Judicial Robotism, Procedural Narcissism and Formalism in the Hijab case: A Commentary.

By Joshua Malidzo Nyawa

> How *do* judges judge? According to the formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way. For the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic."

Ryan Calo in his *Robots as legal metaphors* [1]invokes the term judicial Robotism to describe the particular circumstances where judges behave like robots. To him, a robot is a machine that looks and acts like a person but actually lacks discretion. Judges have invoked robots to describe programmable machines, incapable of deviating from their instructions, even as they apply the term to real people. However the question is whether judges can act as robots or apply the law robotically?[2] In *Allen v state*, the supreme court of Alabama held that "We have not, and hopefully never will reach the stage in Alabama at which a stone-cold computer is draped in a black robe, set up behind the bench, and plugged in to begin service as Circuit Judge."[3]A judge is not expected to "robotically recite" every statutory consideration when issuing a judgment or a ruling[4]. Even where the law and rules have been codified, such a codification is not 'software code that a judge executes like a computer',[5] meaning that courts are not expected to act robotically. John Adams has on the other hand argued that this is drawn from the famous saying that "a government of laws,

[1] Ryan Calo 'Robots as Legal Metaphors' *Harvard Journal of Law & Technology* Volume 30, Number 1 Fall 2016
[2] *See, e.g.*, *Pennsylvania v. Local Union* 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 178 (E.D. Pa. 1974); *Allen v. State*, 276 So. 2d 583, 586 (Ala. 1973) ("The trial judge is a human being, not an automaton or a robot.")
[3] *Allen v. State*, 276 So. 2d 583, 585–86 (Ala. 1973). At 586.
[4] *United States v. Ruiz-Salazar*, 785 F.3d 1270, 1273 (8th Cir. 2015).
[5] *Cf.* John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1374–75 (2008) (advancing a free-will theory of the First Amendment that disputes computer code is speech).

and not of men,"[6] to mean that those laws are to be interpreted and applied by real men and women and not robots.

A reading of the case of *Methodist church in Kenya v Mohamed Fugicha and Others*, Petition No. 16 of 2016 (herein referred to as the Hijab case) will leave no doubt on who sat on the bench to deliver this regrettable judgment. Judicial robots who had been pre-programmed to recite the procedural rules with a specific mandate of not looking at anything outside the law had inhabited the bench. The majority in this case fall within the conception of Judicial Robotism.

It is to be noted that Judicial Robotism is not in line with the leitmotifs of the 2010 constitution. Judicial Robotism, formalism and procedural narcissism flies in the face of the aspirations of the constitution. If the constitution was meant to cure the ills of the past such as the injustices suffered as a result of undue reliance on technicalities as was in *Matiba v Moi*[7] , then such a mission cannot and should not be left in the hands of judicial robots!. If indeed our 2010 constitution is Monumental and memorial[8], a mirror representing the national soul[9], seeking to remind us of where we come from and it giving us a decisive break from the past that haunts the Kenyan

[6] John Adams, *Novanglus, Addressed to the Inhabitants of the Colony of Massachu-setts-Bay, No. VII*, *in* 4 THE WORKS OF JOHN ADAMS 106 (Charles C. Little & James Brown eds., 1851) (emphasis omitted) (defining a republic).
[7] Election Petition 27 of 1993.
[8] Joshua Malidzo Nyawa, *The 2010 Constitution As Both A Monument And A Memorial; The Role Of The Media As A Public Watchdog*
[9] MahomedAJ explained constitutional supremacy as follows in the Namibian case of *S v Acheson* 1991 2 SA 805 (Nm) 813A-C:
'(T) He Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.'

population[10], healing the wounds that the population suffered in the past[11]and guiding us to a better future[12], then if left in the hands of the formalists, such a goal will die.

An analysis of the Hijab case

The main issue in the petition was on the right of Muslim students to wear hijabs. The issue had been brought up by the interested party in the form of a cross-petition which was included in his affidavit. It was the appellant's argument that the cross-petition had not conformed to the Mutunga rules. The Majority agreed with the argument and held that

> [55] Moreover, this cross-petition did not comply with Rule 15 (3) of the *Mutunga Rules* which speaks to a *respondent* filing a cross-petition; and it was also not in conformity with Rule 10 (2) of these Rules. Rule 10(3) cannot also be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained therein and [56] We further note that the petition is unyielding that the *cross – petition* did not meet the set out requirements, it was defective and inconsistent with the *Mutunga Rules*, *further*, they argue that consideration of the same by the Appellate Court violated their right to fair trial denying them opportunity to prepare and canvass the issue raised in the *cross-petition*.

