Bichage v Tong'i & 2 others (Petition 17 of 2014)
[2016] KESC 11 (KLR) (26 February 2016) (Ruling)

Chris Munga N. Bichage v Richard Nyagaka Tong'i & 2 others [2016] eKLR

Neutral citation: [2016] KESC 11 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 17 OF 2014

WM MUTUNGA, CJ & P, KH RAWAL, DCJ & VP,
MK IBRAHIM, JB OJWANG & SC WANJALA, SCJJ

FEBRUARY 26, 2016

BETWEEN

CHRIS MUNGA N BICHAGE ..... APPELLANT

AND

RICHARD NYAGAKA TONG'I ..... 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2ND RESPONDENT

ROBERT K. NGENY ..... 3RD RESPONDENT

(Being an Appeal from the Judgment and Order of the Court of Appeal of Kenya at Kisumu (Azangalala, Mohammed & Kantai JJA)

RULING

A. Introduction

1. On 23rd January 2015, the 1st respondent filed written submissions on the question whether the Supreme Court of Kenya, sitting as a five Judge-Bench, is properly constituted to determine matters entailing constitutional issues, such as a request to the Court to depart from a Judgment that has been rendered by a seven-Judge Bench.

2. In a nutshell, the 1st respondent requests a Bench of seven Judges, to determine the question whether this Court's holding in Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Sup. Ct. Petition No. 10 of 2013; [2014] eKLR should be departed from.

B. Background

3. The appellant, like the 1st respondent, had contested the seat of Member of the National Assembly for Nyaribari Chache Constituency, during the General Elections held on 4th March 2013, while the 2nd respondent had the conduct of the election, which was presided over by the 3rd respondent as the Returning Officer.

4. On 5th March 2013, the 3rd respondent declared the applicant as the winning contestant, with the 1st respondent taking second place in the vote-tally. Dissatisfied with the election result, the 1st respondent filed an election petition, *Richard Nyagaka Tong'i v. IEBC and 2 Others, Election Petition No. 5 of 2013*.

5. On 7th October 2013, Muriithi J. allowed the petition, and declared that the applicant had not been validly elected. Aggrieved by the decision of the trial Court, the applicant lodged an appeal at the Court of Appeal in Kisumu, Chris Munga N. Bichage v. Richard Nyagaka Tong'i and 2 Others, Civil Appeal No. 48 of 2013.

6. On 11th December 2013, the Court of Appeal dismissed the appeal, reserving the reasons (to be delivered on 21st February 2014). The 2nd respondent conducted a by-election on 19th December 2013, in which the 1st respondent was declared to be the elected member of the National Assembly for Nyaribari Chache.

7. On 4th April 2014, the Court of Appeal delivered its reasons for the decision, and thereupon, the applicant, being aggrieved by the Judgment, filed a notice of appeal on 16th April 2014, followed by a petition of appeal on 14th May, 2014.

8. On 6th June 2014, the 1st respondent applied to have the appeal struck out; but this Court dismissed the application on 19th February 2015. It was held that the question raised, on whether the appeal had been rendered nugatory, was one that ought to be determined on the basis of a hearing, rather than at the interlocutory stage.

9. Before a hearing date was set, the applicant filed an application dated 18th May 2015, seeking leave to file a document out of time. In a Ruling dated 16th October 2015, Ojwang and Njoki SCJJ disallowed the application, holding that this Court, while exercising its jurisdiction under Article 163(4) (a) of *the Constitution* and sitting as a second appellate Court, will not grant leave to file fresh evidence by supplementary affidavit.

10. On 23rd January 2016, the 1st respondent filed written submissions in support of the proposition that a seven-Judge Bench should hear the main petition. The matter was heard on 9th February 2016.

C. Submissions of the Parties

i. Appellant

11. Learned counsel for the appellant, Mr. Oduol relied on his written submissions dated 2nd February 2016. He urged that a five-Judge Bench could competently hear the matter. He submitted that there is no provision in *the Constitution* of Kenya, 2010, or the *Supreme Court Act*, 2011 (*Act No. 7 of 2011)*, or the Supreme Court Rules, 2012 which requires the Chief Justice to empanel a Bench of seven Judges to hear and determine an application, where the Court is being asked to depart from its previous decision – and so, there would be no legal requirement for a seven-Judge Bench.

12. On the question as to the constitutional threshold for a "full Bench" in the Supreme Court, it was counsel's contention that the 1st respondent's request for a seven-Judge Bench to determine the matter,

was improper – as he had not questioned the merits of an earlier decision of this Court, Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others, Sup. Ct. Petition No. 4 of 2012; [2013] eKLR. He recalled the holding in Jasbir Singh Rai, namely that: the constitutional threshold for a competent Bench of this Court is five Judges; and the recusal of a Judge carries the danger of occasioning a quorum deficit, making it impossible for the Court to discharge its prescribed constitutional functions – a situation which would run into conflict with public policy and public interest. Counsel submitted that, there was no reason to depart from the Jasbir Singh Rai principle.

