



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION MISC. CIVIL APP. NO. 42 OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE DISCIPLINARY & ETHICS COMMITTEE.....1ST RESPONDENT

THE MEDICAL PRACTITIONERS & DENTISTS COUNCIL.....2ND RESPONDENT

AND DR. DONALD OYATSI.....EX PARTE APPLICANT

AND

AGK (ON BEHALF OF WK -MINOR).....INTERESTED PARTY

JUDGMENT

Introduction

1. Dr. Donald Oyatsi, the applicant herein is a Medical Practitioner duly registered under the provisions of the Medical Practitioners and Dentists Act^[1] (herein after referred to as the Act).
2. The first Respondent, The Disciplinary & Ethics Committee is a committee of the Kenya Medical Practitioners and Dentists Council established under section 4A (b) of the Act. Its mandate includes conducting inquiries into complaints submitted to it; regulating professional conduct; ensuring fitness to practice and operate; promoting mediation and arbitration between parties; and at its own liberty, recording and adopting mediation agreements or compromise between parties, on the terms agreed.
3. The second Respondent, the Kenya Medical Practitioners and Dentist Council is established under section 3 (1) of the Act.^[2] Pursuant to section 3(2) of the Act, it is a body corporate with perpetual succession and a common seal capable, in its corporate name, of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property; and (c) doing or performing all such other things or acts necessary for the proper performance of its functions under the Act as may lawfully be done or performed by a body corporate.
4. The Interested Party, AGK is the mother to WK- minor, on behalf of whom she lodged a complaint against the applicant herein before the second Respondent. The said complaint was the subject of the proceedings against the applicant herein in PIC Case Number 3 of 2017. The ensuing decision is now the subject of challenge in these proceeding. The minor shall hereinafter be referred to as the patient.

The grounds relied upon

5. The application rests on two grounds, namely, that in the impugned decision, the first Respondent incorrectly stated that the applicant had not filed his submissions; yet, they were filed 6 months before the delivery of the ruling. Two that the first Respondent failed to consider his responses on the issues raised during the hearing thus depriving him a fair trial.

Legal foundation of the application

6. The application is anchored on the following grounds. One, that the Respondents acted in excess of their jurisdiction, and that the second Respondent had no power or jurisdiction to make an adverse determination without according the applicant the opportunity to be heard on his submissions. Further, that it had no powers or jurisdiction to deny the applicant the right to be heard before making the impugned decision.

7. Two that by failing to consider his submissions, the Respondent violated the rules of natural justice and the applicant's right to a fair trial under Articles 25(c) and 50 of the Constitution. Three that the Respondents made an adverse determination on matters which were not raised at the hearing and which the applicant was not accorded an opportunity to be heard.

8. Four, the decision is unreasonable in the *wednesbury* sense and unfair such that no public authority applying itself to the relevant law and acting reasonably or fairly could have reached or made it. Five, that having directed the applicant to respond to the medical issues which arose in the course of the hearing, it was open bias, oppressive, unreasonable and grossly unfair for the first Respondent to refuse to consider his response.

9. Lastly, since the Respondents conceded in the Ruling that they were not experts in the field, and that they lacked adequate professional knowledge in the field of epilepsy, and, that they did not find any relevant literature, it was unreasonable to decide based on a material uploaded from the internet without seeking a proper expert opinion on the issue.

Reliefs sought

10. As a consequence of the foregoing, the applicant prays for:-

A. *An order of certiorari to quash and annul the decision of the 1st Respondent and the 2nd Respondent convicting and or holding the applicant liable for professional negligence and directing him to enter into negotiations with AGK on behalf of WK (minor) with a view to compensation and thereafter update the Chairman of the Kenya Medical Practitioners and Dentists Council within ninety (90) days.*

B. *An order of Prohibition restraining the Respondents from taking any action against the applicant on the said decision.*

C. *That the costs this suit be provided for.*

Respondents' Replying affidavit

11. Mr. Michael R. Onyango, the second Respondent's Corporation Secretary swore the Replying Affidavit dated 15th June 2020 in opposition to the application. He deposed that the second Respondent is empowered to receive complaints against Medical or Dental practitioners or Medical Institutions from different sources and it has the expertise to investigate and make decisions on any, complaint made against Medical or Dental Practitioners, Medical Institutions or oral health practitioners.

12. He deposed that the Interested Party lodged a complaint on behalf of her daughter against the applicant detailing the circumstances and enclosing copies of a medical report, reports from Aga Khan University Hospital and correspondence between the complainant and members of Children's Hospital of Orange County, (CHOC) in California, United States. He deposed that upon receipt of the complaint, the second Respondent wrote to the applicant on 19th January 2017, 10th February 2017 and 20th June 2017 and e-mail correspondence forwarding the complaint. That it requested his response and copies of all documents relating to the patient's treatment and her management to enable the second Respondent's Preliminary Inquiry Committee (PIC) to inquire into complaint.

13. He deposed that on 22nd June 2017 the Medical Council received a report dated 9th July 2013 from the applicant, which it rejected, for not addressing the specific allegations made in the complaint. By a letter dated 7th July 2017, the Medical Council requested the applicant to submit an additional report before 14th July 2017. He deposed that the applicant continuously failed to comply with the directions of the Medical Council. He averred that by a letter dated 21st July 2017 the Medical Council informed all the parties that the matter had been placed before the PIC and it directed them to appear before it on 28th July 2017. Mr. Onyango deposed that on 24th August 2017, after a delay of several months, the applicant filed his statement and provided copies of documents relating to the patient's treatment and management.

14. He deposed that prior to the enactment of the *Health Laws Amendment Act, 2019* the PIC was a Committee of the Medical Council established under the provisions of Rule 4 of the *Medical Practitioners and Dentists (Disciplinary Proceeding) (Procedure) Rules* for purposes of undertaking inquiries. However, pursuant to the *Health Laws Amendment Act, 2019*, the Committees hitherto known as the PIC and the Professional Conduct Committee (PCC) are now the Disciplinary and Ethics Committee (herein after referred to as the D & EC), the first Respondent herein.

15. He averred that the PIC consists of practitioners and Consultants in different specialities in Medicine and Dentistry and they consider the evidence and documents presented before the Committee established under section 4A of the Act. Mr. Onyango deposed that the PIC considered the complaint and the documents presented before it and upon careful evaluation and deliberations, it held that there was need to conduct further investigations through interviews and its decision was communicated to the parties vide a letter dated 29th August 2018. He averred that the PIC resolved that the matter proceeds to hearing on 24th May 2019, but following the *Health Laws Amendment Act*, the matter was listed before the D & E C whose functions are listed in section 4A (1) (b) of the Act. He averred that and at the hearing, all the parties including the applicant gave evidence.

16. He deposed that at the close of the hearing, the Committee directed the parties to file their final written submissions within a period of 30 days from 4th June 2019 and scheduled its next sitting on 12th July 2019. Further, the Medical Council wrote a follow up letter dated 4th June 2019 giving directions on the filing of submissions and the applicant was asked to include the documents he cited during the hearing. That the Interested Party filed his final submissions and supporting documents on 19th June 2019, but as at the set deadline for filing submissions, (ie. 5th July 2019), the applicant had not filed his nor did he write to the Medical Council to explain the delay. He deposed that the applicant failed to disclose to this court the second Respondent's directions on filing submissions.