Interestingly is the court's holding that the cross petition did not afford the opportunity for the petitioner to respond to the same effectively. The court proceeded to note that

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[10] see *Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another, Mombasa* HCCC No. 190 of 2010], Ojwang J

[11] *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at para 100 (Budlender AJ) ('ours is a transformative constitution. Justice Scalia of the US Supreme Court has said that "the whole purpose of a constitution, old or new . . . is to impede change or pejoratively put "to obstruct modernity" ... Whatever the position may be in the USA or other countries, that is not the purpose of our Constitution. Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity.'

[12] Justice Pius Langa *Transformative Constitutionalism*, Prestige Lecture delivered at Stellenbosch University on 9 October 2006.

[57] We agree that the issues set out in the cross-petition did not afford the opportunity for the Petitioner to respond to the same effectively. Firstly, because it introduced a different cause of action from that raised in the original Petition; and secondly, because it was not framed in a manner, for which there was a known laid out procedure for an exhaustive response. The fact, that the petitioner may have referred to the issues therein through oral arguments, *could not,* as wrongfully determined by both the High Court and the Court of Appeal, have amounted to formal pleadings in response to those issues. As such we find that both superior Courts violated the Petitioner's right to be heard, as provided for under Articles 25 and 50 of the Constitution.

This was despite the record available which was recognized by the minority. In his dissenting opinion Justice Ojwang provides the record of the High court where Counsel Kibe for appellants had argued on the main question. Mr Kibe had submitted on Article 32 which is the provision governing the right of the Muslim students to wear hijab and the trial judge had pronounced himself. Justice Ojwang notes that

[84] That the trial Judge intimately took up the *hijab* question, deliberated upon it, and elaborately pronounced himself thereupon, is still more evident from the terms of para. 117 of the Judgment:

"Mr. Kibe Mungai responded that there is no connection for Muslim girls wearing *hijab,* ***and the right [for] Muslim girls to secure compulsory education. He submitted that under [the] Basic Education [Act, 2013] nothing turns on the*** *hijab.* ***He pointed out that [the] interested party's point is in the case of [Muslim girls] being educated [, being allowed to] enjoy special status by wearing [by the] Islamic [dress] code. He submitted that [this] has nothing to do with education, but is a religious claim for [special] status. He submitted [that] such [a] claim is discriminatory and offends Article 27 of the Constitution."***

Was the court simply relying on the technicality to avoid the main issue in the petition or was the majority justified to dismiss the petition on a technicality? **Clark** had warned us against a brilliant court which may show a general impatience with procedural delays and faults only to make some of the strangest of procedural rulings, either without appreciating their significance and how far they are departing from modern viewpoints or in an endeavor to rid themselves of unattractive cases through an assumed procedural fault[13], This is because liberal judges often resort to high formalism and literalist technicality to accomplish their projects[14],Was the majority in the hijab case ridding themselves of an unattractive case? Or in other words, was the majority relying on a petty justification or to use the words of bucholz that "*A legal technicality is some tiny legal tripping hazard, a petty justification for throwing out a case, or ignoring justice altogether. They are the kind of things that come up when, after witnessing the murder of your family, your dog, and your dog's family, you have to sit quietly by while some liberal activist judge sets the criminal free for some trivial procedural issue….Let down by everything you used to trust, you are forced to take justice into your hands*[15] or was the court acting like a passive on-looker, and that it could not use the powers available to it to do justice in the case before it?[16]

The 2010 constitution as a transformative constitution

Ours has been described to be a transformative constitution ,its avowed goal of today"s Constitution is to institute 'social change and reform, through values such as social justice,

[13] See the preface to Clark, *Code pleading* (1928), and also Clark, the Union of Law and Equity (1925) 25 Col. L. Rev. 1.
[14] Karl E Klare, Legal culture and transformative constitutionalism 1998 *SAJHR* 146
[15] Bucholz, C. "The 6 Most Insane Legal Technicalities" 2013. Available at http//www.cracked.com
[16] *Amaechi* (n 28 above) pp 324, 344, & 449 (per Oguntade, Musdapher and Aderemi JJSC).

equality, devolution, human rights, rule of law, freedom and democracy."[17]The chief Justice Emeritus, William Mutunga had used the following terms to describe the 2010 constitution