13. On this question of the requisite Bench-quorum for the review of a previous decision of the Supreme Court, counsel drew examples from comparative jurisprudence, in countries such as Ghana, Nigeria, the United Kingdom, and the United States of America, where the law specifies the number of Judges to constitute a quorum, as a basis for determining specific issues. The comparative experience shows that, save for *the Constitution* of Ghana of 1992, there is no specific provision for the quorum required to review a previous decision of a Supreme Court. Article 128(2) of the Ghana Constitution thus provides:

> " The Supreme Court shall be duly constituted for its work by not less than five Supreme Court Justices except as otherwise provided in Article 133 of this Constitution";
>
> and Article 133 (2) then provides:
>
> > " The Supreme Court, when reviewing its decisions under this article, shall be constituted by not less than seven Justices of the Supreme Court."

14. Mr. Oduol, against the foregoing background, submitted that in many Commonwealth countries, the empanelling of a Bench greater than the constitutionally-prescribed number of Judges is a matter of discretion and practice for a given Court, rather than a matter of right. Counsel cited the Court of Appeal holding in Joseph Kabui v. Reginam (1954) 21 EACA 260, where a similar approach to the practice in the Commonwealth, appears to be accepted. In that case the Court of Appeal pronounced itself as follows:

> " ...it is in our view undesirable that a Court of three Judges should depart from a previous decision of three Judges, and that, where counsel decided to ask this Court to depart from one of its own previous decisions, application should ordinarily be made before a Bench of five or more Judges to be assembled" [emphasis supplied].

15. Mr. Oduol submitted that if the 1st respondent's prayers are granted, it would be contrary to another vital principle that guides this Court: timeliness in determining election petition cases – which has a bearing on the appellant's right of access to justice. He contended, besides, that the 1st respondent's application has been brought mala fide, in order to delay the conclusion of this matter.

16. In conclusion, learned counsel submitted that the decision in HassanJoho, which the 1st respondent seeks to review, has already been the subject of consideration before a seven-Judge Bench in a plurality of cases, being declared as good law, and upheld, as follows: Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others, Sup. Ct. Petition 7 of 2014; [2014] eKLR; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Sup. Ct. Petition 2B of 2014; [2014] eKLR; Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others, Sup Ct. Petition Nos. 18 and 19 of 2014; [2014] eKLR; and Anami Silverse Lisamula v. Independent Electoral & Boundaries Commission, David Lenarum, Returning Officer Shinyalu Constituency & Justus Gesito Mugali M'mbaya, Sup. Ct. Petition No. 9 of 2014; [2014] eKLR.

(ii) 1st Respondent

(17) Learned counsel for the 1st respondent, Mr. Omogeni relied on his submissions dated 20th January 2016. He remarked that the main issue in this matter is whether a five-Judge Bench can reconsider the decision of a seven-Judge Bench.

18. Counsel submitted that, by the terms of Article 163(7) of *the Constitution*, all other Courts are bound by decisions of the Supreme Court, but the Supreme Court is not itself bound by its own decisions; and that, consequently, an application asking this Court to depart from its own decisions, is by no means frivolous.

19. Counsel submitted that this Court can, indeed, depart from its earlier decisions, depending on thecircumstances of each case. He cited Kidero, in which this Court drew a distinction between "vertical precedent" and "horizontal precedent", as follows:

> " Article 163(7) of *the Constitution* constitutionalizes the dual doctrine of stare decisis: vertical precedent, which is mandatory, and horizontal precedent (at the Supreme Court) which is distinguishable."

20. As regards the relationship as between the standing of the seven-Judge Bench and the five-Judge Bench, it was the 1st respondent's submission that the practice within the Commonwealth has been that, whereas a Court can depart from a decision of a Court of co-ordinate jurisdiction, a Bench doing so should not be smaller than the Bench that set the earlier decision. To support this submission, he referred to cases from the Supreme Court of India, notably Central Board of Dawoodi Bohra Community v State of Maharashtra, Writ Petition (Civil) 740 of 1986, where it was held that firstly, the law laid down by the Court in a decision delivered by a Bench of larger strength, is binding on any subsequent Bench of lesser, or equal strength; and secondly, a Bench of lesser quorum cannot doubt the correctness of the view of law taken by a Bench of a larger quorum (see also Bharat Petroleum Corpn. Ltd v. Mumbai Shramik Sangha, Appeal (Civil) 6213 of 1997).

21. Counsel also relied on the United States Supreme Court decision, Hertz v. Woodman 218 U.S. 205 (1910), in which the Court thus held:

> " When this Court, in the exercise of its appellate powers, is called upon to decide whether that which has been done in the lower court shall be reserved or affirmed, it is obvious that that which has been done must stand unless reversed by the affirmative action of a majority."