17. He averred that the applicant filed his submissions on 8th August 2019, long after the sitting of 12th July 2019 and the set timelines of 30 days. He deposed that on 12th July 2019 the Committee deliberated on the issues before it, analysed the medical reports, documents submissions and unanimously found that:-

i. *The applicant was culpable of overmedicating the patient without demonstrable benefit to the child by use of 4 medications concurrently thereby increasing risk of causing side effects and also the unnecessary costs of purchasing the drugs; and*

ii. *The Respondent is found culpable of failing to comply with the directions of the Committee at various stages of the inquiry into the matter pursuant to Rule 101 of the Medical Practitioners and Dentists (Disciplinary Proceeding) (Procedure) Rules.*

18. He deposed that the Committee deliberated on the appropriate orders to issue guided by its mandate under Rule 4 of the *Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules* and the applicable Code. Further, the Committee presented its findings to the full council of the Medical Council on 4th October 2019 which adopted and approved the findings and the decision was communicated to the applicant vide the letter dated 21st July 2016.

19. He averred that the Committee acted within its jurisdiction under the Act and the *Medical Practitioner and Dentist (Disciplinary Proceedings) (Procedure) Rules* and that in analysing the issues before it and making the final determination and the ensuing order, the Respondents were guided by the law and adhered to the rules of natural justice and the Constitution. He averred that the applicant was accorded a fair trial in that he was duly informed of the complaint against him, he was provided with the documents in support of the complaint and also he was accorded sufficient time to respond despite his frequent delay in responding. He also deposed that the Committee was impartial, it heard the parties orally and the complainant testified via teleconference while the applicant was physically present and an advocate represented him and he was accorded an opportunity to adduce and challenge evidence.

20. Additionally, he deposed that the provisions of section 4 (14) of the Act gives the Medical Council powers to regulate its own procedure subject to the Act and to any rules made under section 23 of the Act. He averred that the Respondent cannot be faulted for the manner in which the inquiry was conducted. He also deposed that the Act and Rule 10Y of the *Medical Practitioners and Dentists (Disciplinary Proceeding) (Procedure) Rules* grants the PCC powers to make diverse orders after hearing a complainant.

21. He also deposed that the Committee acted within its powers under the Act and the Rules in setting timelines within which parties were to file their final submissions and there was no objection to the said directions. He deposed that the applicant failed to file submissions within the set period and he failed to seek an extension of time. He averred that section 20 of the Act sets out the powers of the Medical Council to undertake disciplinary proceeding and it also stipulates that a person aggrieved by a decision of the Medical Council may appeal to High Court within a period of 30 days. He deposed that the application lacks merit and it's an abuse of court process.

Interested Party's Replying Affidavit

22. M/s AGK, the patient's mother averred that her daughter, born on 22nd December, 2011 was diagnosed with developmental delay at 7 months, and MRI and thyroid tests established some brain damage. That she positively responded to therapy but shortly after turning one year old, she started having seizures and after hepatisation^[3] she was advised that the applicant was a paediatric neurologist who could assist her.

23. On 3rd January, 2013, she took her to Gertrude Hospital in Muthaiga where the applicant attended her on the said date and on 11th and 25th January, 2013, 21st and 25th February, 2013, 13th and 23rd March, 2013, 5th April, 2013, 3rd and 8th May, 2013, 10th June 2013 and 5th July 2013. It is her case that despite the applicant prescribing Tegretol, the seizures persisted and the applicant added Epillim, and prescribed Keppra and finally, Lamictal tablets; but the seizures continued. She deposed that the applicant became difficult to reach. M/ Kimondo deposed that in July 2013 her daughter was getting worse, so she sought medical treatment abroad and asked the applicant to furnish her with a medical report to handover to the new doctors.

24. She averred that the medical treatment abroad had financial implications; hence, she sold her parcel of land and took her to Choc Children's Hospital in Orange County, California where the doctors withdrew the two medicines – Lamictal and Tegretol and advised her to use Phenobarbital medication. She further deposed that they returned to Kenya in January 2014, and consulted Dr. Samia at the Aga Khan Hospital who prescribed 30mg Phenobarbital. She averred that since then the child has been hospitalized once in 2017 in USA. She averred that the applicant overmedicated the patient on unnecessary medicine yet Phenobarbital was/is available in Kenya. She deposed that applicant's indifference or callousness cause herself and the child suffered mental torture and distress.

25. She deposed that the applicant was accorded a fair hearing and the Committee made the following orders –

i) *Pursuant to Section 4A (1)(b)(iv) of the Medical Practitioners and Dentists Act, Dr Donald Oyatsi is directed to enter into mediation with the Complainant, AGK, as relates to the patient, with a view of compensation and thereafter report the progress to the Chair of the Medical Practitioners and Dentists Council within Ninety (90) days from the date of the receipt of this ruling.*

ii) *Pursuant to Section 20(6)(g) of the Medical Practitioners and Dentists Act, Dr. Donald Oyatsi is directed to pay a fine to the Medical Practitioners and Dentists Council the sum of Kenya Shillings Five Hundred Thousand (KShs. 500, 000/- within a period of thirty (30) days, from the date of receipt of this ruling, for continuously failing to comply with the directions of the Committee.*

26. M/s Kimondo deposed that the applicant in his verifying affidavit omitted to attach her complaint, her supporting documents and submissions, which disclosed her complaint on the applicant's negligence and callousness. She deposed that the applicant did not prescribe the universally prescribed seizure drug and that he overmedicated the minor by prescribing unnecessary medicines and his refusal either to avail himself for consultations when complications arose from the said medication and failure to refer her to another neurologist. She

deposed that the application is based on the false assumption that the Respondents were obliged to take into account submissions, which were submitted out of time.

27. The bulk of the rest of her affidavit constitutes legal submissions/argument and authorities whose proper place is the closing submissions.

Litigation history

28. On **18th** February 2020, at the *ex parte* stage, Nyamweya J granted the applicant leave and directed that the leave granted operates at stay of the impugned decision. She directed the applicant to file and serve the substantive application within **14** days and fixed the matter for *inter partes* hearing on **3rd** March 2020.

29. On the said date there was no appearance for the Interested Party. Counsel for the Respondents asked for **14** days to file their response. I granted the Respondent and the Interested Party **21** days to file their Reply. I also granted leave to the applicant's counsel to file a supplementary affidavit if need be to reply to new issues together with their submissions. I directed the Respondents and the Interested Party **14** days to file their submissions and leave to the applicant's counsel to file supplementary submissions if need be within **7** days from the date of the last service. I scheduled the matter for highlighting of submissions on **9th** June 2020.

30. On **9th** June 2020, there was nothing on record to show that the parties had complied with the above directions. I directed the Respondents and the Interested Party do file their responses within **10** days from the said order. I also granted leave to the applicant to file and serve a further affidavit if need be together with submissions within **10** days and the Respondents and the Interested Party to file their submissions within **10** days from date of service. I fixed the matter for mention to confirm compliance and reserve a judgment date on **28th** July 2020.

31. However, on the said date, only counsel for the Interested Party had filed submissions. I ordered that judgement shall be delivered on **22nd October 2020** and granted the applicant and the Respondents **15** days from the said date to file submissions if they so wish. I also ordered that in the event of failing to comply, the court will embark on writing the judgment the failure notwithstanding.

32. Regrettably, at the close of business on **12th** August 2020, which was the **15th** day from the date of the said order, the Respondents and the applicant had not complied. Instead, the applicant's counsel filed his submissions on **19th** August 2020, **5** days late. He also filed a further affidavit without the court's leave on **25th** August 2020. The applicant's advocates also wrote a letter to the Deputy Registrar stating that they would file further submissions by **10th** September 2020. The applicant's advocate filed supplementary submissions stating that the Respondents failed to comply with the court order requiring them to serve their replying affidavit. Again, the said submissions were filed outside the set periods and without courts leave. On their part, the Respondent's counsel filed their submissions on **7th** September 2020, manifestly outside the set period and without leave.