> There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a status quo that was unacceptable, through: provisions on the democratization and decentralization of the executive; devolution; the strengthening of institutions; the creation of institutions that provide checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya which they delegate to institutions that must serve them, and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human-rights State in Kenya; mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development. These instances, among others, reflect the will and deep commitment of Kenyans, reflected in fundamental and radical changes, through the implementation of the Constitution[18]

The Constitution is a document committed to social transformation.[19] It has the aspiration and intention to realize in Kenya a democratic, egalitarian society committed to social justice and self-

[17] *Speaker Of The Senate & Another V Hon. Attorney-General & Another & 3 Others* [2013] eKLR, Advisory Opinion Reference 2 of 2013 Para 51.
[18] Jasbir Singh Rai para 89.
[19] *Speaker Of The Senate & Another versus Hon. Attorney-General & Another & 3 Others*, Advisory Opinion Reference No. 2 of 2013, [2013] eKLR paras 51-53.

realization opportunities for all.[20] In *Communications Commission of Kenya*, the Supreme Court regarded the Kenyan Constitution as one of the „ [t]ransformative constitutions [which] are new social contracts that are committed to fundamental transformations in societies".[21] When interpreting a constitution and especially in the human rights arena, such an interpretation is a value-laden activity that should not be cloaked by the pretense of value neutrality".[22] Unlike the retired constitution which did not tell us what the constitution was about(it was dry as old bones) since It did not even have a preamble, the 2010 constitution is different and refuses to be interpreted as the retired one[23], it sets its own ways of interpretation at article 259, When a transformative constitution is subjected to a mechanical interpretation, the judges who are supposed to be the mid-wives of the constitution will end up strangling it just as the majority did in the Hijab case, This is because transformative constitutions need to create a new legal culture of` protection of rights[24], a need to replace the formalistic vision of the law with a substantive vision of the law. When interpreting the constitutions, judges should not therefore be exceedingly formalistic, positivist, literal and rule bound[25]. In a transformative constitutionalism therefore, proceedings before the court must not degenerate into rigid and purely formal procedural discourse that ignores the purposes of substantive law.[26]

[20] *Ibid* para 51.
[21] Para 377
[22] Scott C *"The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights*" (1989) 27 *Osgoode Hall Law Journal* 769 778.
[23] As emeritus Justice Albie Sachs observed on 11th November 2016 during the African Jurists conference , 2016 organised by ICJ-Kenya : *If you want a PHD on technicalities look at what was happening in kenya in the pre-2010 dispensation.''*
[24] Walter Khobe, Transformation and crisis Legal Education in kenya, *Platform for law , justice and society* Dec 2016-Jan 2017, Number 25/26 pg 66-70
[25] ibid
[26] See E Krings 'Official opening speech' in Storme & Casman (Eds) (n 25 above) 4.

Substance justice over procedural law: The spirit of Article 159

The rules of procedure are not an end in themselves and are only a means to an end. The end being the determination of disputes on their substantive merits. Accordingly, legal and procedural technicalities ought not to be elevated to a fetish or enforced in a manner that defeats the ends of justice and ignore procedural technicalities in favor of determination of disputes on their substantive merits[27]The interpretation of article 159 simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. The ***East*** African court in ***Branco Arabe Espanol v Bank of Uganda (1999) 2 EA 22*** stated that:

"The administration of justice should normally require that the substance of all disputes should be investigated on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."

The essence of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties[28].A court of law should therefore not put more emphasis on the procedure but strive to hear the main dispute as Majanja, J. emphasised in *Caroline Mwelu Mwandiku v Patrick Mweu Musimba & 2 others* [2013] eKLR (Election Petition No.7 of 2013 that **"Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. Beneath the words of a provision**

[27] *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another*, High Court (Nairobi) Civil Case No. 810 of 2001

[28] see *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR at para 55

of law, lies a juristic principle. In this case the principle is that the rule is intended to enable the court fairly adjudicate the dispute between the parties.

The rules of procedure have for a long time been referred to as the handmaiden of justice and not mistresses of justice.In **William Kinyanyi Onyango v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR (Election Petition Appeal No.2 of 2013)** Kimondo, J. took a similar approach to that of Majanja, J:

"In my considered opinion, the petition Rules 2013 were meant to be handmaidens, not mistresses of justice. Fundamentally, they remain subservient to the Elections Act 2011 and the Constitution…..Article 159 of the Constitution would frown upon a narrow and strict interpretation of the rule that may occasion serious injustice. This is not to say that procedural rules will not apply in all cases; only that the court must guard against them trumping substantive justice…"

Maraga, J (as he then was) made a similar point in *Shashikant C. Patel v Oriental Commercial Bank* [2005] eKLR in which he held *inter alia*;

"…we should never lose sight of the fact that rules of procedure, though they may be followed are the handmaids of justice. They should not be given a pedantic interpretation which at the end of the day denies parties justice."