22. The 1st respondent also relied on a scholarly article by Jonathan Nash, "The Majority that Wasn't: Stare Decisis, Majority Rule and the Mischief of Quorum Requirements" (University of Chicago Public Law and Legal Theory Working paper No. 227, 228), in which the following remark appears (p. 28):

> " The situation of a case decided by a 'minority majority' is especially problematic, however, because of the possibility that missing members of the court – or, in the case of court vacancies, the possibility that those who might join the court – might act in some way to change the outcome in the case, and perhaps also of the court itself."

23. On the basis of such a comparative perspective, it is the 1st respondent's contention that a Bench of five Judges cannot depart from the decision of a seven-Judge Bench. It was counsel's perception, moreover, that since in virtually all election petitions so far coming before this Court, parties have benefited from

a jurisprudence developed by a full Bench of seven, it is only fair that such a position should prevail in the case of the 1st respondent.

(iii) 2nd and 3rd Respondents

24. Learned counsel Mr Magare, for the 2nd and 3rd respondents, relied on his submissions dated 18th January, 2016 and urged that it would be practically impossible for this Court to realize a seven Judge-Bench any time soon. He contended that there is no requirement as to Bench-size, where the Court is being asked to depart from its previous decision. He argued that the Court will be duly constituted for that purpose, with a five-Judge Bench.

25. Addressing himself to pertinent issues in overturning a past decision, counsel cited the United States Supreme Court decision in Roe v. Wade, 410 US 113 (1973), in which the following factors were taken into account:

> " The Supreme Court used the occasion to lay out the factors to be considered, where it is called upon to overturn its past decisions:
>
> i. Whether the precedent set has become impracticable or intolerable;
>
> ii. Whether overturning the precedent would occasion hardship, or inequities to those who had already relied on the authority of the precedent;
>
> iii. Whether, since the setting of the precedent, related principles have evolved to such an extent that it is fair to conclude that the society's conditions and expectations have taken new dimensions;
>
> iv. Whether the facts have significantly changed, or are currently viewed so differently, that the design of the precedent has become irrelevant, or unjusticiable. "

26. Counsel also relied on the U.S. Supreme Court's decision in Planned Parenthood of South Eastern Pennsylvaniav. Robert P. Casey, 505 U.S. 833 (1992), which had considered Roe v. Wade. It laid down certain guidelines for overturning its own decisions, as follows:

i. where there are conflicting past decisions of the Court, it may opt to sustain and apply one of them;

ii. the Court may disregard a previous decision if it is shown that such decision was given per incuriam;

iii. a previous decision will not be disregarded merely because some, or all of the members of the Bench that decided it might now arrive at a different conclusion; and

iv. the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness.

27. Counsel urged that the Court, in reconsidering its past decision, ought to focus its attention on the merit of the ratio decidendi, rather than the number of Judges who arrived at the decision. He submitted that a party who seeks to overturn a previous decision of the Court ought to advance meritorious grounds to support such prayers.

28. Learned counsel, in his concluding remarks, submitted that there was no basis for constituting a seven-Judge Bench, as the decision of such a Bench would not be considered superior to that which emanates from a five-Judge Bench.

D. Issue for Determination

29. We have considered the parties' written and oral submissions, and have come to the conclusion that they raise one main issue for determination, namely:

> whether a quorum of more than five Judges is required to determine a case that seeks a departure from this Court's previous decision.

E. Analysis

a. Issues

30. It is clear to us that the 1st respondent is seeking to question this Court's earlier decision in Joho; and in counsel's view, a seven-Judge Bench ought to be empanelled to determine the matter. We bear in mind the terms of *the Constitution* in Article 163(2), which stipulates that the Supreme Court is properly constituted for purposes of its proceedings if it has a Bench of five Judges. We also take cognisance of this Court's pronouncement in Jasbir Singh Rai, as signalled by counsel for the appellant. In that case, we took the position that a five-Judge Bench was required for any appeal to the Supreme Court, in accordance with *the Constitution*; and the recusal of a Judge as a matter of course should not be a factor standing in the way of this principle.

31. It is common cause that the Joho decision which is now sought to be varied, emanated from a five-Judge Bench. Now, must the precedent set by that decision be contested only before a larger Bench-size than five? To address ourselves to this point, two sub-issues arise for determination, namely:

    a. what is the proper Bench-quorum to determine any appeal before this Court?

    b. what is the required Bench-quorum, where the Court is called upon to depart from a decision of a five-Judge Bench?

(b) Proper Quorum of the Supreme Court

32. *The Constitution* has its relevant provision in Article 163(2), in the following terms:

> " The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five Judges."

