under Article 50(2)(h) stands on its own. We are therefore obliged to separately determine the 1st and 3rd respondents' cross-appeals.

[83] In that regard, the right to legal representation at State expense, where the interests of justice demand, did not commence with the promulgation of the Constitution of 2010. This is a global right that has been in place for sometime now. The **International Covenant on Civil and Political Rights** (ICCP) adopted on 16th December 1966, for instance, provides in **Article 14(3)(d)** that legal assistance should be assigned to a party in any case where the interests of justice so require, and without payment in the case of a party who lacks the means to pay for it. Needless to add that Kenya is a party to this Convention having acceded to it on 1 May 1972.

[84] Before the promulgation of the Constitution, 2010, Kenya recognized that in the interest of justice, persons charged with the offence of murder required legal representation and provided counsel to such people through the pauper briefs scheme and by Gazette Notice of 2016, the retired Chief Justice sent out directions on pauper briefs under the current Constitution. In August 2010, Kenya enshrined in **50(2)(h)** of its Constitution the right to legal representation at State expense, in both civil and criminal cases, to deserving Kenyans. In respect of criminal cases, **Article 50(2)(h)** thus declares that "*Every accused person has the right to a fair trial, which includes the right … to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly….*"

[85] In this appeal, as we have pointed out, counsel for the appellant submitted that the right to legal representation under **Article 50(2)(h)** is to be progressively realized and is not automatically available to all persons charged with offences which carry the death penalty upon conviction as was the holding of the Court of Appeal in ***David Macharia Njoroge v. Republic,*** (supra). Counsel said that the said right is available only after a Court has determined that "substantial injustice" would otherwise occur. Counsel for the 1st and 3rd respondents contested that position. Mr. Ole Kina for the 3rd respondent in particular submitted that the right to a fair trial, which includes legal representation at State expense as provided in Article 50(2) (h), is illimitable and faulted the Court of Appeal for holding that it is to be progressively realized. In his view, that right crystalized and vested upon the promulgation of the Constitution on 27th August, 2010 notwithstanding the absence of rules, or of formal structures to be followed in according the right to deserving litigants. Such failure, he said, does not divest the State of its obligations under the Constitution.

[86] The issue for our determination at this point therefore is whether or not legal representation at State expense as provided in **Article 50(2)(h)** vested upon the promulgation of the Constitution on 27th August, 2010 the absence of rules, or of formal structures to operationalize it notwithstanding as Mr. Ole Kina contended or it is to be progressively realized as counsel for the appellant contended.

[87] Article 50(2)(h) of the Constitution provides that *"[e]very accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right*

promptly." It does not define what "substantial injustice" means. However, in ***David Macharia Njoroge v. Republic,*** **(supra),** the Court of Appeal held that "*substantial injustice*" results to "*persons accused of capital offences*" with "*loss of life*" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are *"if substantial injustice would otherwise result…."* While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in ***Thomas Alugha Ndegwa v. Republic;*** **C.A No. 2 of 2004,** when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

[88] In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the Constitution is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "*if substantial injustice would otherwise result".*

[89] It is noteworthy in the above context that the Legal Aid Act, 2016 which came into force on 10th May, 2016 in its preamble states that its focus is to "give effect to Articles 19(2), 48, 50(2) (g) and (h) of the Constitution to facilitate access to justice and social justice."

[90] While we have taken note of the extensive and useful comments made by the Court of Appeal in ***Thomas Alugha Ndegwa v. Republic*** **(supra)** in the operationalization of this Statute, Section 3 of the Act specifically sets out the objectives of the legislation in the following terms:

"The object of this Act is to establish a legal and institutional framework to promote access to justice by—

> ***(a) providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya in accordance with the Constitution;***
>
> ***(b) .....***

Further, Section 43 of the Act, 2016 states that:

> ***(1) A Court before which an unrepresented accused person is presented shall—***
>
> > ***(a) promptly inform the accused of his or her right to legal representation;***
> >
> > ***(b) If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her;***

.....

(6) Despite the provisions of this Section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.