33. The failure to comply with court directions on filing pleadings/submission is worrying and unacceptable. Also unacceptable is the careless attitude of filing pleadings late and without the leave of the court. Court directions do serve a salutary purpose of enabling the court to determine cases expeditiously in line with the constitutional dictate in Article **159** of the Constitution. The court gives directions for the proper conduct of proceedings. The parties or their advocates have no power to alter the procedural steps or courts directions. They have an obligation to assist the court to achieve the constitutional dictate in Article **159**. When parties fail to comply with court's directions on filing pleadings, this constitutional dictate is put into jeopardy.

34. However, for avoidance of doubt, I have considered the applicant's and Respondent's submissions despite the same having been filed late and without leave. This should not be construed to mean the court is condoning the late failing and disregard of court orders. On the contrary, the court frowns and abhors such conduct, just as it hoists high its ever-present duty to act fairly, and in this regard, the need to hear and determine cases on merits.

Determination

35. I propose to distil and address sequentially the issues that flow from the diametrically opposed positions presented by the parties. The gravamen of the applicant's case is that the impugned decision is unreasonable and irrational. To buttress his argument, the applicant's counsel placed heavy reliance on *Republic v The Procurement Administrative Review Board & Others*^[4] which held that it was dishonest, in defiance of logic and in defiance of acceptable moral standards and indeed a perversion of justice to arrive at a decision on the basis of a falsehood. He submitted that the conduct and process adopted by the Respondents in adjudicating and determining the complaint contravenes the provisions of Article **10** of the Constitution, which outlaws any conduct that is discriminatory, lacks integrity or transparency by any person when applying or interpreting the law.

36. He cited *John Ogendo Anyona v Chief of Kenya Defence Forces & Others*^[5] in support of the proposition that a judicial review court intervenes where there is abuse of discretion; or where the decision maker exercises discretion for an improper purpose; or where the decision maker is in breach of duty to act fairly; or where the decision maker has failed to exercise statutory discretion reasonably; or where the decision maker acts in a manner to frustrate the purpose of the Act donating power; or where the decision maker fails to exercise discretion; or where the decision maker fetters the discretion given; where the decision is irrational and unreasonable.

37. The applicant's counsel's assault on the unreasonableness and irrationality of the decision is anchored on his argument that the Respondents requested for the applicant's response on specific medical issues, which were the subject matter of the inquiry. He argued that despite the applicant submitting his response six (6) months prior to making the decision, the Respondent arrived at the impugned decision. He argued that no reasonable person in possession of the said information could have arrived at the same decision. Counsel submitted that the Respondents conceded that they did not possess adequate professional knowledge on the professional issue that was the subject matter of the complaint. To him, having so conceded, no reasonable body could have proceeded to arrive at the impugned decision or adjudicate and make a determination against the applicant by deciding that the applicant had breached professional standards on the very issue, which they

admitted they had no adequate knowledge or necessary skill to determine professionally.

38. Counsel also argued that no reasonable person or professional body in the position of the Respondents and having conceded as previously mentioned could arrive at a decision relying on a mere opinion uploaded on internet without seeking a proper professional opinion on the issue from readily available experts. He argued that the foregoing grossly unreasonable and irrational conduct led to a wrong decision that the Applicant had breached professional standards in the said complaint.

39. The Respondent's counsel argued that the allegations of unreasonableness and irrationality are serious and that the applicant ought to have provided better particulars of each of the allegations to enable the Respondents respond appropriately. He argued that the Respondents comprises of experts in different specialties in medicine and dentistry who determine such matters as experts, albeit what can be termed as peer review in that ordinary persons cannot determine such matters. He argued that the members of the 1st Respondent analyzed the evidence, documents and the issues before it and they unanimously found that the applicant was culpable of overmedicating the patient without demonstrable benefit. They further found that the applicant failed to comply with the directions of the Committee at various stages of the inquiry.

40. Counsel cited *Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya* [6] which held that reasonableness of decision is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. The court went further to state that the test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated. He argued that the decision was justified as it considered the facts of the case before the Committee and made a fair and reasoned decision. He argued that the said decision was made in transparency manner and that the parties were given adequate time to present their case.

41. Counsel for the Interested Party, who is the only counsel who complied with this courts directions and filed submissions within the time frames set by the court did not address the issue under consideration, understandably because he did not have the benefit or having the applicant's and the Respondent's submissions at the time of filing his submissions.

42. In resolving the instant issue, I find it fit to state that the rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process. These principles are premised on the supremacy of the Constitution and the rule of law. The principle of legality is an aspect of the rule of law and the exercise of public power is only legitimate where lawful.

43. The principle of legality requires that the exercise of public power must be rationally related to the purpose for which the power was given.^[7] This lies at the heart of the rationality test. Our courts have consistently held that rationality is a minimum requirement applicable to the exercise of public power in that decisions must be rationally related to the purpose for which the power is given otherwise they are in effect arbitrary and inconsistent with the requirement of rationality. The rational connection means that objectively viewed, a link is required between the means adopted by the person exercising the power and the end sought to be achieved.

44. The test therefore in relation to rationality requirements is twofold. *First*, the decision-maker must act within the law and in a manner consistent with the Constitution. The decision maker must not misconstrue the nature of his or her powers. *Second*, the decision must be rationally related to the purpose for which the power was conferred. This is because if it were not, the exercise of power would, in effect, be arbitrary and at odds with the rule of law.^[8] As was held in *Republic v Public Procurement Administrative Review Board ex parte Trippex Construction Company Limited & another*,^[9] rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of Fair Administrative Action Act^[10] (herein after referred to as the FAA Act) which provides court or tribunal under subsection (1) may review an administrative action or decision, if- the administrative action or decision is not rationally connected to-

- a) *the purpose for which it was taken;*
- b) *the purpose of the empowering provision;*
- c) *the information before the administrator; or*
- d) *the reasons given for it by the administrator."*

45. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* Chaskalson P, stated that :^[11]

"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

46. In applying the test of rationality, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the materials made available and the conclusion arrived at.^[12]

47. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the FAA Act. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the

empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*^[13] O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*.^[14]

“The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock... as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt’. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. ... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.”

48. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be “objectively so devoid of any plausible justification that no reasonable body of persons could have reached it^[15] and that the impugned decision had to be “verging on absurdity” in order for it to be vitiated.^[16] In *Prasad v Minister for Immigration*,^[17] it was held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required “something overwhelming.” It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when “looked at objectively... so devoid of any plausible justification that no reasonable body of persons could have reached them”.

49. A decision, which fails to give proper weight to relevant factors, may also be challenged as being unreasonable.^[18] If an administrative or quasi-judicial body takes into account any reason for its decision, which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.^[19]

50. I have stated in several decisions, review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. The following propositions can offer guidance on what constitutes unreasonableness:-

- i. *Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;*
- ii. *This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the “range” within which reasonable minds may differ;*
- iii. *The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was “not reasonably open” is the same as saying that “no reasonable decision maker” could have made it;*

51. It is beyond argument that the legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused. Legal unreasonableness comprises any or all of the following:- Specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.^[20]

52. The court's role is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the ‘area of decisional freedom’ of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently. Other than loosely using the word unreasonable, the applicant never went further to demonstrate how and why the decision is unreasonable. By loose sense, I mean, the reasons propounded by the applicant do not fall anywhere near the tests for unreasonableness. On the contrary, as shortly explained, the cited reasons go into the merits of the decision.

53. The Respondents' mandate flows common ground from the enabling statute. There is no contest that a complaint was filed against the applicant. Its undisputed he was served with the complaint and was afforded an opportunity to reply. There is nothing before me to show that a reasonable body, faced with the same set of facts and circumstances, would have acted differently. In other words, I find that the applicant has not demonstrated that the decision is tainted with unreasonableness or irrationality. On the contrary, a faithful reading of the enabling law, the proceedings and the impugned decision shows that the proceedings and the outcome are rationally related to the purposes of the statute.