The foregoing terms are replicated in Section 23(1) of the *Supreme Court Act*, which thus states:

> " For the purposes of the hearing and determination of any proceedings, the Supreme Court shall comprise five Judges."

33. It is not the first time we have had to interpret Article 163(2). We have done so in Jasbir Singh Rai, where a party had asked Tunoi SCJ to recuse himself from proceedings, at a time when there were not enough Judges to hear an appeal, had the recusal been allowed. In disallowing the application, the Court pronounced itself as follows:

> "(15) By Article 163(2) of *the Constitution*, the Supreme Court membership comprises seven Judges; and this Court is properly composed for normal

hearings only when it has a quorum of five Judges. We take judicial notice that, for about a year now, the Court has had a vacancy of one member; and also that half of the current membership were previously in service in other superior Courts – and so having the possibility of having heard matters which could very well come up now before the Supreme Court. Recusal, in these circumstances, could create a quorum-deficit which renders it impossible for the Supreme Court to perform its prescribed constitutional functions.

"16 Such a possibility would, in our view, be contrary to public policy and would be highly detrimental to the public interest, especially given the fact that the novel democratic undertaking of the new Constitution is squarely anchored firstly, on the superior Courts, and secondly, on the Supreme Court as the ultimate device of safeguard."

34. What we meant, even without the incidental constraints that the Court faced in its numerical composition at the time, was that for all practical purposes, this Court is properly composed for the discharge of its constitutional mandate if it has a quorum of five Judges, in accordance with Article 163(2). Ibrahim SCJ in his concurring opinion, expounded on the scenario of a five-Judge Bench of the Supreme Court being sufficient to determine a matter, as follows:

> " The total number of the Supreme Court Judges that this country can have at any given time under *the Constitution* is seven. The minimum that must sit and determine a matter is five. This means that the only allowance given by *the Constitution*, of the Judges who may be away for whatever reason, including illness or worse still, death, is two. If one of the remaining five is required to disqualify him/herself, it may be argued that out of necessity the Judge would have to sit, to ensure that there will be no failure of justice due to the Bench being below the quorum set by *the Constitution*."

35. Such germane perceptions make it clear that a five-Judge Bench constitutes a practically and rationally valid platform for determining any matter coming up before this Court. While, however, such a position also fulfils the terms of *the Constitution*, it falls short of resolving a question now before us: what should be the legitimate, rational, and valid Bench-quorum, in a case in which a party is urging the Court to depart from its previous decision arrived at by a Bench comprising five Judges?

c. Quorum for departing from a Five-Judge-Bench Decision

36. This issue is in the nature of a novelty; it is addressed neither in *the Constitution*, the *Supreme Court Act*, nor the Supreme Court Rules. Do Judges then wring their hands in despair, and invoke the bounty of Providence as best recourse? No; they revert to the spirit of the common law, which empowers them to devise laws that are in consonance with the letter and spirit of *the Constitution*.

37. Here is a case in which a party calls for the invocation of Article 163(7) of *the Constitution*, and asks us to depart from the precedent set by this Court; but no guidelines – not in the rules of the Court – can be found signalling to the Chief Justice the size of the Bench that can rectify a perceived error in the law. The design of our common-law strategy is one that observes past judicial trends, and constructs upon any historical pillars already erected by Judges. We find a case that has come up before this Court, even though by no means identical. And we may build upon the beacons evolved in comparative jurisprudence.

38. In Jasbir Singh Rai, the applicant asked this Court to depart from its five-Judge Bench decision in Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others, Sup. Ct.

Application No. 2 of 2011; eKLR [2012]. The applicant also sought the recusal of a Judge. The Court disallowed the application for recusal, on ground that a quorum deficiency would have arisen, depriving the Court of an occasion to serve the public interest. In the Jasbir Singh Rai application, a five-Judge Bench heard the application and, even by the time of delivery of the Ruling, on 6th February 2013, the Deputy Chief Justice, a new member of the Court, had not yet been appointed. Thus, at the time of the Ruling, there would have been just six Judges available to determine the petition. The petition was later heard and determined on 20th August 2013, by a seven-Judge Bench, following the appointment of the Deputy Chief Justice. Had the Deputy Chief Justice not then been appointed, but the petition was still heard and determined, it would have been a perfectly logical interpretation that a seven-Judge Bench was not a conditio sine qua non.