This was similar to the position adopted by Muriithi, J in *Inland Beach Enterprises Ltd v Sammy Chege & 15 Others* [2012] eKLR where he held, *inter alia*:

"…in my view, with the cardinal principle of procedure that rules are handmaids of justice not mistresses; the rules must serve the justice of the case as the court may determine in the circumstances of the proceedings."

The phrase has been borrowed from the English case of *Coles,* where the learned judge, Collins MR. had stated

""that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."'[29]

Charles E. Clark[30] had argued correctly that Sentiments such as these, when expressed as abstract propositions, will no doubt win the assent of all. Applied to concrete cases, however, there is danger that by a conservative bench and bar they may be more honored in the breach than in the observance. He compares rules of procedure to the handmaid in a house, and concludes that no matter how devoted a housemaid seems to be, she will never averse to becoming mistress of a household should opportunity offer and therefore Just so do rules of procedure tend to assume a too obtrusive place in the attentions of judges and lawyers-unless, indeed, they are continually restricted to their proper and subordinate role[31].

There is a great danger when there is an 'elaborate and technical a system' that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.[32]The majority was working along these lines, it sought to establish a technical system where the decision was solely made on a technicality. **Hepburn** spoke of "the inveterate nature of the incongruity between procedure and substantive law" and went on

[29] In re Coles [1907] 1 K. B. 1, 4.
[30] Charles E. Clark, 'The Handmaid of Justice', 23 *Wash. U. L. Q*. 297 (1938).
[31] see also *Tom Onyango Agimba v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR
[32] Holdsworth, *History of English Law* (3d ed. 1923) 251.

to say, "The former petrifies while the latter is in its budding growth" and "the conservatism of the lawyer preserves the incongruity."[33] I dare say that the incongruity was preserved by the conservatism and formalistic reasoning of the majority in the Hijab case.

I agree with the position that the article 159 did not do away with the rules of procedure, neither does it mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. Rules of procedure are equally important in litigation as was recognised in *Nicholas Kiptoo Arap Korir Salat -V- IEBC & 6 Others*:

"I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschews defeatist technicalities were ever meant to aid in overthrow of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, even headed, fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."

However, article 159 behooves courts to undertake and place substantive considerations above those of procedure, especially where the procedural infractions are curable[34]. Where the technicality does not cause any prejudice or a miscarriage of justice to the other party, it is

[33] Hepburn, *The Development of Code Pleading* (1897) 31, 37.
[34] The court of appeal in *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR

inappropriate for a court of law to chase away a litigant from the seat of justice. This argument is not new. In ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others*** **[2013] eKLR (Civil Appeal No. (Application) 228 of 2013)** Ouko, JA stated that:

"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness…it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statues that promote substantive

justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities."

Similarly Korir J in the case of **Samuel Kazungu Kambi & Another v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** held the view that whereas there is need for strict compliance with the laws and rules governing the resolution of election disputes, the court ought to be mindful that the current constitutional dispensation requires substantive justice to be done and that unless an election petition is so hopelessly defective and cannot communicate all the complaints and prayers of the petitioner, the court should ensure that the petition is heard and determined on merit[35]. In the hijab case, there was no prejudice or injustice that was or could be said to be suffered by the appellants. Even though the question of wearing hijab had been raised by the interested party in his affidavit as a cross petition, the advocates of the appellants had at the trial court addressed the court on the issue despite it having been raised as a cross petition. The majority was basically manufacturing a technicality in order avoid the main question raised.The dismissal of the petition on a technicality is not a reflection or manifestation of our current jurisprudence and justice system. It should be remembered that the elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. The majority in the hijab case was either unaware of the existence of article 159 or is still clouded in the pre-2010 era. Such an interpretation does not have space in the new dispensation where courts are expected to put emphasis on substantive justice[36] and

[35] See *Deepak Chamanlal Kamani& Another vs. Kenya Anti-Corruption Commission & 2 Others* Civil Appeal (Application) No. 152 of 2009.

[36] *Hon. Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR*

procedural omissions must always take a back seat[37], The majority should be reminded of the wise words of Apaloo, J.A. (as he then was) in Wachira –vs- Ndanjeru [1982 – 88] I KAR 1062 where he stated at page 1065:

"At all events it seems to me that the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a court, must, at least at the present day, strive to do substantial justice to the parties, undeterred by technical procedure rules."