54. Judicial intervention in Judicial Review matters is limited to cases such as where the decision was arrived at arbitrarily, capriciously or *mala fide*; or where the decision is arrived at as a result of unwarranted adherence to a fixed principle; or where the decision is undertaken in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him/it and took into account irrelevant considerations or ignored relevant ones; or where the decision is so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter. None of these has been established. Applying the tests for unreasonableness and irrationality discussed above, I find and hold that none has been proved in this case. It follows that the applicant's argument that the decision is tainted with unreasonableness and irrationality collapses.

55. Next is the applicant's counsel's argument that the Respondents conceded that they did not possess adequate professional knowledge on the professional issue that was the subject matter of the complaint. Counsel argued having so conceded, no reasonable body could have arrived at the impugned decision. Closely related to the above line of argument is the applicant's advocates' submission that the Respondents

having so conceded, relied on an opinion uploaded from internet without seeking a proper professional opinion on the issue from readily available experts. He argued that the foregoing conduct led to a wrong decision.

56. The above argument sounds attractive; however, it collapses on three fronts. *First*, the composition of the Council and the Committees established under the Act is provided for under sections **3A & 4A** of the Act respectively. There is nothing to show that the composition of the Respondents and the mode of their appointments did not conform to these provisions. That alone extinguishes the applicant's argument.

57. *Second*, there is no argument or attempt even in the slightest form challenging the composition of the Respondents. For the applicant's argument to have value, it was incumbent upon him to study the statutory provisions providing for the composition of the Respondents and point out non-conformity with the statute. Such a line of argument could have added weight on the allegations, which seem to challenge to professional expertise and competence of the Respondents.

58. *Third*, the applicant's counsel argued that the Respondents confessed that they were not experts in the field in question (though it is not clear how a committee or a body comprising of professionals and or persons professing expertise in the fields of medicine, dentistry etc and appointed in accordance with the act could lack the expertise as alleged). To me, the applicant picked the alleged admission out of context. He is deliberately confusing it with inability to appreciate the nature of the complaint before them.

59. *Next* is the issue whether the Respondents acted in excess of their jurisdiction. The Applicant's counsel did not address this issue.

60. On his part, the Respondent's counsel submitted that the Respondents are clothed with jurisdiction flowing from the enabling Act and the Rules hence they did not act in excess of jurisdiction. He argued that the second Respondent is established under **Section 4** of the Act and that section **20** of the Act makes provision for disciplinary proceedings on complaints made by persons dissatisfied with any professional service offered or allegations of breach of standards by a registered or licensed person under the Act. He submitted that the second Respondent is empowered to receive complaints against Medical, Dental Practitioners, or Medical Institutions from different sources and has the expertise to investigate and make decisions. He argued that in the instant case, there is no dispute that the Interested Party lodged a complaint against the applicant on behalf of her child. He argued that the Respondents acted within their jurisdiction in making the impugned determination.

61. He submitted that the 1st Respondent deliberated at length on the recommendations or Orders to be recommended under the circumstances of the case while considering its mandate and powers as set out in **Rule 4** of the *Medical Practitioners and Dentist (Disciplinary Proceedings) (Procedure) Rules* and the applicable Code of Conduct. He also argued that in compliance with the provisions of the Act, as read together with the Rules enacted thereunder, the Committee presented its findings to the Full Council of the Medical Council in its sitting of 4th October, 2019 that adopted the findings. He added that the decision was communicated to the applicant.

62. Counsel for the Interested Party submitted that section **4(1) (j)** of the Act empowers the Council to regulate the conduct of Medical Practitioners and take disciplinary measures for any form of professional misconduct. He also cited section **20** of the Act, which provides for disciplinary proceedings.

63. The core issue here as I see it is whether the impugned decision was arrived at *ultra vires* the Respondents' legal mandate. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. I am afraid, the applicant never attempted to go this far, at least to demonstrate that the impugned decision is illegal. Differently put, the applicant never bothered to examine the Respondent's statutory mandate and demonstrate that the impugned decision falls outside its legal mandate.

64. The core question here is whether the Respondents remained within the areas assigned to it by Parliament. The courts when exercising this power of construction are enforcing the rule of law, by requiring statutory bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.^[21] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

65. The Constitution requires a purposive approach to statutory interpretation.^[22] The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.^[23] The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."^[24]

66. In *Natal Joint Municipal Pension Funds v Endumeni Municipality*^[25] the court acknowledged the interpretation that gives regard to the manifest purpose and contextual approach as the proper and modern approach to statutory interpretation. In *In re Birdie v General Accident Fire and Life Assurance Corporation Ltd*,^[26] the court stated the following on the contextual approach to statutory construction:-

"The real question to be decided is, what does the word mean in the context in which we here find it, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy."

67. In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others*^[27] Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

“In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment.”

68. The above excerpt is useful while ascertaining the purpose of a statute. In the context of this case, this position becomes clear if we read the preamble to the enabling Act. Also relevant is section 3 of the Act which establishes the Medical Council, its functions as enumerated in section 4 which include regulating the conduct of registered Medical and Dental Practitioners and taking such disciplinary measures for any form of professional misconduct as stipulated in section 4 (j). Also relevant is section 20 of the act, which provides for disciplinary proceedings and section 23, which provides for the enactment of the Rules for the better carrying of the provisions of the act.

69. The starting point is whether the enabling statute and the Rules made thereunder confer mandate upon the Respondents to perform the impugned functions. The functions prescribed in section 4 include regulating the conduct of registered medical and dental practitioners and to take such disciplinary measures for any form of professional misconduct; registering and licensing health institutions; carrying out inspection of health institutions; regulating health institutions and taking disciplinary action for any form of misconduct by a health institution; (n) accredit continuous professional development providers; issuing certificate of status to medical and dental practitioners and health institutions; and do all such other things necessary for the attainment of all or any part of its functions. Also relevant is section 20 of the Act which provides as follows:-

20. Disciplinary proceedings

(1) Any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person under this Act, may lodge a complaint in the prescribed manner to the Council.

(2) The Council may, or through a committee appointed for that purpose, inquire into any complaint of professional misconduct, malpractice or any breach of standards.

(3) Upon an inquiry held by the Council to determine the complaint made under subsection (2), the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or through a representative.

(4) For purposes of proceedings at any inquiry held under this section, the Council may administer oaths, enforce the attendance of witnesses and production of books and documents.

(5) The Council shall regulate its own procedure in disciplinary proceedings.

(6) Where after an inquiry, the Council determines that a person is guilty, the Council may—

(a) issue a caution or reprimand in writing;

(b) direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months;

(c) direct the medical practitioner or dentist be placed on probation for a period not exceeding six months;

(d) suspend, withdraw or cancel the practising licence of a medical practitioner or dentist for a period not exceeding twelve months;

(e) suspend, withdraw or cancel the licence of a health institution or a section of the health institution for a period not exceeding twelve months;

(f) permanently remove the name of a medical practitioner or dentist from the registers under section 5(3); or (g) in addition to the penalties stipulated in paragraphs (a), (b), (c), (d), (e) or (f), impose a fine which the Council deems appropriate in the circumstance.

(7) A person or health institution whose licence has been withdrawn or cancelled under subsection (6), shall forthwith surrender the license to the Council.

(8) A person or health institution whose name has been removed from the register under subsection (6)(f) shall forthwith surrender the registration certificate to the Council.

(9) A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court.