39. Ibrahim SCJ, wrote a concurring opinion in the Jasbir Singh Rai application in which he made certain pertinent observations:

> " The *Supreme Court Act* has no specific provision requiring that on reviewing its decision a greater number of Judges should sit. This is contrary to the submissions made by Mr. Oraro, counsel for the respondents, that under the Supreme Court Rules the term 'full bench' has been defined to mean a bench of the seven Judges and on review the full bench is required to sit. Counsel should note that the Supreme Court Rules cited have since been deleted by the Supreme Court Rule, 2012 which did away with the definition of 'full bench' and only defined the term 'bench'. 'Bench' means Judge or any number of Judges as may be constituted by the Chief Justice in connection with any proceedings. In that case, the Court may in reviewing its decision sit as five Judges just as it sat in the previous matter whose decision is sought to be reviewed.
>
> > "As a result, it is possible for the Court to consist of five Judges in a review application. Ordinarily, the Honourable the Chief Justice would have power to constitute a bench of seven, in view of the powers conferred on him. In such circumstances if there is a vacancy, as ... is currently the case in the office of the Deputy Chief Justice, a bench of six could still sit. Section 4 of the *Supreme Court Act* provides that a vacancy in the Supreme Court as constituted under Article 163 (1) of *the Constitution* shall not affect the jurisdiction of the Court. However, there is a catch in that s. 25 (2) provides that if the bench is equally divided the decision sought to be reviewed is deemed affirmed.
> >
> > > "The upshot is that I would also hold that in the circumstances Justice Tunoi is not disqualified since the doctrine of necessity must operate in order for the Supreme Court to perform its constitutional functions."

F. Comparative Lessons

a. Preliminary Note

40. We derive valuable perspectives from the practices observed in other countries of the common law world, in relation to the issues in the case before us. We will advert to the position in several such countries, with which, historically, we have a shared juristic outlook.

b. Ghana

41. *The Constitution* of Ghana of 1992 specifies a Bench-quorum in applications for review of previous decisions of the Supreme Court. Articles 128 and 133 of that Constitution may, in this regard, be noted. Article 128 is in similar terms to Article 163 (2) of *the Constitution* of Kenya. It reads:

> " The Supreme Court shall be duly constituted for its work by not less than five Supreme Court Justices except as otherwise provided in article 133 of this Constitution. "

Article 133(2) then carries a qualification:

> " (2) The Supreme Court, when reviewing its decisions under this article, shall be constituted by not less than seven Justices of the Supreme Court."

42. The foregoing provision has been replicated in the Ghana's Courts Act of 1993 (Act No. 459), but not in the Supreme Court of Ghana Rules of 1996. At any rate, Ghana's Constitution clearly anticipates that a litigant may request the Court to review its own decisions; and it prescribes the requisite Bench-size, for the determination of the question.

c. The United Kingdom

43. The United Kingdom's Supreme Court consists of twelve justices. Typically, a panel of five constitutes the quorum of the Court. In some cases, a panel of seven or nine will be convened, where the parties are asking the Court to depart from a previous decision of the Court, or of its predecessor, the House of Lords; or where the Court on its own motion, would depart from its previous decision.

44. What emerges is a broadly volitional scenario, in which the Court develops its general practices. The course of practice shows the Bench to have exceeded five Judges in a certain category of cases: a case of high constitutional importance; a case of great public importance; a case where an inconsistency between decisions of the (erstwhile) House of Lords, the Judicial Committee of the Privy Council and/or the Supreme Court has to be reconciled; or a case raising an important point in relation to the transnationally-applicable European Convention on Human Rights. The U.K. Supreme Court President, Lord Neuberger, in a speech bearing the title, "Tweaking the Curial Veil: The Blackstone Lecture 2014", at Pembroke College, University of Oxford, 15 November 2014, thus observes (para 42):

> " I turn finally to *the constitution* of the panels which hear the appeals themselves. There are twelve Justices in the Supreme Court and most appeals are heard by five of us, although we not infrequently sit seven (on important cases or often where we are being asked to overrule a previous decision). Occasionally, we even sit nine for particularly contentious or important cases – for instance the recent Nicklinson case on assisted suicide. Whatever the size of a particular panel, its members are selected from the Justices. The selection is made initially by the Registrar, who compiles the list of panel constitutions for each term's cases and then submits the list to the President and Deputy President, and any other Justice who ought to be consulted, for approval."

d. South Africa

45. The composition of the Constitutional Court of the Republic of South Africa is drawn from Section 167(1) of *the Constitution*. It comprises eleven Judges, namely, the Chief Justice, the Deputy Chief

Justice, and nine other justices. The Bench-quorum is prescribed in Section 167(2) of *the Constitution*, which thus provides:

> " A matter before the Constitutional Court must be heard by at least eight judges."

46. The upper limit of Bench-size is thus left open – probably to be settled through regular rules of practice. The jurisdiction of the Court is governed by Section 167(3) of *the Constitution*, which provides that the Constitutional Court:

> " (a) is the highest court of the Republic; and
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and (c) makes the final decision whether a matter is within its jurisdiction."

47. Further matters are specified in Section 167(4) of *the Constitution* as falling within the exclusive jurisdiction of the Court, as follows:

> " Only the Constitutional Court may—
>
> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
>
> (c) decide applications envisaged in section 80 or 122;
>
> (d) decide on the constitutionality of any amendment to *the Constitution*;
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
>
> (f) certify a provincial constitution in terms of section 144."