The place of Article 22(3) (b) and (d) of the constitution

The provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. The court is mandated to entertain proceedings on the basis of informal documentation and further ensure that the courts are not unreasonably restricted by procedural technicalities[38]. This is a clear departure from the Anglo-Saxon requirement of precision as was in the famous **Anarita Karimi Njeru vs. Republic (No. 1) 1979 KLR 159.** There is an urgent need that the said decision be read in line with the 2010 constitution. Odunga J has held in *Charles Otieno Opiyo & 3 others v Orange Democratic Movement Party & another* [2017] eKLR that **to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3) (b) under**

[37] Kenya Court of Appeal in Civil Appeal No. 270 of 2001, *Lt. Colonel Joseph Mweteri Igweta –vs- Mukira M' Ethare & Attorney – General*

[38] see *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another* [2016] eKLR

which proceedings may even be commenced on the basis of informal documentation. He proceeded to note further that striking out a petition solely because of a procedural issue where the bill of rights is under a threat would amount to this Court shirking its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues**.** This is to mean that where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights, the latter ought to prevail over the former[39], Furthermore, the provisions of Article 22 seek to remind us of the wise counsel that

> **"A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing[40]**

The provisions of article 22 therefore calls for a substantive reasoning and not the formalistic reasoning as was exhibited in the pre-2010 constitutional dispensation. Put it in other words, the constitution calls for an interpretation that eschews formalism, but one which favours the purposive approach[41], the 2010 constitution calls for a flexible approach to interpretation and not the religious worshipping of the technicalities as was exhibited by the majority in the hijab case. It should further be noted that the key word in article 22 is shall which connotes the mandatory

[39] see also The Court of Appeal in *Peter M. Kariuki vs. Attorney General* [2014] eKLR
[40] *Nation Media Group Limited vs. Attorney General* [2007] 1 EA 261.
[41] *In The Matter Of the Interim Independent Electoral Commission* Advisory Opinion 2 of 2011

nature of the requirement, as was explained in *Thomas Morara Nyabenga & 2 others on behalf of all inmates at Manyani Prison) v PS Interior Ministry & 8 others* [2017] eKLR that

> Although the Senior Litigation Counsel had suggested that the suit was incurably defective *ab initio,* Article 22 (3) (b) of the Constitution of Kenya stipulates that the formalities relating to the commencement of suits must also be kept to a minimum. The key word is "shall (emphasis court) if necessary, entertain proceedings on the basis of informal documentation" connoting the mandatory nature of that provision.

A strict adherence to procedure obscures or ignores justice[42], such kind of formalism is inconsistent with a transformative Constitution and as **Langa** observes that at the heart of a transformative Constitution is a commitment to substantive reasoning. **Walter[43]** while writing on the Outa decision had also noted on the dangers of a formalistic reasoning, he argued that the resort to high formalism and literalist technicality in constitutional interpretation discourages appropriate constitutional innovation and leads to less generous or innovative interpretations and applications of the Constitution than are permitted by the text and drafting history of the Constitution. The majority in hijab case need to be reminded that 'our jurisprudence and decisional law' no longer countenances this kind of technical and formalist justice. If it must be repeated the admonition that Courts can no longer deploy technicalities as the basis for their decisions comes from the Constitution: Article 159(2) (d)[44].

Conclusion

[42] Justice Pius Langa, Transformative Constitutionalism Supra ft 12
[43] Walter Khobe Justice Njoki Ndungu's *concurring dissents and transformative adjudication* (2015) 5 The platform pp 40-44
[44] *Anchor Limited v Sports Kenya* [2017] eKLR

Prempeh has called for courts to develop a certain type of jurisprudence, he refers to it as 'rights-friendly' jurisprudence.[45], while **Eric Christiansen**[46]has called for a 'justice oriented ideology'. What the two mean is the need to develop a jurisprudence that would be made up of decisions on the merits and not the throwing away of petitions on technicalities. Article 159 and 22 are therefore intended to provide an ideational justification for a shift in legal culture[47]. This in turn means Judges are not expected to be judicial robots, mechanically deciding cases and dismissing them on technical grounds[48]. They are called upon to exercise their minds taking all factors into consideration when presiding and deciding over a matter. This will in return lead to the rightly-friendly jurisprudence. At the inauguration of the Constitutional Court, Mandela declared to the new judges: "the guarantee of the fundamental rights and freedoms for which we have fought so hard, lies in your hands".[49] This is the new role which calls for a substantive reasoning on the judges.

The Kenya's Judges and Magistrates Vetting Board poignantly observed thus on the 2010 Constitution's vision for substantive justice:[50]

> We are unaware of any other constitution in the world that has chosen to elevate the avoidance of undue technicalities to the status of an express constitutional value. Sad Kenyan experience indicates why those words were included. The raising of technical and

[45] HK Prempeh 'Africa's "constitutionalism revival": False start or new dawn?' (2005) 3 *International Journal of Constitutional Law* 469.
[46] Christiansen E, 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice', *The Journal of Gender, race & Justice* (2010), 1-7.
[47] Walter Khobe Ochieng, The State of Judicial Independence in Kenya - Reflections from the 2017 Presidential Elections in James Gondi (ed) *Reflections on the 2017 Elections in Kenya Paper Series on Emerging Judicial Philosophy in Kenya*
[48] Justice Kihara Kariuki, '*Procedural Reforms/Innovations that enhance Access to Justice and Ensure Protection of Rights in Kenya* 2015.'
[49] Nelson Mandela, Speech at the inauguration of the Constitutional Court, 14 February 1995, available at http://www.constitutionalcourt.org.za/site/thecourt/mandelaspeech.html (accessed 1 June 2016).
[50] See JMVB Report Number 4 of 2012 at para. 17.

> procedural questions was a particularly strong weapon in the armoury of those who sought to defend the powerful and the wealthy with the connivance of compliant judges. Substantive questions could be evaded and matters left to drift in the courts for so long that outcomes became irrelevant. Reliance on ultra- technicality was used to impede the work of agencies set up to investigate malfeasance by those in positions of authority. Far from furthering the rule of law, these narrow, technical rulings, issued in the name of legality, contributed massively to the prevalence of impunity. Indeed, they undermined the rule of law, promoting a spirit of lawlessness that proceeded from the highest in the land all the way down. The unhappy lesson for the country was that the emancipatory vision of the rule of law should not be confused with the tyranny of heartless legalism.

This was a recognition of the fact that judges constrained by formalism will not always produce the best possible decisions; sometimes the rule being applied will be a bad rule, and sometimes even the application of generally good rules will produce bad results[51] or in the words of Tamanaha that A **"formalist" judge is guilty of foolishness or dishonesty: a slavish adherence to rules contrary to good sense, or of manipulation under the guise of adherence.**[52] The majority decision in the Hijab case was thus technicist and avoided the main question, they forgot that the spirit of justice does not reside in formalities, not in words, nor is the triumph of the administration of justice to be found in successfully picking a way between pitfalls of technicalities[53]**.**The Applying of technicalities with an almost peremptory command has always led to an absurdity and disparage of the very Constitution to which all law must conform[54] and the majority decision

[51] Christopher J. Peters, Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication in L. Pineschi (ed.), *General Principles of Law - The Role of the Judiciary*, Ius Gentium: Comparative Perspectives on Law and Justice (2015) 46.
[52] Brian Tamanaha, The Bogus Tale About The Legal Formalists, available at http://ssrn.com/abstract=1123498
[53] Epiphany Azinge in 'Living Oracles of the Law and the Fallacy of Human Divination'
[54]Bgm Hc Misc App. No.1107 Of 2010 – *Matungu Land Disputes Tribunal, Ex Parte Electina Wang'ona*

in the hijab case was not an exception. The majority must be reminded that "justice is not a fencing game in which parties engage each other in a whirling of technicalities."[55] It can be said and correctly so that the majority in the *hijab case* had become too much of a slave to its rules (of procedure) that it could not rectify a violation of the constitution[56]. It is a sad situation that the majority reduced the Supreme Court into a legal theatre, where justice was subordinated to bewildering legal technicalities.

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[55] Professor B.J. Olufeagba & 43 ors v. Professor Shuaib Oba Abdurraheem & 3 Ors (2009) 12 SC (Pt II) 1. Here, the Supreme Court held that "Rules of Court must be obeyed. But in obeying Rules of Court, technicality should be avoided so as to pave way for the current motion of substantial justice.

[56] Ramadhani, A.S.L. Twenty Five Years of the Court of Appeal of Tanzania and the Establishment of the East African Court of Justice in Peter, C.M & Bisimba, H.K (Eds). Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal of Tanzania. Dar es Salaam, Mkuki & Nyota Publishers/ Legal and Human Rights' Centre, 2007, p.235