(10) Notwithstanding the provisions of section 3A (5), the Council shall not remove the name of a person from the register under

subsection (6) unless at least seven members of the Council are present in the inquiry.

70. The first Respondent is a Committee of the Council established under section 4A of the Act. Section 4A (1) (b) provides that the mandate of the D&EC include— *(i) conducting inquiries into complaints submitted to it; (ii) regulating professional conduct; (iii) ensuring fitness to practice and operate; (iv) promoting mediation and arbitration between parties; and (v) at its own liberty, recording and adopting mediation agreements or compromise between parties, on the terms agreed.*

71. Section 23 of the Act provides for enactment of rules in the following words:-

23. Rules

The Cabinet Secretary may, after consultation with the Council, make rules generally for the better carrying out of the provisions of this Act, and any such rules may, without prejudice to the generality of the foregoing— (a) prescribe anything required by this Act to be prescribed; (b) provide for the procedure to be followed by the Board in an inquiry under section 20;

72. It follows that the rules enjoy a statutory underpinning. The rules are explicit on the mandate and functions of the D& EC. Section 4A (1) (b) provides that the mandate of the D& EC includes— *(i) conducting inquiries into complaints submitted to it; (ii) regulating professional conduct; (iii) ensuring fitness to practice and operate; (iv) promoting mediation and arbitration between parties; and (v) at its own liberty, recording and adopting mediation agreements or compromise between parties, on the terms agreed.*

73. *The medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) (Amendment) Rules, 2012* introduced amendments to the hitherto existing Rules, namely, the *Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules*. Rule 4 was amended as follows:— (a) in paragraph (1), by deleting the words "and to determine and report to the Board whether an inquiry should be held, pursuant to section 20 of the Act, in respect of the medical practitioner (b) in paragraph (2) (b), by deleting the word "Board" appearing immediately before the word "together" and substituting therefor the words "**Professional Conduct Committee**"; and (c) by deleting paragraph (3). 3. The principal Rules are amended by inserting the following new rule immediately after rule 4— 4A (1) There is established a **Professional Conduct Committee** consisting of the following persons appointed by the Board— (a) a chairperson; (b) two persons registered in the same profession in which a medical practitioner or dentist whose conduct is being inquired to is registered; (c) one member of the Board; (d) one person representing the general public; (e) an advocate of the High Court who shall be the legal advisor; and the Chief Executive Officer of the Board.

74. At the risk of repeating myself, in a departure from the past, the Rules provide for the functions of the D&E C as follows: — *(a) conduct inquiries into the complaints submitted by the PIC made under rule 4(2) and make appropriate recommendations to the Board; (b) ensure that the necessary administrative and evidential arrangements have been met so as to facilitate the Board to effectively undertake an inquiry under rule 6; (c) convene sittings in respective counties to determine complaints; (d) promote arbitration between the parties and refer matters to such arbitrator as the parties may in writing agree.*

75. Paragraph 3 of the Rules provides that the PCC shall, subject to prior or subsequent approval by the Board, have power to— (a) levy reasonable costs of the proceedings from parties; (b) order a medical practitioner or dentist to undergo continuous professional development for a maximum of up to fifty points; (c) suspend licenses for medical institutions for up to six months; (d) order, closure of institutions until compliance with the requirements of the operating licence.

76. A faithful reading of the above provisions show that the Respondents acted within their statutory mandate. Put differently, the Respondents did not act outside or in excess of their jurisdiction nor did they commit a jurisdictional error. As was held in *Craig v South Australia (1995) HCA 58:-*

“A jurisdictional error occurs when the extent of that authority is misconceive. Decisions affected by jurisdictional error can be quashed by judicial review. Examples of jurisdictional errors include asking the wrong question, ignoring relevant material, relying on irrelevant material, and breaching natural justice.

Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers.” (Emphasis added)

77. It cannot be said that the Respondents fell into jurisdictional error or acted outside the general area of their jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of their functions and powers. There is evidence that the full Board approved the decision as the law requires. Additionally, a reading of the enabling statute and the rules leaves no doubt that the final orders are anchored on the law. In fact in the final orders, the Respondents cited the relevant provisions of the law which provide for the orders made, namely, section 4A (1) (b) (iv) of the Act and section 20(6) (g) of the Act.

78. Next is the question whether the impugned decision violated the applicant’s right to natural justice. The applicant’s counsel submitted that by choosing to make its decision without referring to the applicant’s response and falsely stating that the applicant had not provided the said response as at the time of the impugned decision, the Respondents deliberately chose to deny the applicant the opportunity to be heard. He argued that this failure led to a wrong decision that the applicant had breached professional standards in the said complaint.

79. He submitted that the inquiry was a judicial process, which was to determine legal rights; hence, the Respondents were required to comply with the law relating to administration of justice. He argued that it was illegal and contrary to the law relating to fair administration of justice for the Respondents to make the impugned decision on the false basis that the applicant had failed to provide the said evidence, when in fact the evidence was in their possession and without considering the facts established by the applicant’s said evidence.

80. The Respondent's advocates submitted that the Respondents did not depart from the procedure provided by the Rules. He cited sections **20(5)** and **23** of the Act and the Rules and submitted that *Medical Practitioners and Dentist (Disciplinary Proceedings) (Procedure) Rules* provide the procedure to be followed in disciplinary proceedings. He submitted that vide a letter dated **19th** January 2017, the Medical Council notified the applicant about the complaint and requested him to submit to it a comprehensive report responding to the allegations. He also argued that it also requested for a certified copy of the entire patient's file and any other relevant document(s) or information that will assist the PIC to carry out its investigations. He submitted that the applicant failed to respond to the said letter necessitating further reminders from the first Respondent together with tele-conversations requesting him to file his response to the complaint. He argued that the applicant delayed the inquiry by failing to respond, and, it was not until **22nd** June 2017 when the Medical Council received a report from the applicant dated **9th** July, 2013, which it rejected because it did not address the specific allegations or complaints. Subsequently, the applicant did submit an additional report. He also submitted that the PIC considered the complaint and the documents and concluded that there was need to conduct further investigations through interviews or *viva voce* evidence.

81. He referred to section **4A (1)(b)** of the Act which sets out the functions of the **D & EC** and argued that there was no dispute on the manner the inquiry would be conducted and all parties submitted to the first Respondent. He also argued that an advocate represented the applicant and at the close of the hearing, the Committee directed the Parties to file their submissions within a period of **30** days from **4th** June, 2019, translating to on or before **5th** July, **2019**. He submitted that applicant failed to file his submissions within the set timelines and he failed to seek an extension of time. He argued that the allegations that the applicant was not granted a hearing is an afterthought intended to mislead this court, and, that, he is estopped from challenging the directions which were given by the **D&EC**.

82. Further, the Respondents counsel argued that the applicant had not filed his submissions; hence, he cannot blame or fault the Respondents for his own failures. He cited *Magnolia Pvt Limited v Synermed Pharmaceuticals (K) Ltd*^[28] and urged the court to note the applicant's conduct of failing to file his response despite several reminders. He argued that the principles of natural justice were adhered to and that the Committee and the Medical Council made the impugned decision guided by the law.

83. It was his submission that all the Parties were granted sufficient time to file their documents. He added that the parties appeared before the Committee when directions on conducting the inquiry were issued, and none of the parties disputed the directions. He also submitted that after the hearing the Parties agreed on the timelines for filing their respective submissions. He submitted that by not considering the submissions filed by the Party, which failed to comply with the set timelines, the Respondents did not violate the rules of natural justice and fair trial. He argued that the *wednesbury's* principle cannot support the applicant's conduct and as any reasonable Tribunal, would have acted in the same manner. He submitted that the principle of natural justice depends on the circumstances of the case. (Citing *Judicial Service Commission v Mbalu Mutava & another*.^[29]

84. The Interested Party's counsel cited *Judge of the High Court and Another v Ng'uni*^[30] for the holding that if the proceedings are derived from statutes, then in the absence of any set or fixed procedures, the relevant authority must formulate and carry out the necessary procedures as envisaged in section **20(5)** of the Act. (*DeSouza v Tanga Town Council*^[31] cited). He supported his argument by citing Rule **101** reproduced later.