The Act has not defined the term 'substantial injustice' and consequently for one to know who would be entitled to legal representation at the expense of the State, one would have to draw inferences from the various provisions of the Act that relate to grant of legal aid. For instance, one would need to consider the provisions of Section 36 which stipulates the persons entitled to legal aid. Notably, that Section provides that legal aid shall not be provided unless the National Legal Aid Service is satisfied about factors set out in Section 36 (4) which are that:

"(a) the cost of the proceedings is justifiable in the light of the expected benefits;

(b) resources are available to meet the cost of the legal aid services sought;

(c) it is appropriate to offer the services having regard to the present and future demands;

(d) the nature, seriousness and importance of the proceedings to the individual justify such expense;

(e) the claim in respect of which legal aid is sought has a probability of success;

(f) the conduct of the person warrants such

assistance;

(g) the proceedings relate to a matter that is of public interest;

(h) the proceedings are likely to occasion the loss of any right or the person may suffer damages;

(i) the proceedings may involve expert cross-examination of witnesses or other complexity;

(j) it is in the interest of a third party that the person be represented;

(k) denial of legal aid would result in substantial injustice to the applicant; or

(l) there exists any other reasonable ground to justify the grant of legal aid."

[91] Comparative jurisprudence in other jurisdictions may also provide guidance on what ought to be considered in defining the concept of substantial injustice, and in the African Commission case of A***vocats Sans Frontières (on behalf of Bwampamye) v. Burundi***, (2000) AHRLR 48 (ACHPR 2000), the Commission stated as follows, with respect to legal representation as a component of fair trial:

> ***"The right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the***

obligation on the part of Courts and tribunals to conform to international standards in order to guarantee a fair trial to all."

[92] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 similarly provides guidelines applicable with respect to legal aid and legal assistance. They provide as follows:

F. LEGAL AID AND LEGAL ASSISTANCE

(a) The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.

(b) The interests of justice should be determined by considering:

1. in criminal matters:

(i) the seriousness of the offence;

(ii) the severity of the sentence"

It is thus clear from the above guideline that free legal assistance may be accorded to a person who *"does not have sufficient means to pay for it",* and that representation should also be given "where interests of justice so require".

[93] In recognizing the discretion exercisable by any Court in making the determination as to whether the accused person is entitled to legal aid, the Supreme Court of India held as follows:

"The Court may Judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the Court."

[94] In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

(i) the seriousness of the offence;
(ii) the severity of the sentence;
(iii) the ability of the accused person to pay for his own legal representation;
(iv) whether the accused is a minor;
(v) the literacy of the accused;
(vi) the complexity of the charge against the accused;

[95] In concluding on the above issue, it is our finding that in addition to the specific guarantee of legal representation afforded to an accused person by Article 50(2) (h) of the Constitution, there is now in operation an elaborate legal aid scheme that is in the process of implementation following the

enactment of the Legal Aid Act no. 6 of 2016 and we shall make appropriate Orders at the end of this Judgment as regards the present appellants' right to such legal representation.

G. DETERMINATION

[96] We are informed that over 400 criminal appeals were disposed of by mixed benches during the Judicial Service Week between 14th and 18th October, 2013. Some civil appeals have also been determined by such mixed benches. In the circumstances, it is incumbent upon us to consider the likely effect our final orders in this appeal will have on the decisions of those benches and give appropriate directions.

[97] In that regard, our finding that the appellate bench at the High-Court-level was constituted in a mode contrary to the terms of the Constitution, leads us to the ultimate question: What are the consequential Orders to be made, and how do these affect the parties? Are the appeals at the High Court level to be re-heard? Will this Court's decision have retrospective or prospective effect on such decisions? On such questions, what are the governing principles of law?

[98] As we stated earlier, the respondents urged us to order that the High Court level appeals be repeated, before two duly-appointed Judges of that Court on the basis that Article 50(2) (d) of the Constitution safeguards accused persons' right to a public trial before a Court-established under the Constitution. They founded their case on Article 2(4) of the Constitution which provides that:

> ***"Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."***

[99] Is the foregoing provision to be applied literally, or interpretively? This Court's challenge is that of construing and applying a new Constitution and, in the process, establishing new and functional precedents, such as will give effect to the broad principles and values of the charter. By no means is it the case that the Constitution's provisions, literally construed, will invariably allow a holistic view of the document. This Court has to take the most realistic view, even as it draws from the lessons of comparative experience and in particular reflect on the effect its decision will have in the administration of justice in our country. We shall therefore start this discourse with the issue of whether this Court's decision should have retrospective or prospective application.

[100] In that regard, it is generally accepted that the prospectivity or retrospectivity of a statutory provision is to be determined on a case-to-case basis. That is why this Court, in the case of ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank & Two Others*** (Supra) stated:

> ***"....in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of restrospectivity, the Court ought not to impart it***

into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of his rights legitimately [accrued] before the commencement of the Constitution."