48. Section 167(3)(a), read together with subsection (b), makes it clear that the Constitutional Court is the highest Court of the Republic, in all matters falling within its jurisdiction. The South African Constitution, unlike the Kenyan one, does not explicitly state that all Courts except for the Constitutional Court itself, are bound by that Court's decisions. The vertical and horizontal effects of the Constitutional Court's decisions have only been reflected in the mode of application of the principle of stare decisis (like cases to be decided alike), which has guided the Court's judgments. In Camps Bay Ratepayers and Residents Association and Another v. Harrison and Another [2010] ZACC 19; 2011 (2) BCLR 121 (CC); 2011 (4) SA 42 (CC), the Court pronounced itself as follows (para.28):

> " What it boils down to, according to the authors, is: certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal

system from the principle of stare decisis. Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution."

49. For example, the Constitutional Court in Gcaba v. Minister for Safety and Security and Others [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) confirmed (para.62) that it has the capacity to determine that it erred in a previous decision, and so to depart from that precedent. Therefore, it is clear that in general, Judgments of the Constitutional Court have a binding effect upon it and upon the lower Courts; however, the Supreme Court has the competence to depart from its own decision, where it finds the decision to have been erroneous.

50. It is to be noted that the South African Constitution, like the Kenyan one, is silent as regards Bench-quorum, when it has to consider the question of a departure from its previous decision. In the Court Rules, there is no guidance on this question; and the Bench is, in theory, properly constituted by a quorum of eight justices, irrespective of the matter that comes before that Court. But the practice of the Court is that it always sits in all mattersas a full Bench of eleven, except where a Judge has recused himself or herself, or is unable to sit for some reason.

e. The United States of America

51. Article 3, Section 1 of *the Constitution* of the United State of America thus provides:

> " The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

52. Rule 4 of the Supreme Court Rules provides for the sessions and quorum of the Supreme Court, Sub-rule (2) prescribing as follows:

> " Six Members of the Court constitute a quorum. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending—or if no Justice is present, the Clerk or a Deputy Clerk—may announce that the Court will not meet until there is a quorum."

53. There is nothing in *the Constitution* or any relevant legislation, that requires the Supreme Court of the United States to depart from the quorum of six Judges, when determining any matter before it, irrespective of whether such matter may entail departing from its own previous Judgment. Yet, as a regular practice, the United States Supreme Court invariably sits as a full Bench, when determining cases that have been duly admitted by issuance of certiorari.

f. Canada

54. The Supreme Court is the highest Court in Canada. In terms of Section 35 of the *Supreme Court Act* (R.S.C., 1985, c S-26), this Court exercises an appellate, civil and criminal jurisdiction throughout Canada. Its composition is stated in Section 4(1) of the *Supreme Court Act*, as follows:

> " The Court shall consist of a chief justice to be called the Chief Justice of Canada, and eight puisne judges" .

55. The quorum of the Supreme Court is set out in Section 25 of the *Supreme Court Act*, as follows:

> " Any five of the judges of the Court shall constitute a quorum and may lawfully hold the Court."

556. The *Supreme Court Act* allows for a lower quorum of four Judges in two instances. The first is where a Judge is recused from a case, in accordance with Section 28 of the Act, which provides:

> "(1) No judge against whose judgment an appeal is brought, or who took part in the trial of the cause or matter, or in the hearing in a court below, shall sit or take part in the hearing of or adjudication on the proceedings in the Supreme Court.
>
> "(2) In any cause or matter in which a judge is unable to sit or take part in consequence of this section, any four of the other judges constitute a quorum and may lawfully hold the Court."

57. The second instance is provided for in Section 29 of the *Supreme Court Act*, which allows parties, by their own consent, to accede to a lower Bench-quorum of four.

58. There is yet another instance in which the Supreme Court Bench is lower than the normal quorum of five: when it considers applications for leave to appeal. By Section 43(3) of the *Supreme Court Act*, any three Judges of the Court constitute a quorum for the consideration and determination of an application for leave to appeal, whether or not an oral hearing is entailed – subject to the qualification in Section 43(4), which bears an exception. It states that:

> " Notwithstanding subsection (3), five judges of the Court constitute a quorum in the case of an application for leave to appeal from a judgment of a court
>
> (a) quashing a conviction of an offence punishable by death; or
>
> (b) dismissing an appeal against an acquittal of an offence punishable by death, including an acquittal in respect of a principal offence where the accused has been convicted of an offence included in the principal offence."

(g) India

59. Article 124 of *the Constitution* of India provides that there shall be a Supreme Court of India consisting of a Chief Justice and, subject to legislation increasing the number, not more than seven other Judges. As provided by such legislation, the number has increased to twenty-five other Judges (Supreme Court (Number of Judges) Amendment Act, 1986).