85. He argued that the applicant did not apply for extension of time as provided under rule **10S**. He cited *Beatrice Wanjiru Kamuri v John Kibira Muiruri*^[32] which held that a court should have little sympathy for persons who deliberately file their documents late. He also relied on *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others*^[33] for the holding that parties have a duty to comply with the timelines prescribed by the court. He also relied on *Nabro Properties Limited v Sky Structures Limited and 2 Others*^[34] which held that a person cannot base his claim on his own wrong and pointed out that the applicant filed his submissions two months after the Committee's directions and one month out of time.

86. On the alleged breach of natural justice, he cited *Wanyoike v MPDB* for the holding that it is not in every situation that the other side must be heard and argued that since the Respondent failed to comply with the time lines, the maxim *volenti non fit injuria*, applies. (Citing *United Millers Limited v John Mangoro Njogu*^[35]). He argued that the council cannot be faulted for properly exercising its discretion. Lastly, counsel cited *Wanyoike v Medical Practitioners and Dentist Board & another*^[36] which held that the PIC had no specific procedure provided for under its Rules and regulations as long as the procedure is fair and in keeping with good practices of fair hearing.

87. A convenient starting point is that a decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not been followed or if the "rules of natural justice" are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

88. The term *procedural impropriety* was used by [Lord Diplock](#) in the [House of Lords](#) decision *Council of Civil Service Unions v. Minister for the Civil Service*^[37] to explain that a public authority could be acting *ultra vires* (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of [judicial review](#), the other two being [illegality](#) and [irrationality](#).^[38]

89. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and [common law](#) rules of [natural justice](#) and fairness.^[39] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.^[40]

90. In recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.^[41] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it.

91. A decision contrary to natural justice is where the presiding Judge or Magistrate or Tribunal denies a litigant some right or privilege or benefit to which he is entitled to in the ordinary course of the proceedings, as for instance refusing to allow a litigant to address the court, or where he refuses to allow a witness to be cross-examined, or cases of that kind.^[42]

92. Section 4 of the FAA Act re-echoes Article 47 of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

93. Subsection 4 further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of Judicial Review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution.^[43]

94. Whether or not a person was given a fair hearing depends on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle.^[44]

95. What fairness demands depends on the context of the decision, and this is to be taken into account in all its aspects. The courts look at all the circumstances of the case to determine how the demands of fairness should be met.^[45] The foregoing implies that the range of procedural protections will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used "fairness" as an explanation of other grounds of review. This is apparent, for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on "wrongful" or "mistaken" assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

96. The Court of Appeal in *J.S.C. vs Mbalu Mutava*^[46] succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50(1) (2) of the Constitution. It held: - *first*, fair administrative action broadly refers to administrative justice in public administration. *Second*, it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. *Third*, the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.^[47] *Fourth*, fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.

97. Here is a case where the applicant consistently flouted directions issued by the Respondents from the very beginning when he was asked to respond to the complaint. Sadly, the applicant exhibited a careless attitude despite the Respondents accommodating him and according him many opportunities to present his case. Despite this careless and don't care attitude, the applicant faults the Respondents yet he filed his submissions one month late. Rule 101 of the *Medical Practitioners and Dentists (Disciplinary Proceedings) (Amendment) (Procedure) Rules, 2013* provides as:-

(1) Where a party fails to comply with directions given under these Rules, the Committee may, in addition to other powers available to it, before or at the hearing of the complaint dismiss the whole or part of the complaint, or, as the case may be, strike out the whole or part of a respondent's reply and where appropriate, direct that a party be excluded from participating in the hearing.

98. Sections 20(5) of the Act vests the second Respondent with power to regulate its own procedure. Section 23 of the Act provides for the enactment of Rules generally for the better carrying out of the provisions of the Act, which include the procedure to be followed by the Council in an inquiry under Section 20 of the Act. The *Medical Practitioners and Dentist (Disciplinary Proceedings) (Procedure) Rules* provide the procedure to be followed in disciplinary proceedings. A reading of the rules shows that the Respondents actions are anchored on the Law. The applicant was supplied with the complaint. He was accorded an opportunity to reply. An advocate in the proceedings represented him. He never raised any objections. He never applied for extension of time. The alleged breach of natural justice is unsustainable. The applicant's argument on this ground fails.

99. I now turn to the submission that the impugned decision was tainted with bias. The applicant's counsel submitted that the Respondent's failure to consider the applicant's submissions and documents is evidence of open bias, which led to a wrong decision.

100. The Respondents' relied on *Ernst & Young LLP v Capital Markets Authority & another*^[48] and submitted that the circumstances of this case do not disclose bias. The Interested Party's advocate did not address this ground of attack save maintaining that the Respondents acted within the law.

101. I find useful guidance in the Supreme Court of Canada's explanation that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."^[49] There are many similar judicial pronouncements, which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias --that of the fair minded and informed observer.^[50] This fictitious person provides a vessel in which the

courts can impart as little or as much knowledge as is required to provide context. The courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making.

102. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that "*justice should not only be done, but be seen to be done.*"^[51] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be impartial, rather than the narrower problem that they might in fact not be impartial.

103. The High Court of Australia explained, "*Bias, whether actual or apparent, connotes the absence of impartiality.*" Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.^[52] A claim of apprehended bias requires a finding that a fair-minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. As the Supreme Court of Kenya held in *Hon. Lady Justice Kalpana Rawal v Judicial Service Commission & Another*^[53] citing Professor Groves M. in "*The Rule Against Bias*"^[54] :- "... *claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand.*"

104. In formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man.^[55] The House of Lords also made clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion." In a subsequent decision, the House of Lords also affirmed that the fair-minded observer would take account of the circumstances of the case at hand.^[56]

105. Whether the allegation relates to actual or apprehended bias, it is a serious matter, which strikes to the validity and acceptability of a decision. Actual bias has been applied in the following two fact-situations: (a) where a decision maker has been influenced by partiality or prejudice in reaching a decision; and (b) where it has been demonstrated that a decision maker is actually prejudiced in favour or against a party.^[57]

106. What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the decision maker might be disposed towards one side or another in the matter in court. Case law shows that it is difficult to prove actual bias,^[58] apparently because of the subjectivity attendant upon it. It is enough that apparent bias be shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.^[59]

107. In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.^[60] As formulated, the test is: "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel.

108. I now apply the above tests laid down in the above jurisprudence to the facts of this case. The Respondent gave clear directions on filing responses and submissions, which the applicant consistently flouted. A reading of the impugned ruling shows that the Respondents analyzed the complaint, the response; it reviewed the patient's records and considered the inquiry by the PIC. It also considered the testimonies tendered during the hearing and the complainant's submissions. It noted that the applicant failed to file his submissions as at the deadline set for drafting its decision. I find no merit in the allegations of bias. This ground of assault based on alleged bias collapses.

109. Next, I will address the question whether the applicant is guilty on non-disclosure. The applicant's counsel gave this issue a wide berth despite the fact that it was raised in the Respondents' and Interested Party's submissions. Addressing the applicant's submissions that there was failure by the Committee to consider its submissions, which were filed on 8th August, 2019, the Respondent's counsel submitted that the applicant failed to disclose to this court the directions issued after the hearing. He argued that the said directions were issued in the presence and with the consensus of the Parties and the applicant's counsel. He argued that this was followed by a letter dated 4th June, 2019 directing the Parties to file their respective submissions within 30 days and which also gave prior notice of the scheduled Committee meeting to be held on 12th July, 2019 when the matter was to be deliberated by the Committee.

110. He urged the court to adopt the holding in the case of *Hussein Ali & 4 Others v Commissioner of Lands, Lands Registrar & 7 Others*^[61] where the court underscored a litigants obligation to make the fullest possible disclosure of all material facts within his knowledge, and if he fails, then he cannot obtain any advantage from the proceedings. He placed further reliance on *Brinks-MAT Ltd v Elcombe*^[62] which held that:- (i) the duty of the applicant is to make a full and fair disclosure of the material facts. (ii) The material facts are those, which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers. (iii) The Applicant must make proper inquiries before making the application. He argued that by failing to disclose the directions on filing submissions which the applicant failed to comply, the applicant has come to a court of equity with unclean hands and hence undeserving any equitable remedy. He argued that there was material non-disclosure by the applicant, which was intended to mislead the court to decide in his favour. He urged the court to hold that the applicant is guilty of material non-disclosure and hence undeserving the reliefs sought.

111. Counsel for the Interested Party cited *KANU v Hon Mwai Kibaki*^[63] which held that an applicant for an order of judicial review is obliged to disclose to the court all the relevant matters. He faulted the applicant for failing to make a candid disclosure of material facts, a failure he argued is a ground for the court to refuse the reliefs sought citing *Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (JV) & another (Interested Parties); Ex parte Magal Security Systems Ltd/Firefox Kenya Limited (JV) [2019] eKLR,*

112. A person who approaches the court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material facts, which have a bearing on the adjudication of the issues raised in the case. A litigant owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. (See *R. v. Kensington Income Tax Commissioner*^[64]). The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use..."^[65] The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.^[66] Abuse of court process involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. The applicant has not been candid in this case. One of his core grounds is that the Respondent failed to consider his submissions and documents. He carefully avoided mentioning that he filed the said papers outside the prescribed time. This disclosure ought to have been made at the earliest opportunity. Had the applicant disclosed that he had failed to comply with court orders, the court could not have granted him the *ex parte* orders. It is my finding that the applicant is guilty of material non-disclosure.

113. Lastly, I will address the question whether the applicant has established any grounds to merit the judicial review orders sought, an issue only addressed by counsel for the Interested Party. He submitted that the applicant has not met the tests set out in *Kenya National Examination Council v Republic*^[67] and maintained that the grounds cited by the applicant go to the merit of the case. He relied on *Republic v Public Procurement Administrative Review Board & 3 others ex-parte Saracen Media Limited*^[68] which discussed the difference between appeals and judicial review. I have carefully reviewed the applicant's grounds. These can be summarized as failure to consider his submissions. Reliance on internet material. That the applicant cited more authoritative guidelines. That the Respondents did not find any actual algorithm in literature to help them resolve the professional issues. That the Respondents lacked expertise on the key issues. The Respondents failure to seek guidance from an expert in the field in question. These grounds are essentially inviting this court to review the merits of the decision. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at in excess of jurisdiction, arbitrarily, capriciously, *mala fides* or in breach of natural justice, a position elucidated in *Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others*.^[69]

114. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples include where an applicant's own conduct has been unmeritorious or unreasonable. For example, where an applicant has unreasonably delayed in applying for judicial review, or where the applicant has not acted in good faith, or is guilty on non-disclosure as in this case. Others include where an applicant has violated the law or committed a criminal offence or where a remedy would impede the authority's ability to perform its functions. In the instant case, faulting the Respondents for declining to admit submissions filed manifestly without leave would impede with its proper exercise of its statutory mandate.

115. In *Republic v Judicial Service Commission ex parte Pareno*^[70] the court held that (i) judicial review orders are discretionary and are not guaranteed, (ii) a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. (iii) since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. (iv) since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.^[71]

116. The applicants pray for a writ of *certiorari*. *Certiorari* is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say, it is declared completely invalid, so that no one needs respect it. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. No material has been presented before me to show that the decision is tainted with illegality or procedural impropriety to warrant the writ of *certiorari*.

117. The applicants also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. There is nothing to be prohibited. A writ of *prohibition* cannot issue in the circumstances.

118. I cannot conclude this determination without examining comparable jurisprudence and in particular examining how courts in other jurisdictions have construed the law in similar cases. I appreciate that foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues confronting us in this matter. At the same time, I appreciate foreign case law will not always provide a safe guide for the interpretation of our Constitution.

119. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence^[72] and develop our common law in a manner that promotes the values and principles enshrined in our Constitution. In this regard the Constitution at Article 43 (1) (a) guarantees the highest attainable standard of health which includes the right to health care services.

120. The Supreme Court of India has severally pronounced itself on the subject of professional misconduct. In *P.J. Ratnam v. D. Kanikaram*,^[73] it held that the object of a proceeding in respect of professional misconduct under the *Bar Councils Act* and similar statutes is to ensure that highest standards of professional conduct are maintained; the proceedings though in a sense penal, are solely designed for the purpose of maintaining discipline to ensure that a person does not continue in practice who by his conduct has shown that he is unfit so to do.

121. Similarly in *V.C. Rangadurai v. D. Gopalan*^[74] the Supreme Court of India reiterated that disciplinary proceedings are *sui generis* and

are neither civil nor criminal in character and that as a rule even in exercise of appellate power the Court would not, as a general rule interfere with the concurrent finding of fact by the Disciplinary Committee unless the finding is based on no evidence or it proceeds on mere conjecture and unwarranted inferences.

122. In addition, the Supreme Court of India in *Rajendra V. Pai v Alex Fernandes*^[75] held that ordinarily the court does not interfere with the quantum of punishment where an elected statutory body of professionals has found one of their own kinsmen guilty of professional misconduct unless the punishment is found to be totally disproportionate to the misconduct. The Division Bench of the Court in *Satendra Singh v Union of India*^[76] though in a different context held that in exercising jurisdiction under [Article 226](#) of the Constitution of India, the Court is not to sit as a superior medical expert expressing opinions over the opinions rendered by the experts in the field.

123. The scope of interference by the courts in such matters was defined by the English Courts in *Meadow v General Medical Council*^[77] and *Raschid v General Medical Council*^[78] as here under:-

- a. *The panel is concerned with the reputation and standing of the medical profession, rather than with the punishment of doctors;*
- b. *The judgment of the panel deserves respect as the body best qualified to judge what the profession expects of its members in matters of practice and the measures necessary to maintain the standards and reputation of the profession;*
- c. *The panel's judgment should be afforded particular respect concerning standards of professional practice and treatment;*
- d. *The court's function is not limited to review of the panel decision but it will not interfere with a decision unless persuaded that it was wrong. The court will, therefore, exercise a secondary judgment as to the application of the principles to the facts of the case before it.*

124. It has further been held that since the principle purpose of the Panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, particular force is given to the need to accord special respect to the judgment of the professional decision-making body in the shape of the Panel.

125. In *Noratanman Courasia v. M. R. Murali* the Supreme Court of India explored the amplitude and extent of the words “professional misconduct.” In arriving at the decision, the Supreme Court carried out an over-view of the jurisprudence of the courts in the area of misconduct of advocates, which can to a large scale apply to the field of Medicine. It reiterated that the term “misconduct” is incapable of a precise definition. Broadly speaking, it envisages any instance of breach of discipline. It means improper behavior, intentional wrongdoing or deliberate violation of a rule of standard of behavior. It stated that the term may also include wrongful intention, which is not a mere error of judgment. Therefore, “misconduct,” though incapable of a precise definition, acquires its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty.