[101] Further, in ***Mary Wambui Munene v. Peter Gichuki King'ara & Two Others,*** Sup. Ct. Pet. No. 7 of 2014; [2014] eKLR, this Court added [para. 84]:

"However, in appropriate cases, this Court may exercise its jurisdiction to give its constitutional interpretations retrospective or prospective effect."

[102] In addition to the above, the prospectivity or retrospectivity of judicial decisions is also a subject already considered by Courts and the common thread running through local and comparative jurisprudence is that, generally, judicial pronouncements are to have prospective application. For instance, in ***A. v. The Governor of Arbour Hill Prison*** [2006] IESC 45; [2006] 4 IR88, the applicant was convicted of an offence under a statutory provision that was, in a subsequent case held to be unconstitutional. On the basis that unconstitutionality in that regard must be viewed backwards in time, the applicant moved the Court, praying for release from custody. *Geoghegan, J.* in addressing that issue remarked as follows:

"I am of the view that concluded proceedings whether they be criminal or civil, based on an enactment subsequently found to be unconstitutional, cannot normally be reopened... I

am prepared to accept that there may possibly be exceptions. But in general it cannot be done... I am also firmly of the opinion that if the law were otherwise, there would be a grave danger that Judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences, something which...should not happen."

In the same case, *Murray, CJ,* expressed the same concern thus:

"In my view when an Act is declared unconstitutional a distinction must be made between the making of such a declaration and its retrospective effects on cases which have already been determined by the Courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interests of the common good in an ordered society."

[103] On the material facts of a case before it, this Court held the same view and declined retroactive application in ***Mary Wambui Munene v. Peter Gichuki King'ara & Two Others, (Supra)*** thus remarking [para. 90]:

"We are aware that several constitutional processes have been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. It is our position that, in either of these

scenarios, and as a matter of finality of Court processes, parties cannot reopen concluded causes of action."

[104] Disruption in the application of criminal justice, finality in criminal proceedings, certainty of the law and public policy in respect of rights that have vested and have been acted upon have been given as the reasons for prospective rather that retrospective application of judicial pronouncements. In the United States case of ***Johnson v. New Jersey*** 384 U. S. 719 (1966), the Supreme Court was called upon to determine whether two earlier decisions [***Escobedo v. Illinois***, 378 U.S. 478 (1964); and ***Miranda v. Arizona*** 384 U.S. 436 (1966)] should be applied retrospectively. The question raised before the Court was constitutional safeguards against self-incrimination. The Court held that the declaration in the two cases could not be applied retrospectively, as to do otherwise was likely to occasion a severe disruption in the administration of criminal law—in particular as it would require the re-trial or release of many prisoners already found guilty, on the basis of evidence adduced in accordance with earlier-recognised constitutional standards.

[105] In another case, ***Chicot County Drainage Dist. v. Baxter State Bank***, 308 U.S. 371 (1940), the same Court was of the view that:

"The past cannot always be erased by a new judicial declaration. The effect of the subsequent Ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations

deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination…[;] it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

[106] The same principle speaks out clearly from yet another U.S. Supreme Court decision, ***Linkletter v. Walker,*** 381 U.S. 618 (1965). The petitioner in that case was convicted of the offence of burglary. While already serving in prison, he sought release on the authority of a new Supreme Court decision, ***Mapp v. Ohio***, 367 U. S. 643 (1961), which held that evidence illegally secured was inadmissible in a criminal trial. However, in his application for a writ of *habeas corpus,* the Supreme Court held thus:

"The effect of a subsequent Ruling of invalidity on prior final Judgments when collaterally attacked is not automatic retroactive invalidity, but depends upon a consideration of particular relations and conduct, or rights claimed to have become vested, of status, of prior determinations deemed to have finality, and of public policy in the light of the nature of the statute and its previous application…. The Constitution neither prohibits nor requires retroactive effect, and in each case, the Court determines whether retroactive or prospective application is appropriate" [emphasis supplied].

[107] The Court in the ***Linkletter*** case reiterated a fundamental point of general relevance in judicial practice which we have stated above: that it devolves to the Judges, by dint of their professional training and work-experience, as well as by the adjudicative mandate reposed in them singularly by the people, to determine, on a case-by-case basis, the propriety of a prospective or retrospective application of a constitutional principle or edict.