60. The Supreme Court of India is the highest Court, with a wide jurisdiction, original, advisory and appellate, as specified in Articles 131-133. Article 137 empowers the Court to review its own decisions, as follows:

> " Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."

61. *The Constitution*'s empowerment is further embodied in Order XLVII, Rule 1 of the Supreme Court Rules, 2013. A petition seeking such review is to be filed within thirty days from the date of Judgement

or Order and, as far as practicable, is to be circulated, without oral arguments, to the same Bench of Judges who delivered the Judgment or Order sought to be reviewed.

62. However, this review jurisdiction is limited to correction of errors in the Judgment and Order of the Court. It does not cover cases where the Court is being asked to reconsider and review a previous decision that stands as precedent. Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 provides that a person aggrieved by a decision of a Court (which includes the Supreme Court):

> "...and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

63. Under Article 145(3), the minimum number of Judges to sit, for the purpose of deciding any case involving a substantial question of law, as to the interpretation of *the Constitution*, or for the purpose of hearing any reference for advisory opinion, is set at five. But Article 145(2) provides that the Rules may prescribe the minimum number of Judges to sit for any purpose, and may provide for the powers of single Judges, and Division Courts.

64. We have noted that neither the Indian Constitution, nor any organic statute or rule under it, provides for Bench-quorum, for the purpose of considering an application where the Supreme Court's previous decision is questioned, and a departure sought.

65. Hence, in the conventional common law mode, the Supreme Court of India has proceeded to lay down certain guidelines, as regards questions to the propriety of a decision by a given Bench-size of the Court. In Bharat Petroleum Corporation Ltd v. Mumbai Shramik Sangha & Others (2001) 4 SCC 448, the Court stated that:

> "...a decision of a Constitution Bench of this Court binds a bench of two learned judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. At the most, they could have ordered that the matter be heard by a Bench of three learned judges."

66. The above decision was followed in Pradip Chandra Parija & Others v. Pramod Chandra Patnaik & Others (2002) 1 SCC 1, where a two-Judge Bench expressed doubt regarding a decision of a three-Judge Bench, and remitted the matter for consideration before a five Judge-Bench. *The Constitution* Bench of the Court, guided by what it typified as 'judicial discipline,' and 'propriety,' held that only a Bench of the same quorum can question the correctness of a decision of a Bench of co-ordinate jurisdiction; and the matter should then come before a Bench of larger quorum, for consideration. The Court held that two Judges, though they be unsettled by a decision of three Judges of the Court, would not have a basis to question that decision; and their option is only to request the Chief Justice to place the matter before a three-Judge Bench, which may endorse or depart from an earlier position of the three Judge-Bench.

67. The foregoing principles were followed in Central Board of Dawoodi Bohra Community v. State of Maharashtra & Another, in which the Court thus remarked:

> "(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.
>
> "(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted."

h. What Principles emerge from the Comparative Judicial Experience?

68. What emerges from the various common law jurisdictions, is that there are no hard-and-fast rules, perhaps with the exception of Ghana, on Supreme-Court quorum, where a party calls for the reconsideration of a previous decision: save that in most instances, there is some pragmatic and rational factor taken into account.

69. Good practice, as perceived in the case of the United States Supreme Court, and the Constitutional Court of South Africa, dictates sittings as full Bench in virtually all cases – and obviously, such will be the position even where a party seeks departure from precedent already laid down. The question whether it is a larger Bench-size reconsidering an earlier decision by a smaller Bench-size, therefore, becomes largely academic; and no impropriety is attributed to the prospect of a Bench reconsidering a precedent set by an earlier Bench of equal strength.

70. Different practical considerations have conditioned the law and practice in some of the other countries considered in this Ruling. One of these is that, it is in keeping with good order, that a larger Bench-quorum is necessary for the reconsideration of a precedent laid by a more limited Bench. And conventionally, it falls to the Chief Justice as director of judicial functions, to constitute such suitable Bench for the reconsideration of a past decision.

71. It emerges from the comparative analysis that, it has not been possible in the different jurisdictions to apply the same rules as to Supreme Court Bench-size, for the reconsideration of that Court's past precedents. Several factors of unquestionable merit have accounted for such variations of judicial practice: for instance, the size of the Supreme Court membership differs from one country to another; there are divergent statutory provisions regarding particular sitting Benches – in the case of Canada, as an example, a Judge of the Supreme Court is disqualified from hearing an appeal on a matter he or she had entertained while serving in a lower Court; some of the countries attach a special rating to any particular appeal-subject – for the purpose of setting the size of the proper appellate Bench; there

are varying local factors of the greatest public interest (such as those recorded in Roe v. Wade, in the case of the U.S.A.).

72. As the forum of litigation invariably raises objective questions of contest, often with great relevance over extensive time-scales, it is, when perceived in a comparative context, a truly dependable basis for observing the essential elements of individual cases, regardless of their national provenance. On that basis, it becomes clear to us in the instant case, that this Court should accommodate the pragmatic dimension, and should incorporate in our guidelines certain specific considerations: the notable, relevant aspects of *the Constitution* of Kenya, 2010; the relatively limited size of our Supreme Court Bench; the fundamental lines of constitutional interpretation already emerging from our electoral and related jurisprudence – in particular, the factor of timeliness in the resolution of electoral disputes; the occasional interruptive situations that have afflicted the due functioning of a fledgling apex Court.

73. As we apply the foregoing considerations, we take into account the past decisions of this Court, noting that the Joho case was heard by a five-Judge Bench, constituted by Rawal, DCJ; Tunoi, Ibrahim, Ojwang and Ndungu, SCJJ. It was determined by the constitutionally-prescribed minimum number of Judges, under Article 163(2). The decision of that Bench, under Article 163(7) of *the Constitution*, is binding on all lower Courts in the country. The 1st respondent submits that even though Joho was a decision by a five-Judge Bench, subsequent decisions of the full seven-Judge Bench have since followed and affirmed its dictum; and that this has the effect that, to depart therefrom by a five-Judge Bench, would be prejudicial to him – by depriving him of the same treatment as other parties were accorded before the Supreme Court, in various election petitions.

G. Applying the Principles

74. The 1st respondent's contention does not, in our view, fall within the category of policy and judicial considerations emerging as the lesson from the comparative experience. The 1st respondent's position rests on a rather narrow base, and is more in the nature of an abstract quest for validation, than a practical view of the merits of Bench-size in the Supreme Court, where it considers departing from its past decision.

75. On its special facts, the Joho case holds that, for the purpose of lodging an election petition before the High Court, the date of declaration of voting results is marked by the issuance of Form 38 by the Returning Officer. It is precisely that finding, that the 1st respondent is contesting, as he challenges the petitioner's contention that the election petition in the High Court had not been filed within the time allowed.

76. The 1st respondent thus states in his written submissions (para.2):

> "The 1st respondent/applicant on the question before this Court seeks Orders...that this petition be heard by a fully-constituted Supreme Court Bench of seven ...Judges, and that the 1st respondent be at liberty to submit before such Bench for the reconsideration of the holding in the Joho case...."

77. It is clear to us that the several election petitions coming up after Joho, which have been referred to by the 1st respondent, were determined on the basis of the principle laid down by that case. The Joho case, in the circumstances, today represents the governing precedent for like matters.

78. What Bench-quorum, in the circumstances, should entertain a cause seeking a departure from the Joho precedent?

79. As already noted, several factors are relevant, including the clear implications to be drawn from the written Constitution; the relevant perceptions of justice and fairness; the limitations and realities attending the functioning of *the Constitution*; and the like. Were it not for such practical, contextual and nuanced elements, which must confer upon the Court some discretionary remit, a plain solution would have been to subject a precedent emanating from a five-Judge Bench to a larger Bench, for reconsideration. However, in the present circumstances, we would draw a lesson from the practice elsewhere: and as already noted, the Supreme Court of the United States of America generally sits in the same numerical strength, when setting a precedent, and when reconsidering a precedent. We also take into account the reality that the Kenyan Supreme Court has the limited-size Bench of seven, which on occasions may not sit as such, but as a five-Judge or six-Judge Bench. Given the challenge of Bench-size, in a new Supreme Court that is in quest of greater stability, and in the light of the latitude allowed by *the Constitution*, we would take the position, in these times, that the prescribed minimum Bench-quorum, with the essential research and scholarly assistance, and with the back-up of professionally-competent advocacy from the Bar, will be properly constituted to hear and determine all matters coming up before it. Such a Bench is duly empowered to hear and determine matters as prescribed in Article 163(3),(4), (5),(6) and (7) of *the Constitution*, and in the relevant legislation and regulations.

80. We would affirm the decision of this Court in the Jasbir Singh Rai case, in which we thus stated:

> " The *Supreme Court Act* has no specific provision requiring that on reviewing [the Court's] decision a greater number of Judges should sit."

81. Applying these principles to the instant matter, we would hold that this Court may sit, whether with its minimum quorum of five Judges or more, in reconsidering the precedent set in the Joho case.

H. Directions

82. The terms of the foregoing paragraph represent our directions in this matter, and the parties are at liberty to proceed accordingly.

83. The parties shall bear their own respective costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2016.

.....

W.M. MUTUNGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

K.H. RAWAL

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME

.....

J.B. OJWANG

JUSTICE OF THE SUPREME

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar, Supreme Court