126. In a recent similar decision, I observed that the standard of conduct of Doctors flows from the broad canons of ethics and high tone of behavior. The reasonableness or otherwise of the impugned decision is to be appreciated with clear understanding of the broad definition of reasonable standards of conduct as opposed to the restrictive approach. The real question here is whether professional misconduct was established. The reasonableness or otherwise of the decision is to be discerned from the facts and circumstances captured in the Respondent’s observations and findings in the impugned decision. The second step is to apply the findings to the definition of what constitutes misconduct then we determine whether the decision is reasonable or otherwise.

127. The constitutional and legislative framework governing conduct of Doctors and Dentists is legally binding. A patient approaching a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief to his medical problem. The relationship takes the shape of a contract retaining the essential elements of tort. A doctor owes certain duties to his patient and a breach of any of these duties gives a cause of action against the doctor.

128. Expectations of a patient are two-fold: doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff. He is expected to use his special knowledge and skill in the most appropriate manner keeping in mind the interest of the patient who has entrusted his life to him. The fairness and lawfulness of the disciplinary process and the ensuing decision must be assessed in terms of the provisions of the enabling statute, Rules made pursuant to the enabling act, the Regulations and the *Fair Administrative Action Act*.^[79]

129. In view of my analysis of the facts, the law, the authorities and conclusions enumerated herein above, the conclusion becomes irresistible that the applicant’s case is unmerited. This is not a proper case for the court to unleash any of the judicial review orders sought. The upshot is that the applicant’s Notice of Motion dated 21st February 2020 is fit for dismissal. Accordingly, I dismiss the said application with costs to the Respondents and the Interested Party.

Right of appeal

Signed, Dated and Delivered vis e-mail at Nairobi this 18th day of September 2020

John M. Mativo

Judge

[1] Cap 253, Laws of Kenya.

[2] *Ibid.*

[3] **Hepatisation** is a stage of lobar pneumonic consolidation. In the early stage there is hemorrhagic fluid within the alveoli which gets organized, resulting in a pathological appearance called "red **hepatisation**". Later on fibrosis occurs in the organized exudate leading to an appearance called "gray **hepatisation**".

[4] Mombasa JR No. 59 of 2017.

[5] JR No. 2 of 2014.

[6] {2019} e KLR.

[7] *Affordable Medicines Trust and others v Minister of Health and others* {2005} ZACC 3; 2006 (3) SA 247 (CC) at para 75.

[8] See Moseneke DCJ in *Masetlha v President of the Republic of South Africa and Ano* {2007} ZACC 20; 2008 (1) SA 566 (CC) at para 81.

[9] JR No 605 2015.

[10] Act No. 4 of 2015.

[11] 2000 (4) SA 674 (CC) at page 708; paragraph 86.

[12] *Trinity Broadcasting (Ciskei) v ICA of SA* 2004(3) SA 346 (SCA) at 354H- 355A Howie P

[13] {2004} ZACC 15; 2004 (4) SA 490 CC at 512, para 44.

[14] {1995} 1 All ER 129 (HL) at 157.

[15] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821]).

[16] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[17] {1985} 6 FCR 155

[18] *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 per Mason J (at 41).

[19] See *Patel vs Witbank Town Council* 1931 TPD 284 Tindall J said (at 290);

[20] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) *Administrative Justice and its Availability* (Federation Press, 2015) 37.

[21] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[22] For examples of a purposive approach to statutory interpretation, see *African Christian Democratic Party v Electoral Commission and Others* {2006} ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); at paras 21, 2

5, 28 and 31; *Daniels v Campbell NO and Others* {2004} ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3; *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others* {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[23] Thornton *Legislative Drafting* 4ed (1996) at 155 cited in JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[24] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[25] 2012 4 SA 593 (SCA).

[26] 1949 Ch D 121 130.

[27] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[28] {2018} e KLR.

[29] Civil Appeal No. 52 of 2015 [2015] e KLR.

[30] {2007} 2 EACA 201.

[31] {196} EA 377

[32]{2016} e KLR.

[33] {2013} e KLR.

[34] {2002} 2 KLR 299.

[35] {2016} e KLR.

[36] {2017} e KLR.

[37] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, *House of Lords* (UK).

[38] *Ibid.*

[39] Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", *Textbook on Administrative Law* (6th ed.), Oxford: *Oxford University Press*, pp. 342–360 at 331, ISBN 978-0-19-921776-2.

[40] *Supra*, note 18.

[41] David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* <http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf>.

[42] (1897) 18 N.S.W.R. 282, 288 (S.C.).

[43] In the South African Case *Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others*, Chaskalson, J (CCT) 31/99 [2000] ZACC 1; 2000 (2) ZA 674.

[44] See S. De Smith, *Judicial Review of Administrative Action*, 4th ed. J. Evans (1980), 352- 4.

[45] See also *McInnes v. Onslow-Fane* [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[46] {2015}eKLR

[47] *Ibid.*

[48] Petition No. 385 of 2016 [2017] eKLR

[49] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[50] *Minister for Immigration and Multicultural Affairs Ex p Jia* (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); *Bell v CETA* (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); *PCCW-HKT Telephone Ltd v Telecommunications Authority* [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

[51] *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": *Shragar v Basil Dighton Ltd* [1924] 1 KB 274 at 284.

[52] *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

[53] Supreme Court No. 11 of 2016.

[54] {2009} U Monash LRS 10.

[55] [1993] UKHL 1; [1993] AC 646 at 670.

[56] Porter v Magill [2001] UKHL 67; [2002] 2 AC 357.

[57] See *McGuirk v University of New South Wales* 2010 NSWADTAP 66 paras 9 and 11; *PCL Constructors Canada Inc v IABSORIW Local No 97* 2008 CanLII 39763 (BCLRB) para 1.

[58] On the contrary, Burns and Beukes Administrative Law 303-304 think it is the other way round. For them, it is generally "a simple matter to identify actual bias since the administrator will reflect a closed mind to the issues raised." In their view, "a reasonable suspicion of bias or perceived bias is rather more complex"

[59] Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; Granpré J, *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393. *Vakuata v Kelly* 1989 167 CLR 568 (HCA) is another example. The trial judge had made statements critical of the evidence given by defendant's medical experts in previous cases. The Australian High Court held that although no case of actual bias was made out against the judge, the remarks made by him would have excited in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him

[60] *Sager v Smith* 2001 3 SA 1004 (SCA); *S v Roberts* 1999 4 SA 915 (SCA). See also the judgment of Leon JP in the Swazi Court of Appeal in *Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire*; *In Re Stanley Wilfred Sapire* 2002 (Unreported) Civ Appeal No. 49/2001 (Re Sapire).

[61] {2013} e KLR.

[62] {1988} 3 ALL ER 188.

[63] High Court Miscellaneous No. 128 of 2003.

[64] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[65] Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[66] *Public Drug Co V Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415

[67] Court of Appeal at Nairobi Civil Appeal No. 266 of 1996.

[68] {2018} e KLR.

[69] Civil Appeal No. 266 of 1996 {1997} e KLR.

[70] {2004} 1 KLR 203-209

[71] See *Anthony John Dickson & Others vs. Municipal Council of Mombasa*, Mombasa HCMA No. 96 of 2000.

[72] Ibid

[73] {1964} 3 SCR 1.

[74] {1979} 1 SCC 308.

[75] {2002} 4 SCC 212.

[76] MANU/DE/2694/2009.

[77] {2007} Q.B. 462.

[78] {2007} 1 W.L.R. 1460.

[79] Act No. 4 of 2015.