[108] Thus, while declining retrospective application in the ***Linkletter*** case, the Court observed:

> ***"[T]he misconduct of the police prior to Mapp has already occurred, and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of Mapp.... [T]he purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment [to the U. S. Constitution]. That purpose will not at this late date be served by the wholesale release of the guilty victims.***
>
> ***"Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated"*** **[emphasis supplied].**

[109] No less relevant to the instant matter is the decision of the Supreme Court of Canada in ***R. v. Wigman*** [1987]1 S.C.R. 246, in which it was held that a decision declaring the invalidity of a statute, on grounds of unconstitutionality, *could not be relied upon in criminal cases already decided,* and no longer pending before the Courts. The Court thus held:

> ***"The appropriate test is whether or not the accused is still in the judicial system. As expressed in the Crown's factum, this test affords a means of striking a balance between the 'wholly impractical dream of providing perfect justice to all those convicted under the overruled authority and the practical necessity of having some finality in the criminal process?*** **Finality in criminal proceedings is of the utmost importance…"** [emphasis supplied].

[110] None of these foreign cases, attractive their reasoning is related to the issue of the jurisdiction of the Courts that determined the cases under review. As we know, jurisdiction goes to the root of any litigation. This position was forcefully reiterated in the *locus classicus* decision of *Nyarangi, J.A* in ***The Owners of Motor vessel Lilian "S" v. Caltex Oil Kenya Ltd.*** **[1989] KLR 1** that "jurisdiction is everything." Without it a Court cannot make a move. Lack of jurisdiction thus renders a Court's decision void as opposed to it being merely voidable. When an act is void, it is a nullity *ab initio*. It cannot found any legal proceedings and Lord Denning's decision in the Privy Council case of ***Benjamin Leonard Macfoy United Africa Company Limited*** **(UK)[1962] AC 152** succinctly makes this point. He stated thus:

"Court has discretion in matters that are voidable not to proceedings that are a nullity for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the Court …"

And;

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. … And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

[111] In the above context, in the matter before us, as we have found, the bench constituted by *Meoli J.* and *Angote J.* had no jurisdiction to determine the appeals. Their decisions were consequently a nullity *ab initio*. With that finding, we once again ask: does such constitutional impropriety annul the hearings that took place? Do the respondents whose guilt was upheld at those hearings, and who for several years have been serving sentence, have to be subjected to fresh hearings at the High Court?

[112] In answering the above questions, it should be noted that in this case, the question to be determined is not whether *a decision of this Court declaring an action to be unconstitutional should have retrospective effect or not. Neither is it a question as to whether a decision of this Court should have retrospective effect on earlier decisions of this Court or other superior Courts unrelated to this appeal.* In the comparative

cases we have referred to above, the Courts therein were called upon to determine either of those two questions, while the case before us on the other hand, *is a live appeal that has come all the way from the Magistrate's Court*. We have already held, in concurrence with the Court of Appeal, that the "High Court" bench, which affirmed the convictions of the respondents herein, was unconstitutionally empanelled by the retired Chief Justice. The convictions of the respondents could therefore neither be affirmed nor overturned by such a bench. All that was done by the said bench is a nullity and no question of retrospectivity should therefore arise.

[114] It therefore follows that, in the light of the terms of Article 2(4) of the Constitution, despite the drawback our decision will have on the backlog of cases in our Courts, we have no choice but to accede to the respondents' plea that their appeals at the High Court level be re-heard. Our decision must of necessity have a similar effect on all the appeals that were determined by similarly empaneled High Court Benches.

H. ORDERS

[115] Consequent upon our findings above, the final Orders in this petition are the following:

(a) The appeal herein, against the main decision of the Court of Appeal, fails: and it is hereby reaffirmed that Angote, J, a Judge of the Environment and Land Court, could not properly hear and determine High Court at Malindi Criminal Appeals Nos. 49 of 2012, 54 of 2009 and 136 of 2011.

(b) The Court of Appeal Order that the appeals before the High Court be heard afresh by Judges of that Court, excluding Meoli, J. is hereby upheld.

(c) By virtue of Orders (a) and (b) herein, the issue of whether the Appellants ought to have had the right to legal representation at State expense at the Magistrate's and the High Court, is a matter to be determined at the High Court at the hearing of the appeals afresh within the criteria laid out by the Legal Aid Act, No. 6 of 2016 and this Judgment.

(c) The parties shall bear their own respective costs.

DATED and **DELIVERED** at **NAIROBI** this **26TH Day** of **May, 2017.**

.....	.....
D. K. MARAGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**P. M. MWILU** **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT OF** **THE SUPREME COURT**
.....	.....
M. K. IBRAHIM **JUSTICE OF THE SUPREME COURT**	**J. B. OJWANG** **JUSTICE OF THE SUPREME COURT**
.....	.....
S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**N. S. NDUNGU** **JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA