**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTION & HUMAN RIGHTS DIVISION**

**PETITION NO. 23 OF 2012**

**IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA**
**AND**

**IN THE MATTER OF: ARTICLE 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 28, 31, 47, 50, 165, 166, 168, 171 AND 172 OF THE**

**CONSTITUTION OF THE REPUBLIC OFKENYA**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND/OR THREATENED VIOLATION OF FUNDAMENTAL RIGHTS**
**AND**
**FREEDOMS INDIVIDUAL AS ENSHRINED UNDER ARTICLES 25, 27, 28, 31, 45, 47 AND 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: SUCCINT PRINCIPLES OF NATURAL JUSTICE**

**AND**

**IN THE MATTER OF: THE PRINCIPLES OF PROPORTIONALITY, REASONABLENESS AND LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF: THE DOCTRINE OF SEPARATION OF POWERS AND INDEPENDENCE OF THE JUDICIARY**

**AND**

**IN THE MATTER OF: THE HONOURABLE LADY JUSTICE NANCY MAKOKHA BARAZA,**

**DEPUTY CHIEF JUSTICE OF THE REPUBLIC OF KENYA AND VICE PRESIDENT OF THE SUPREME COURT OF KENYA**

**AND**

**IN THE MATTER OF: A PURPORTED PETITION TO HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF KENYA,**
**BY THE JUDICIAL SERVICE COMMISSION TO SUSPEND AND APPOINT A TRIBUNAL TO INVESTIGATE**
**THE CONDUCT OF THE HONOURABLE DEPUTY CHIEF JUSTICE, LADY JUSTICE NANCY MAKOKHA BARAZA,**
**VICE PRESIDENT OF THE SUPREME COURT OF KENYA**

**AND**

**IN THE MATTER OF: THE SUSPENSION OF THE DEPUTY CHIEF JUSTICE AND ESTABLISHMENT OF A TRIBUNAL IN THE MATTER**

**AND**

**IN THE MATTER OF: GENDER DISCRIMINATION UNDER ARTICLE 27 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: INTERNATIONAL HUMAN RIGHTS LAW, THE UNIVERSAL DECLARATIONS OF HUMAN RIGHTS, 1948,**
**THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, THE BANGALORE AND LATIMA PRINCIPLES**
**AND UNITED NATIONS RESOLUTIONS AND INTERNATIONAL LAW.**

**AND**

**IN THE MATTER OF: THE JUDICIAL SERVICE ACT, NO. 1 OF 2011,**
**THE PUBLIC OFFICER ETHICS ACT, JUDICIAL SERVICE CODE OF CONDUCT AND ETHICS.**

**BETWEEN**

**HONOURABLE LADY JUSTICE NANCY MAKOKHA BARAZA**
**…… PETITIONER/APPLICANT**

**VERSUS**

**THE JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT**

**AUGUSTINO STEPHEN LAWRENCE RAMADHAN.....3RD RESPONDENT**

**JUDITH MBULA BEHEMUKA.....4TH RESPONDENT**

**SUKRINDER KAPILA…….....……...5TH RESPONDENT**

**BEAUTTAH ALUKHAVA SIGANGA…….….....……6TH RESPONDENT**

**GRACE BARABARA NGELE MADOKA…….....……7TH RESPONDENT**

**MUGAMBI JESSE NDWIGA KANYUA…..…….....….8TH**

**RESPONDENT**

**VALERIE ONYANGO…….....……..9TH**

**RESPONDENT**

**GEDION SOLONKA KILAKOI..……..….....….10TH**

**RESPONDENT**

## JUDGEMENT

### Introduction

**1.** The matter before us is a Constitutional Petition dated 25th January, 2012 and amended on 13th February, 2012. The Petitioner is a person who has achieved some 'firsts" of sorts almost in the league of Jeffrey Archers "FIRST AMONG EQUALS". She was appointed to the said posts having gone through a rigorous interviewing process conducted by the Judicial Service Commission. It is this same body which had assessed her performance during interviews for the post of DCJ, with approval, that has now made recommendations for her suspension and setting up of a tribunal which is a step towards disciplinary proceedings.

**2.** The 1st respondent is Judicial Service Commission, a Constitutional Commission established under Article 171 of the Constitution of the Republic of Kenya tasked with amongst other functions, recommending the appointment of persons to be appointed as Judges to the President of the Republic of Kenya. It shall variously be referred to hereinafter as "the Commission" or "JSC".

**3.** The 2nd respondent is the Principal Legal Adviser and the Attorney General to the Government of the Republic of Kenya.

**4.** The 3rd 4th, 5th, 6, 7th and 8th Respondents are members of the tribunal.

**5.** The 9th and 10th respondents are Lead and Assistant Counsel, respectively, of the Tribunal.

**6.** The precursor to the issues for our determination are events which took place on Saturday 31st December 2011 at the Village Market, an up market shopping mall in the outskirts of Nairobi, involving the Petitioner and a security guard, one Rebecca Kerubo (also known as Kemunto). The matter was then reported to Gigiri Police Station by Kerubo who alleged that she was assaulted, intimidated and threatened by the Petitioner herein. Police commenced investigations into the incident. Thereafter the press picked up the episode and it generated a lot of discussions, debate, commentaries and critical analysis in both print and electronic media.

**7.**As a result of the enormity and the magnitude of the matter, it attracted considerable amount of public debate and discussion. The debates and the discussions were elaborate and to some extent sensational. The debate centred on what was the expectation of the petitioner and Ms. Kerubo in matters revolving around public safety and security. The articles and the publications were generally geared towards the manner in which public officers should behave and conduct themselves. The matter was thereafter taken by the Criminal Investigation Department Headquarters to continue with the investigations in order to determine the criminal liability and/or probity of the incident.

**8.** In light of the foregoing, the Honourable the Chief Justice, Dr. Willy Mutunga, the Chairman of the Commission, vide a Press Release dated 5th January 2012, while reiterating his commitment and that of the leadership of the Judiciary to the Rule of Law and their steadfast belief in the equality of all before the law, with a view to instituting the judiciary's own internal investigations, convened an emergency meeting of the Commission to discuss the matter, while at the same time recognising that the police were conducting their own investigations into the matter which should be allowed to proceed without undue influence or interference from any quarters. On 9th January 2012, a full Commission meeting presided over by the Chief Justice met at which it was resolved a sub committee be appointed of eight members to look into the said incident and report back to the Commission. The sub committee was to be chaired by

Reverend Samuel Kobia, with other members being Commissioners Justice Isaac Lenaola, Prof. Christine Mango, Emily Ominde, Florence Mwangangi, Ahmednasir Abdullahi and Titus Gatere. The secretary was Gladys Shollei, the Chief Registrar of the Judiciary.

**9.** The said sub committee's terms of reference were:

> **1. To investigate all aspects or facets of the incident, altercation, exchange, disagreement and/or argument between the DCJ, Mrs Nancy Baraza and Mrs. Rebecca Kemunto on New Year 's Eve at Village Market Shopping Centre.**
> **2. To interview, interrogate and debrief Ms Nancy Baraza, Mrs. Kemunto and any material witnesses relevant to the incident.**
> **3. To hear, receive any report or information that the general public may forward relating to the incident.**
> **4. To liaise and collaborate with any agency or institution that may have relevant information, report or witness' testimony relevant to the incident.**
> **5. To report its findings and recommendations on the incident and all relevant issues to the JSC on 13th January 2012.**

**10.** The sub committee interpreted and understood its mandate to be holistic appraisal, audit and investigation of all facets of the Village Market incident in so far as it relates to the person of the Deputy Chief Justice. The subcommittee took recognizance of the fact that its mandate relates to an investigation as to whether the Deputy Chief Justice had breached the judicial code of conduct, acted in a gross manner or showed, exhibited a conduct that can be termed as a gross misconduct or misbehaviour under Article 168 of the Constitution.

**11.** The sub committee embarked to discharge its mandate by receiving oral and documentary evidence. There were a total of 15 witnesses among them the Petitioner and the Complainant. The complainant Rebecca Kerubo testified that on 31st December 2011 at 6.00 p.m. while on duty, a lady she did not recognize, wilfully bypassed the security desk without submitting herself to a mandatory security check. According to her the Petitioner was un co-operative, rude and dismissive; the petitioner assaulted her and in the process told her she "needed to know important people"; the Petitioner later came back to the security desk after buying medicine and ordered her bodyguards to shoot Mrs. Kerubo; and that when the guard declined to obey the order the Petitioner went away and came back with a gun, which she pointed at her and threatened to shoot.

**12.** The Petitioner was afforded an opportunity to testify before the sub committee. According to her evidence, an incident did occur on 31st December 2011 at the Village Market. The Petitioner was summoned to the Gigiri Police Station on 2nd January 2012 where she recorded a statement with the police. On 7th January 2012 the Petitioner reported to the CID Headquarters and recorded a further Statement before two police officers. The Statement recorded before the CID Officers, according to her, was obtained by duress and in total disregard of her constitutional rights.

**13.** The sub committee in due course prepared its report which it handed over to the 1st Respondent. After lengthy deliberation, evaluation of witness testimonies and other material evidence submitted, the Commission resolved that pursuant to Article 168(4) it would send a petition to the President with a view of suspending Lady Justice Nancy Baraza as a judge of the Supreme Court and Deputy Chief Justice of the Republic of Kenya and to appoint a tribunal to investigate her conduct. By a letter dated 19th January 2012, the Commission informed the Petitioner that after investigating the incident, it had resolved to send a petition to His Excellency the President of the Republic of Kenya in terms of Article 168(1)(e) of the Constitution requesting the President to suspend her from office and establish a tribunal to investigate her conduct. The Commission also enclosed a copy of the said petition and the sub committee's report. We wish to reproduce the said letter hereunder:

> **19TH January, 2012**

**REF 1 / 2**
**The Hon. Lady Justice Nancy Baraza,**
**The Deputy Chief Justice/Vice president of the Supreme Court,**
**Supreme Court Building,**
**City Hall way**
**NAIROBI**

**Dear DCJ**
**RE: NOTIFICATION OF THE JUDICIAL SERVICE COMMISSION PETITION**
**The Judicial Service Commission after investigating the incident involving your Honour at the Village Market, resolved to send a petition to His Excellency the President of the Republic of Kenya in terms of Article 168(1) (e) of the Constitution. The petition requests His Excellency to suspend your Honour from office and to establish a tribunal to investigate your Honour's conduct.**
**Kindly find enclosed a copy of the petition and the report of the sub committee chaired by Commissioner Reverend Dr. Kobia for your Honour's information.**

**Yours sincerely,**

**HON. DR. WILLY MUTUNGA, D.Jur, SC,EGH**
**CHAIRMAN**

**JUDICIAL SERVICE COMMISSION**

**14.** On receipt of the said letter the Petitioner responded in the following manner:

**23rd January 2012**

**The Chairman**
**Judicial Service Commission**
**Supreme Court Building**
**NAIROBI.**

**Dear Chief Justice/Chairman**

**RE: NOTIFICATION OF THE JUDICIAL SERVICE COMMISSION PETITION**

**I acknowledge receipt of your letter dated 19th January 2012 notifying me of the Judicial Service Commission Petition to His Excellency The President in accordance with Article 168 (1) (e) of the Constitution. Although the letter refers to a copy of the Petition and the Report of the Sub-committee chaired by Rev. Dr. Kobia, I have only seen a copy of the Petition but not the Report.**

**Kindly let me have the said a copy of the Sub-committee Report at your earliest convenience.**
**Yours sincerely,**
**Signed.**

**NANCY BARAZA**
**DEPUTY CHIEF JUSTICE**

**15.** By a letter dated 19th January 2012, the said Commission pursuant to the provisions of Article 168(2) of the Constitution requested His Excellency the President to suspend the Petitioner and appoint a Tribunal in terms of Article 168(5)(b) of the Constitution. The said letter stated as follows:

**19th January, 2012**

**REF 1/2**
**His Execllency Hon. Mwai Kibaki, C.G.H. M.P.**
**President and Commander-In-Chief of**
**The Defence Forces of the Republic of Kenya**

**Your Excellency**
**RE: PRESENTATION OF PETITION BY THE JUDICIAL SERVICE COMMISSION OF KENYA UNDER ARTICLE 1168 OF THE CONSTITUTION OF KENYA**
**The Judicial Service Commission under Article 168(2) has jurisdictional powers to carry out an inquiry into the conduct of a judge. The Commission has exercised these powers and carried out an inquiry into the conduct of the Deputy Chief Justice, Vice President and Judge of the Supreme Court of Kenya, Hon. Lady Justice Nancy Makokha Baraza.**

**Kindly find enclosed a petition by the Judicial Service Commission requesting Your Excellency to suspend the Hon. Lady Justice Nancy Makokha Baraza and to appoint a Tribunal in terms of ARTICLE 168 (5) (b) of the Constitution to inquire into the conduct of Hon. Lady Justice Nancy Makokha Baraza.**

**Yours Sincerely,**

**HON. DR. WILLY MUTUNGA, D. Jur, SC, EGH**
**CHAIRMAN**
**JUDICIAL SERVICE COMMISSION**

**16.** That is what triggered the matter before us. We must point out that at time the petition was filed on 25th January, 2012, the Gazette Notice No. 664 of 26th January 2012 had not been published. Accordingly, some of the prayers in the amended petition were overtaken by events when the said Tribunal was Gazetted and its members sworn in.

**The Petition**

**17.** The grounds, upon which the petition is based, though not necessarily in the order in which they appear are as follows:

1. **The said petition and recommendations to the president were arrived at by the 1st Respondent subsequent to discovery by a purported delegated sub-committee of the Judicial Service Commission Chaired by Commissioner Reverend Dr. Kobia which delegation the Petitioner contends was set up in breach of the Constitution. The 1st Respondent adopted the findings of the delegated Sub-committee under the Chairmanship of Commissioner, Reverend Dr. Kobia without independent and lawful consideration and without due regard to and in breach of Article 171(2), which categorically sets out the Composition of the Judicial Service Commission, the 1st respondent herein, despite the delegation having been comprised of a limited number of members of the Judicial service Commission it is thus the Petitioner's respectful submission that the 1st Respondent was not properly constituted to make the recommendations and findings as it did through the said petition presented to His Excellency the President. In any event the delegated sub-committee of the 1st respondent had no powers whatsoever, whether conferred by statute or by virtue of the Constitution to inquire, question and/or investigate the conduct of the deputy Chief Justice of the Republic of Kenya as currently held by the Petitioner by virtue of section 32(1) of the Judicial service Act and to such an extent any decision, recommendation and/or proceedings purported to have been undertaken by the delegation of the 1st Respondent were an illegality, *ultra vires* the constitution and this a mere nullity.**
2. **The Petitioner therefore contends that whereas the constitution provides for two methods of initiating the proceedings for the removal of a Superior Court Judge, either by the 1st Respondent on its own motion or on a petition to the Commission, where, as in this case, the former route is taken, the requirements of Article 252(1) must be satisfied which include**

**the Commission conducting independent investigations before making a conclusion.**

3.**The 1st respondent, in exercising its powers as conferred upon it by article 168 of the constitution exercises a quasi-judicial power which is subject to rules of evidence and the Rules of Natural Justice.**

4.**That the 1st Respondent through its delegation, in its recommendations and findings reflected on the petition dated 12th January 2012 (sic) were solely premised and pegged on witness statements, witness testimony and reports by the Criminal Investigations Department, through its officials and/or agents such evidence being devoid of any independent inquiry and analysis by the 1st Respondent further pointing towards complete lack of independence in the exercise of the judicial functions conferred upon the 1st Respondent contrary to the Constitution of Kenya. That the evidence recorded and collated by the Criminal Investigations Department Headquarters were devoid of any probative evidential value since the same had been illegally obtained and solicited by the officers and officials of the said entity contrary to the constitutional provisions laid out under article 50 of the constitution which provide for the right to legal representation among others thus in breach of the Bill of Rights. That during the said sub-committee inquiry, the Petitioner was never afforded an opportunity to test the veracity or otherwise of the Evidence adduced by the witnesses who testified at the delegated sub-committee sittings either through cross examination or other modes known to law and as such the 1st Respondent was denied a reasonable opportunity to influence the decision making process thus in breach of the succinct rules and principles of Natural Justice. Further to the aforementioned the Petitioner avers that her rights to a Fair hearing as encapsulated under article 50 of the constitution have been grossly violated and/or trampled upon by the 1st Respondent. The 1st respondent adopted the findings of the delegated Sub-Committee under the chairmanship of Commissioner, Reverend Dr. Kobia without due regard to and in breach of the rules of natural justice as the Sub-Committee failed to give the Petitioner due notice of the illegal inquiry it was engaged in. In this case the Judicial Service Commission initiated the process of removal of the Petitioner on direct instigation by the media reports which were largely premised on falsehoods, gross mis-representation of material facts, in the absence of a written petition from any person or member of the public. The 1st respondent, in exercising its powers as conferred upon it by article 168 of the Constitution exercises a quasi-judicial power which is subject to rules of evidence and the Rules of Natural Justice.**

5. **The Petitioner further avers that the findings, remarks and recommendations of the 1st respondent through the delegated sub-committee were solely premised and pegged on witness Statements, and reports from the Criminal Investigation Department Headquarters, a body falling within the executive arm of the Government and as such importing the said witness statements and reports into its decision making process offences the principle of separation of powers and judicial independence. The Petitioner avers that the 1st Respondent's findings and recommendations as to the issue of "gross misconduct and misbehaviour" were solely based and pegged on the report and witness statements recorded at the Criminal Investigations Department which such statements and reports constitute unproven facts yet to be substantiated through a trial process further pointing to irrationality, lack of independence, thus this begs the question as to whether the 1st Respondent's findings and recommendations were based on any probative evidential value or at all. The Petitioner respectfully avers that Article 165 enjoins this honourable court to ensure that the principles enshrined in this Constitution more particularly the principles of separation of powers, the rule of law, equality, human rights, independence of the judiciary are promoted and protected.**

6.**The Petitioner is a victim and the 1st Respondents crusaders of Double Jeopardy against the Petitioner, at the instance of parallel investigations into her conduct instigated at the behest of**

**the 1st Respondent and the Criminal investigative authorities thus in breach of the constitution and known principles of law.**

7. **In any event the 1st respondent had no powers whatsoever under Article 168(2) of the constitution to inquire, question and/or investigate the conduct of the Petitioner, this being a power vested in a valid tribunal created hereof by article 165(7)(b) of the Constitution. The 1st Respondent acted in excess of its lawful powers under the constitution by purporting to inquire and or investigate the conduct of the Petitioner. To the extent that the Judicial Service Commission acted in excess of its powers by investigating and recommending the suspension of the Petitioner instead of initiating and sending the Petition to the President, the following provisions of the Constitution were violated namely Articles 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 28, 31, 47, 50, 165, 166, 168, 171 and 172 of the Constitution of the Republic of Kenya.**

8.**The Petitioner avers that her unquestionable reputation, repute, prestige, power and standing as the Honourable Deputy Chief Justice, the vice President of the supreme Court and Judge of the Supreme court of Kenya has been subjected to ridicule, odium and contempt in the eyes of the general public at the instigation of the 1st Respondent further worsened by the unchecked and absolute media attention into the trifling allegations by which the 1st Respondent duly condone, thus acting in breach of the Petitioner's Constitutional Rights to Privacy as enshrined and protected under Article 31 of the Constitution. The Petitioner avers that the desire to inquire into the conduct of the Petitioner having regard to the alleged prevailing circumstances, defeats principles of common sense, is in violation of the Bangalore and Latima principles on the independence of the judiciary including the United Nations basic principles of independence of the Judiciary embodied in Resolution 40/32 and 40/46 of 1985.**

9.**That despite the incessant request by the Petitioner, more particularly through her letter dated 23rd of January 2012 for reports and findings of the delegated sub-committee under the chairmanship of Reverend Dr. Kobia, the 1st Respondent has through its secretary refused to furnish the said report to the Petitioner dismissing such request thus in further violation of Article 47 of the Constitution that guarantees the Petitioners rights, as a person likely to be affected by administrative actions and decisions to be afforded written reasons for the decision of the delegated sub-committee as an administrative body exercising quasi judicial-powers of an administrative nature.**

10.**The 1st Respondent further breached the Petitioner's right of legitimate expectation to a judicious, procedural, and fair trial as a judicial officer and Supreme Court Judge and Vice President of the Supreme Court of the Republic of Kenya, the highest court in the land. It is the Petitioner's legitimate expectation that her rightfully guaranteed and inalienable right to a fair hearing as enshrined by the constitution would reasonable be upheld and any unreasonable limitation of such rights would be baseless in law, based on extraneous considerations and lacks any sound legal efficacy.**

11.**The Judicial Service Commission's purported exercise of its powers in the matter has been steeped in and tainted with abuse of power, bias, irrationality, injudiciousness, reckless and oppression all in breach of the Constitution and rules of natural justice.**

12. **The 1st Respondent is in breach of the principle of proportionality and reasonableness since by dint of Article 252 (1) (b) in exercising its judicial functions as a commission, the 1st Respondent is mandated to exercise its powers in such manner that it is necessary for conciliation, mediation and negotiations owing to the trifling nature of the allegations forming the subject matter of the inquiry. The 1st Respondent never at any one point opted to exercise such powers duly conferred upon it by the law and as such the said decision, findings and recommendations of the 1st respondent lacked any legal merit, was unreasonable is ultra vires**

**the Constitution thus null and void.**

**18.** At the hearing of the petition two other matters were raised which were not in the petition namely the composition of the tribunal and the Gazette Notice No. 664 of 26th January, 2012 in so far as it purported to include the words "*including but not limited to*".

**The Prayers**

**19.** Therefore the Petitioner seeks the following orders:

a. **A DECLARATION** that the process leading up to, including the decision, findings and recommendations of the 1st Respondent contained in its petition to His Excellency the President of the Republic of Kenya dated the 19th of January 2012 through its delegated sub-committee to inquire into the conduct and allegations against the Petitioner herein, as the Deputy Chief Justice of the Republic was constitutional, unprocedural, substantively unconstitutional, high handed, biased, lacking in independence, in breach of the rules of Natural Justice, in breach of the principles of separation of powers, judicial independence, ultra-vires thus null and void *ab-initio*.

b. **A DECLARATION** that the delegated sub-committee of the 1st Respondent, had no powers whatsoever to question, inquire, make findings and recommendations pertaining to the discipline of the Deputy Chief Justice of the Republic of Kenya as currently held by the Petitioner and as such, the 1st Respondent through its decision, findings and recommendations as contained in its petition to His Excellency the President of the Republic of Kenya dated the 19th January 2012 were ultra-vires the constitution thus null and void.

c. **A DECLARATION** that the Petitioner's Fundamental Rights and Freedoms to a Fair trial, Human dignity, right to privacy, right to Fair Administrative Action and the right to a Fair Hearing as encapsulated under Articles 25, 27, 28, 31, 47 and 50 of the Constitution have been violated, transgressed and trampled upon by the 1st Respondent.

d. **A DECLARATION** that the 1st Respondents is in breach of International law, International Human rights law particularly as embodied under the Universal Declarations of human rights, the International Covenant on Civil and Political Rights, The Bangalore and Latima principles on Judicial independence and the United Nations Resolution embodied under the international law Regime.

e. **A DECLARATION** that the 1st Respondent in the exercise of its powers to discipline judicial officers and through its recommendations and findings as contained in its petition to His Excellency the President of the Republic of Kenya dated the 19th of January 2012 through its delegated sub-committee to inquire into the conduct and allegations against the Petitioner herein, as the Deputy Chief Justice of the Republic acted in breach of the doctrines of legitimate expectation, reasonableness, rationality, proportionality, and the principles of separation of powers.

f. **A DECLARATION** that Article 168(5) of the Constitution makes no provision for the composition of a tribunal to remove from office the Deputy Chief Justice and if any purported Tribunal established/Gazetted pursuant to Article 168(5)(b) of the Constitution pursuant to the recommendation of the Judicial Service Commission it will be unconstitutional.

g. **A DECLARATION** that under Article 168 (2), (3) and (4), only a person other than the Judicial Service Commission can petition the removal of a Judge and there being no Petition of such a person in the instant case, the Judicial Service Commission exercised powers that do not belong to it and its Petition to the President is null *ab initio.*

h. **AN ORDER OF CERTIORARI** to call up into this Honourable Court for the purpose of being

quashed the proceedings, decision, findings and recommendations of the Judicial Service Commission, the 1st Respondent herein, contained in a petition herein dated the 19th day of January 2012 and presented to His Excellency the President and Commander in Chief of the Armed forces of the Republic of Kenya calling for the suspension and eventual appointment of a tribunal to investigate the conduct of the Honourable Deputy Chief Justice, Lady Justice Nancy Makokha Baraza, the Petitioner herein and forthwith quash the same.

i. **AND ORDER OF PROHIBITION** to prohibit the Respondents herein either acting through its agents, servants and/or officers or any other person whosoever prohibiting them from in any way carrying out further inquiries, investigations, from summoning the Petitioner, or in any other manner whatsoever and to bar them from in any way executing the report, findings and recommendation of the Judicial Service Commission contained in a petition herein dated the 19th day of January 2012 and presented to His Excellency the President and Commander in chief of the Armed Forces of the Republic of Kenya calling for the suspension and eventual appointment of a tribunal to investigate the conduct of the Honourable Deputy Chief Justice, Lady Justice Nancy Makokha Baraza, the Petitioner herein pending further orders of this Honourable Court.

j. **A CONSERVATORY ORDER** do issue restraining any State Officer or organ of State or State Institution from appointing and/or publishing in the Kenya Gazette of a Tribunal in terms of Article 168 (5) as requested in the Judicial Service Commission's Letter and Petition dated 19th January 2012.

k. **A CONSERVATORY ORDER** be issued restraining any State Officer or organ of the State or State Institution from swearing into office any Tribunal envisaged and/or established under Article 168 (5) as requested in the Judicial Service Commission's Letter and Petition dated 19th January 2012.

l. **A CONSERVATORY ORDER** be issued restraining any State Officer or organ of the State or State institution and/or Tribunal and/or member of the Tribunal from commencing and executing its mandate as envisaged under Article 168(5) of the Constitution.

m.**AN ORDER** restraining the Respondents and/or any state officer/state organ from infringing and/or violating on the Petitioners right and freedoms as provided for in the Bill of Rights.

n. **A DECLARATION** under Constitution, that the composition of a tribunal to remove from office the Deputy Chief Justice is as prescribed under Article 168 (5) (a) of the Constitution.

o. **AN ORDER OF CERTIORARI** to call up into this Honourable Court for the purposes of being quashed Gazette Notice No. 664 of 26th January, 2012 issued under Article 168 (5) (b) of the Constitution of Kenya purporting to appoint Chairperson and Members of tribunal to investigate the Conduct of the Petitioner on matters '*including but not limited to'* the allegations contained in the Petition by the Judicial Service Commission dated 19th January, 2012.

p. **AN ORDER OF PROHIBITION** to prohibit the 3rd, 4th, 5th, 6th, 7th, 8th and 9th Respondents herein from in any way commencing, carrying out or continuing inquiries or investigations into the conduct of the Petitioner pursuant to Gazette Notice Nos. 664 and 665 of 26th January, 2012 or at all.

q. Any further orders, writs, directions and declarations that this Honourable court may deem fit to grant in the interest of justice.

r. Costs of the Petition.

**The Supporting documents**

**20.** In support of the petition, the Petitioner swore an affidavit on 25th January 2012 and a supplementary affidavit on 10th February 2012. The gist of the said affidavits is as follows. On 31st December 2011 the Petitioner had an encounter at the Village Market Mall and thereafter a series of events culminating into among others, into investigations by the 1st Respondent herein. There was also an extensive media coverage on the encounter leading to widespread media speculation marred by episodes of persecution, discrimination, lynching, maltreatment and falsehoods which said acts were condoned by the 1st Respondent, as a result of which her reputation has been severely damaged. On the basis of these wide media coverage, the Chairman of the Judicial Service Commission, the Honourable The Chief Justice Dr. Willy Mutunga, released a press statement and, according to her, a purported sub-committee of the Judicial Service Commission was formed to investigate the incident, which sub-committee was headed by Commissioner Reverend Dr. Julius Kobia. After the conclusion of the said investigations and sittings the sub-committee of the 1st respondent duly furnished its report to the Judicial Service Commission which proceeded to convict her. On 19th January, 2012, she received a letter from the Judicial Service Commission through the Chairman wherein the Petitioner was informed that the 1st respondent after investigating the incident, had resolved to present a petition to his Excellency the President of the Republic of Kenya and further requested him to suspend her from office and to establish a tribunal to investigate her conduct. The said letter was accompanied by a copy of the petition. Though the Chairman of the Judicial Service Commission's covering letter explicitly stated it had attached a copy of the sub-committee's Report none was in fact attached. Her letter requesting for a copy of the report by the said sub-committee was, however, neither acknowledged nor was she furnished with a copy of the said report. On 7th January 2012 she was inhumanly and illegally held for more than 5 hours at the Criminal Investigations Offices (hereinafter referred to as CID) being coerced to record statements and was denied the right of representation by her lawyers. According to the Petitioner, the 1st Respondent relied exclusively on the statements of various individuals previously recorded at the police and CID offices pertaining to the said allegations levelled against her, which reports the Director of Public Prosecutions is quoted as having rejected and described as sloppy. The petitioner contends that the statements relied upon by the 1st respondent have no probative evidential value. According to the advice from her advocate the 1st respondent has no constitutional or other statutory powers to delegate its constitutional mandate to a sub-committee and especially as regards her case. The Petitioner states that her constitutional rights have been violently and flagrantly trampled upon by the 1st respondent including; the right to privacy and human dignity; the right to administrative action that is lawful, reasonable and procedurally fair; the right to a fair hearing and protection of the law; and the right to a judicial process by the Judicial Service Commission. Her whole professional career, integrity, reputation, livelihood and dignity are at risk and in real danger of being completely destroyed by the unconstitutional enterprise set in motion by the 1st respondent to remove her from office and she stands to suffer irreparable harm and damage.

**21.** In the supplementary affidavit the Petitioner states as follows: that she has been advised by her advocates on record that the procedure adopted by the 1st respondent leading to her suspension in her office and purportedly setting up of a tribunal is flawed and gravely tainted with illegality in that rules of natural justice were not complied with before the petition was referred to His Excellency the President; the letter forwarding the petition to His Excellency the President was biased and contrary to the law; the 1st respondent set up a Sub-Committee that had no validity in law; the 1st respondent relied on statements taken by criminal investigation officers which were gravely tainted with illegality and have no standing in the law; that the entire media including print, broadcast online and social has viciously, maliciously, intensely in orchestrated manner engaged in character assassination against her, malicious propaganda which had the impact of crucifying, persecuting and judging her in the eyes of the public without making any effort to hear her side of the story; on 7th January, 2012 at 10:45 a.m. she reported at the Nairobi Area Provincial Criminal Investigations Headquarters where she was subjected to intensive interrogation on the alleged events of 31st December, 2011 at the Village Market in the absence of an advocate and unaccompanied despite her efforts to be accorded access to one. Her protestations that the matter was being investigated by Gigiri Police Station fell on deaf ears but instead elicited from the two police officers grave physical threats and intimidation which she has been advised by her advocates that there is no way that the so-called confessional statement was voluntary and can be admissible in evidence in any

competent court; in between the threats which went on till 3.30 p.m. one of the two police officers kept receiving and answering to a telephone caller who appeared to be keenly monitoring the development and at one point he answered "yes, Mr. A.G." and stepped out of the room to communicate with the caller; at 3.30 p.m. the said officers became extremely hostile and aggressive and threatened to expose more damaging and adverse material on CCTV clips; her attempts to call either her lawyers or the Chief Justice were similarly denied unless she confessed. Due to the aggressiveness of the said police officers, the petitioner felt insecure and vulnerable taking into account that she was alone save for the two male police officers on a Saturday in a secluded place, and gave in to their demands and admitted in writing that she was in possession of a gun and that she had threatened Ms. Kerubo with it, which statement she signed together with a cautionary statement already written by one of the police officers, after which one them purportedly called the Attorney General and informed him "we have cracked it". Thereafter she was allowed her to leave when it was approaching 4.p.m. According to the petitioner, on the 8th January, 2012 the Attorney General met with among other people, the Director of CID at the Nairobi Club at which meeting he impressed upon the Director of CID the need to move with speed and have her prosecuted in view of what he kept on saying was her voluntary confession. The petitioner further believes that the Attorney General has handled her matter in a very malicious manner to the extent of encroaching on the D.P.P's constitutional mandate to achieve ulterior motives known only to him and is thus highly apprehensive about the Attorney General's impartiality and fairness since he also sits on the JSC and he participated in all adverse decisions made by the Commission against her and he is also the Chief Government Legal Advisor who gave His Excellency the President a hurried advice to suspend her and appoint a tribunal to probe her conduct. The petitioner confirms to have appeared before the sub committee and gave her side of the story. The petitioner did inform the sub committee the circumstances under which she recorded the confessionary statement with the police hoping to thereafter seek refuge in the law. A video-taped version of her session with the police was also produced before the sub committee though she was never informed that she was being video-taped and did not consent to it. On 12th January, 2012, at around 9.00 a.m., while on her way to Naivasha on official duty she was informed by her office that she had been summoned to appear before the 1st respondent on that same day, to answer to an affidavit that had been made against her by one Bryson Mangla Agot at 2.00 p.m. She consequently turned back and returned to Nairobi. On 13th January, 2012, at about 4.30 p.m., the 1st respondent issued a statement to the press conveying their decision. The media reported during prime news that the 1st respondent had resolved to send a petition to the president to suspend her and to constitute a tribunal to investigate her conduct. According to her she was never supplied with the decision, the proceedings of the Sub-committee, or the report of the Sub Committee. Neither was she supplied with the reasons for the decisions by the Sub- committee and the 1st respondent; on 20th January, 2012, she received a letter from the 1st respondent dated 19th January, 2012 informing her that it was resolved to petition the President to suspend her from office and to establish a tribunal to remove her from office. The petitioner's case is that she has been tried, convicted and sentenced by the media, without any fair hearing. According to her advocates, Article 168(2) of the Constitution does not vest in the 1st respondent the power to conduct inquiry in the manner they purported to do and or at all; the composition of the tribunal to investigate her conduct for purposes of removal is as prescribed under Article 168(5) (a) of the Constitution and, not Article 168 (5) (b) pursuant to which the purported tribunal has been established.

**The 1st respondent's case**

**22.** The 1st respondent filed a replying affidavit which was sworn by its secretary, on 10th February, 2012. The gist of the said affidavit is that an incident occurred on 31st December 2011 at the Village Market mall, which was widely covered in the media. The Honourable Chief Justice Dr. Willy Mutunga, convened a Special Judicial Service Commission meeting on 9th January 2012 to deliberate on the incident. At the said special meeting the 1st respondent deliberated and resolved to appoint a sub committee under section 14 of the Judicial Service Act to inquire into the matter given the seriousness of the allegations. Subsequent to the special meeting of the 1st respondent, a member of the public Mr. David Gichira sent a petition to the 1st respondent, seeking the removal of the Petitioner from office as a result of the incident of 31st December 2011. The petition was handed over to the sub Committee. After considering and evaluating the Petition, the Sub-Committee was satisfied that the Petition had not met the

constitutional threshold to warrant the exercise of the discretionary power conferred by the provisions of Article 168 (4) of the Constitution and dismissed the Petition.

**23.** The members of the Sub-Committee in the exercise of their mandate made a site visit to the Village Market on 10th January 2012. They also held a meeting with the management of the village Market, surveyed the general area of the security desk where the alleged incident occurred. They also visited Belladona Pharmacy. The Sub-Committee received evidence from 15 witnesses. It also received rebuttal evidence from the petitioner. In essence the petitioner was given opportunity to contest or rebut the evidence received from the other witnesses. Thereafter, the sub committee evaluated and deliberated on the testimony by all the witnesses and concluded that Petitioner's contact with Rebecca Kerubo was unwelcome, unconsented, intrusive and aggressive to the person of Rebecca Kerubo and that the Petitioner's act of threatening and pointing a gun at Rebecca Kerubo constituted gross misconduct under Article 168 (1) (e) of the Constitution; that the conduct of the Petitioner was in breach of the regulations set out in the Judicial Service Code of Conduct and Ethics, Legal Notice No. 50 of 2003, which regulates the conduct of Judicial Officers; that the Petitioner's conduct portrayed her as a person who has utter contempt and flippant respect for the dignity and rights of ordinary Kenyans in breach of Rule 3(5) and 12(1) of the Judicial Code of Conduct and was in violation of Chapter 6 of the Constitution and in particular Article 73 (1) and (2) and Article 75 (1) (c); that the Petitioner was not candid and her evidence on all material facts was exaggerated and even contradicted by her own witnesses, was economical with the truth and came across as an unreliable person devoid of candour due to her constant shifting of positions and therefore her integrity and suitability to continue holding the position of Deputy Chief Justice was in doubt; that the Petitioner came out as a person who could not handle the prestige, power and standing of the office of Deputy Chief Justice to the extent of losing all sense of common rationality and was mesmerized and overwhelmed by the trappings of office.

**24.** The report of the Sub-Committee was deliberated upon and adopted by the Judicial Service Commission in a meeting held on 13th January 2012. The 1st respondent decided to send a Petition to the President under the provisions of Article 168 (4) of the Constitution with a view to setting up a tribunal. The President after receiving the petition appointed a Tribunal to investigate her conduct and suspended her as the Deputy Chief Justice and as Judge of the Supreme Court on 26th January 2012 by Gazette Notice No. 664 under powers conferred by Article 168 (5) (b) of the Constitution. It is the 1st respondent's contention that in view of the foregoing, the allegation that the 1st respondent relied exclusively on statements of individuals previously recorded at the Police and CID offices to petition the President is baseless. In making its recommendation to the President, the Judicial Service Commission has discharged its Constitutional mandate lawfully, fairly and impartially and has not convicted the Petitioner as alleged, since there were sufficient grounds supported by independent witnesses to Petition the President as required by law. In conclusion the deponent states that the JSC has not violated any of the Constitutional rights of the Petitioner and neither has it violated any of the Articles of the Constitution in exercising its mandate under Article 168 (4) of the Constitution.

**The 2nd respondent's case**

**25.** The second respondent, on its part, filed the following grounds of opposition dated 31st January 2012 in opposition to the petition:

**1. That the petition lacks merit and is an abuse of the court process.**

**2. That prayers (h), (i), (j) and (k) have been overtaken by events.**

**3. That the petition seeks to stop the execution of the Constitutional mandate of Judicial Service Commission.**

**4. The grounds set out in support of the petition do not raise any Constitutional issue either for enforcement of fundamental rights or interpretation of the Constitution.**

**5. The sub-committee of the Judicial Service commission acted within the delegated powers of Judicial Service Commission and its recommendations were ultimately owned by the Judicial**

**Service Commission.**

**6. The petition is premature as the Petitioner will be accorded a fair hearing by the Tribunal to advance her case.**

**26.** Apart from the said grounds of opposition, the second respondent also opposed the petition by way of a replying affidavit sworn by the 2nd respondent on 16th February 2012, the gist of which is that the 2nd respondent does not know the Criminal Investigation Officers, said to be investigating the issues related to this petition, nor has he communicated with them at any time on any issue relating to this matter. The Criminal Investigations Department has not sought any legal advice on this matter from his office and he has not provided any. He neither met Mr. Ndegwa Muhoro the Director of Criminal Investigations Department on 8th January 2012 as alleged, nor has he given any directions or instructions in this matter to the said Mr. Ndegwa or Mr. Keriako Tobiko the Director of Public Prosecutions whose mandate is clearly spelt out in the Constitution of Kenya. He has only come into contact with and handled the issues related to this petition by virtue of his position as a member of the Judicial Service Commission which body is composed of eleven (11) members besides himself. He does not make any individual decisions for and on behalf of the Judicial Service Commission on any matter that may be placed before it for its deliberation and determination. The 2nd respondent has also taken issue with the contents competency of the affidavits in so far as the deponent the source of information of the various allegations made in her supporting and supplementary affidavit. He beseeches this honourable court to exercise its powers under Order 19 Rule 6 of the Civil Procedure Rules, 2010 to strike out the said paragraphs for being scandalous, oppressive and lacking any factual basis. It is the 2nd respondent's contention that once the Judicial Service Commission acted in accordance with Article 168 (1) (2) (3) and (4) of the Constitution it was immaterial whether the Attorney General did or did not advise the President, nor is there any fetter within the Constitution of Kenya that would curtail the powers vested by Article 156.

**The Submissions**

**Submissions in Support of the Petition**

**27.** The Petitioner filed written submissions and authorities. Through her counsel Dr. John Khaminwa, Senior Counsel, who appeared together with Mr. Kaluma, she also made oral submissions.

**28.** In his submissions, Dr. Khaminwa, submitted that senior police officers from Gigiri Police Station had taken statements with respect to the incident in question, and formed an intention to charge Rebecca Kemunto with a criminal offence. Instead of her being charged, the Criminal Investigations Department at its headquarters jumped into the matter and obtained a statement from the Petitioner which, according to them, was a confessional statement which, cannot be relied upon in law at all. She was with the said police officers for five hours, counsel submits on a Saturday, unaccompanied by a third party and without the benefit of legal counsel. That so called confessional statement, it is submitted, was in breach of the provisions of section 25A of the Evidence Act. Counsel further submits that the Petitioner went through horror. She was threatened and intimidated and they made it clear to her that that they would not leave her until she confessed. It was only after she did so in the words that she was required to use, that she was left alone. According to counsel, the Petitioner, a woman, signed the so called confession, under the belief that she would later take refuge in the law. As soon as she made the said statement one of the officers telephoned the Attorney General and told him "we have cracked it". According to counsel, this statement should not have been used by the Judicial Service Commission. The Petitioner having gone through a criminal process at Gigiri Police Station, which station did not form an opinion to charge her, counsel submits, this supports the Petitioner's contention that the so called confession was made under duress.

**29.** The Commission, according to the Petitioner, stated that she was to be investigated for gross misconduct. Quoting from a book by Professor Yash Ghai ***Kenya's Constitution: An Instrument for Change,*** the Petitioner submits that the term "gross misconduct" means **"generally atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking. These words express some extreme negative conduct whether a conduct is gross or not will depend on the matter as exposed by the facts".** According to the Petitioner the allegations levelled against her herein do not amount to gross misconduct as defined above.

**30.** Counsel further submits that under Article 168(2) the removal of a Judge is initiated only by the Commission acting on its own motion or on the petition of any person. In this case since there was no petition, the Commission was purportedly acting on its own motion. To initiate, according to Senior Counsel, means to cause or propose. The Commission's jurisdiction was only to initiate the process and nothing more. Anything more would be outside its jurisdiction and it was not empowered to carry out any inquiry at all. Inquiry, according to the Petitioner is a totally different thing from initiation. Accordingly, the Commission had no powers to summon the 15 witnesses at all. However, counsel submitted that if that line of argument is incorrect then the Commission did not afford the Petitioner a right to cross examine the witnesses who were called which process is vital in establishing the truth in the matter.

**31.** Similarly the sub committee had no authority to conduct an inquiry. It is submitted that the Commission did not have authority to establish a sub committee since there is no provision in the Constitution that allows the setting up of a sub committee. It is further submitted, that legislative jurisprudence cannot be imported since the Constitution does not authorize the setting up of a sub committee.

**32.** An issue is also taken with the Petition that was presented to the President. According to Dr. Khaminwa, the Chief Justice and the Deputy Chief Justice belong to a different cadre from the rest of the judges since they are nominated by the Commission, approved by Parliament and appointed by the President which procedure, was borrowed from the South African Constitution. The Chief Justice and the Deputy Chief Justice perform extra-judicial services some of which include attending State functions and ceremonies. Accordingly, both belong to a class of their own. The Tribunal set up to investigate them should therefore be similar. In the case of the Chief Justice, the Speaker of the National Assembly is to be the chairperson. The reason for this, it is submitted, is that since the appointment of the Chief Justice and the Deputy Chief Justice must pass through Parliament similarly, the process of their removal should pass through Parliament. Accordingly, the Tribunal that investigates the conduct of the Deputy Chief Justice, who is the Petitioner herein, must have similar composition to that of the Chief Justice as provided by Article 168(5)(a). Since the Tribunal that was set up excludes the Speaker of the National Assembly, the said Tribunal is improperly constituted and is a nullity in law. To support the contention that the Chief Justice and the Deputy Chief Justice stand alone from the rest of the judges, Dr. Khaminwa relied on the South African case of **Justice Alliance of South Africa vs. President of The Republic of South Africa and Others [2011] ZACC 23**. At pages 39 and 40 of the said decision it is stated as follows:

**"In our view the singling out of the Chief Justice, alone amongst the members of this Court, is incompatible with section 176(1). It is indeed so that the Constitution itself creates the office of the Chief Justice and the Deputy Chief Justice and to this extent singles them out from the other members of the Court. The Constitution provides that this Court "consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges". What is more, the Constitution provides a special appointment process by which the President as head of the national executive appoints the Chief Justice and Deputy Chief Justice, after consulting the JSC and the leaders of the parties represented in the National Assembly. These provisions establish the distinctive offices of the Chief Justice and Deputy Chief Justice, and confer special power on the President to appoint them after consultation. As indicated earlier, the other judges of this Court are appointed by the President, also after consultation, from the list the JSC provides. The distinctive appointment process for the Chief Justice and the Deputy Chief Justice indicates the high importance of their offices. It signifies that their duties may require them to represent the judiciary and to act on its behalf in dealings with the other arms of government. In addition to their judicial functions, they may be called upon to perform ceremonial and administrative duties. Indeed, the Chief Justice and the Deputy Chief Justice are the most senior judges in the judicial arm of government, and their distinctive manner of appointment reflects the fact that they may be called upon to liaise and interact with the Executive and Parliament on behalf of the Judiciary".**

**33.** On the issue of the Gazette Notice it is submitted that the appointment of the Tribunal through a special Gazette Notice was a serious mistake, since such notices are only for state appointments in the

Government. Accordingly, that notice was illegal.

**34.** The Petitioner further submits that the Gazette Notice, as formulated, gave the Tribunal powers to investigate beyond what had been recommended by the Commission. The Commission confined itself to allegations of gross misconduct but the President gave the Tribunal powers to investigate any other matters. Since the President did not have authority to do so, the said Gazette Notice is thereby rendered a nullity.

**35.** Further, in the said Notice, the Petitioner is referred to as the Deputy Chief Justice Supreme Court of Kenya which is wrong since it is not the Petitioner's position as she is the Deputy Chief Justice and the Vice President of the Supreme Court of Kenya. Since the Kenya Gazette Notice sets out the law of Kenya any mistake in misdescription of a party therein renders it incurably fatal. There is also another matter. The said Gazette Notice, it is submitted starts by setting up the Tribunal and then later suspending the Petitioner. The actual position constitutionally is that the suspension precedes the setting up of the Tribunal. Dr. Khaminwa has referred to **Nairobi High Court Miscellaneous Civil Application No. 1298 of 2004-Republic vs. Chief Justice of Kenya & 6 Others Ex Parte Moija Mataiya Ole Keiwua [2010] EKLR (Ole Keiwua's Case)** to reinforce the said submissions.

**36.** Whereas Article 10 of the Constitution deals with National Values and Principles of Governance, learned counsel submits, a breach thereof by any judge does not make out a case for removal of a judge at all which is provided for in Article 168(1).

**37.** The Petitioner further contends that one cannot have two concurrent proceedings i.e. criminal and a Tribunal. The proper way to go was to start with the criminal proceedings, obtain a conviction after which the conduct may be described as gross misconduct. However, it is submitted that not all manner of convictions amount to gross misconduct and that is why the Constitution uses the word "may".

**38.** The Attorney General's role also came into question. According to the Petitioner, the Attorney General, who sits in the Commission, is also the Principal Legal Adviser to the Government. Accordingly, the Petitioner submits, there is a conflict of interest since he is also the adviser to the CID and the President. Reference is made to the South African **Justice Alliance of South Africa Case (ibid)** in support of the submission that the independence of the judiciary as an arm of the State is very fundamental and threats to judges may come from other quarters as well as the executive. The judiciary must, however, remain sober and unemotional otherwise the entire judiciary will be interfered with. Accordingly, it is submitted that judges should not be removed based on media outbursts or shouts in the street lest we end up with no judiciary at all. One of the culprits, according to Dr. Khaminwa, is the publisher of the Nairobi Law Monthly. Dr. Khaminwa refers to **Abuse of Process and Criminal Fairness in Criminal Proceedings by David Corker and David Young** where at page 105 the authors opine that in proceedings against a particular defendant which has attracted substantial, predominantly hostile publicity and where he is convicted one can readily appreciate why that defendant may feel he did not receive a fair trial or hearing by the jury. Adverse publicity in the newspaper, Dr. Khaminwa submits, can render a trial to be stayed by the trial court, or can render a trial unfair and that is precisely what happened in this case, and led the Commission into making a wrong decision thereby occasioning injustice.

**39.** Article 252(1)(b) of the Constitution, it is submitted, provides for options for sorting out matters such as by way of conciliation, mediation and negotiation and even a reprimand. In the instant case, counsel submits there is no conviction. Accordingly, the principle of proportionality and legitimate expectation were not taken into account by the Commission in arriving at its decision.

**40.** On the procedural aspects, Dr. Khaminwa submits that the steps leading to the suspension of the Petitioner were heavily breached, unfair and unconstitutional since there was no proper notification of the proceedings, no notification of the findings of the sub committee and comments thereon, lack of cross examination, the right to counsel and the Commission should not have relied on the confession as a basis for petitioning the President. The reliance on the criminal processes rendered the decision of the Commission lacking in independence and impartiality.

**41.** Counsel also raised the issue of gender discrimination submitting that the Petitioner is the first lady Deputy Chief Justice, a fact male chauvinists are uncomfortable with, since the post of the Deputy Chief Justice is a highly coveted seat.

**Submissions in Opposition to the Petition by the 1st respondent**

**42.** On his part Mr. Paul Muite, also a Senior Counsel, who appeared with Mr. Issa in these proceedings on behalf of the 1st respondent opted to make oral submissions and also relied on authorities. He submitted that the issue to be determined by this court is the petitioner's constitutional right and in which Article of the Constitution it is to be found and the manner in which that right has been violated. The burden, according to counsel, is on the Petitioner to satisfy the court of the existence of the rights and violation of the same.

**43.** With respect to the steps taken by the Commission, Mr. Muite submits that the Commission cannot be a conveyor belt whose role, once a complaint is made, is to transmit the same to the President for setting up a Tribunal. Although Article 168(2) of the Constitution does not go into the details of how the Commission is to initiate the matter, Mr. Muite submits, recommending a Tribunal for the removal of a Judge is a weighty matter and before initiating the process it is incumbent on the Commission to address its mind to the allegations, to evaluate the sameand if found frivolous dismiss the same. The converse is also true. This process is expensive and takes time since recommending the removal of a judge is not a trivial matter. There is no way the Commission can make an informed decision as to whether or not to recommend the tribunal unless it carries out inquiries targeted at finding out whether, *prima facie*, the allegations merit a recommendation for removal. It would, in counsel's view, be the failure to do so that would give rise to a complaint and not the other way round. Article 252(1)(a) of the Constitution which deals with the general powers of commissions gives the commissions power to conduct investigations and therefore the suggestion that the Commission did not have such a mandate must be put to rest. This power is independent of the powers under Article 168(2). According to counsel, the Commission did no more than carry out the preliminary investigation and there is no violation of Article 168.

**44.** With respect to authority to set up a sub committee, Mr. Muite submits that a Constitution lays down the principles while the operationalisation of the principle is by an Act of Parliament and therefore to expect the Constitution to provide for a sub committee would be absurd. Therefore, it is submitted, that the Commission as established under Article 171 of the Constitution has its functions set out in Article 172 but the operationalisation of these Articles is through the Judicial Service Act, No. 1 of 2011. To buttress this point Mr. Muite refers to Article 252(1)(d) of the Constitution which empowers the Commission to perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by the Constitution. Section 14 of the aforesaid Judicial Service Act, counsel submits, provides that the Commission may delegate such of its functions as are necessary for the day-to-day management of the judicial service to sub committees or to the secretariat. The court, it is submitted, should take judicial notice of the fact that appointing sub committees is the way in which business is conducted, and the Chief Justice was not expected to troop to Village Market with the whole Commission in tow to investigate the complaint. The sub committee that was appointed was not an independent body as it was composed of the Commissioners and its report was tabled before the Commission which had the mandate to accept or reject the same. It was only after it was considered that the Commission resolved to accept the same and petition the President. Thereafter the inquiry is supposed to be conducted by the Tribunal where the Petitioner shall have full rights to appear and defend herself and cross-examine the witnesses because it is that Tribunal that is mandated to find whether the allegations levelled against the Petitioner are proved. Neither the Commission nor the sub committee was tasked with making findings of fact and therefore the issue of cross-examination does not arise. It was simply an evaluation whether the facts warranted the setting up of a Tribunal and pointing a gun was a serious allegation whose proof will be determined by the Tribunal.

**45.** With respect to the much contested confession Mr. Muite submits that section 25A of the Evidence Act applies to court proceedings and there is no requirement to observe strict rules of Evidence when it is a Judicial Service Commission investigation in terms of Article 168. Therefore a confession which might not be admissible in Court would be admissible before a Tribunal or a Commission. However, it would be for the Tribunal to inquire into these matters and also as to whether or not a Judge, who agrees to be intimidated by Police Officers, has any business being a Judge.

**46.** It was submitted that it is not for this court to go into what amounts to gross misconduct and what is not since that is the function of the Tribunal lest the Court is accused of sitting on appeal on the decision of the Commission, a temptation that the court must avoid. According to Mr. Muite, this court must conclude that the Commission, faced with the material that was before it had no option but to recommend the setting up of a Tribunal. The court is advised to refrain from dealing with issues of fact since what the Commission was dealing with was a *prima facie* case and to grant what the Petitioner is seeking would result in stopping the Tribunal from inquiring into her conduct which would render Article 168 a dead letter in the Constitution.

**47.** The decision whether or not the Commission should have recommended conciliation, negotiation or mediation is a matter which, similarly, will be dealt with by the Tribunal whereas if it finds against the Petitioner, the Petitioner still has a right to challenge its findings in the Supreme Court.

**48.** On the composition of the Tribunal, Mr. Muite is of the view that the Petitioner's complaint is that her rights are being infringed upon by the Constitution. Counsel submits that if the drafters of the Constitution were of the view that the composition of a Tribunal for both the Chief Justice and the Deputy Chief Justice were to be similar, nothing would have been easier than for them to have expressly stated so. According to counsel, it was this misunderstanding of her status that led to the incident in issue.

**49.** On the wording of the Gazette Notice, Mr. Muite submits that Article 168 of the Constitution is about removal of a Judge first and foremost, then a Deputy Chief Justice and the Vice President of the Supreme Court. On the same issue and the use of the words "including but not limited to" counsel submits that once a Tribunal is set up, that Tribunal should have the mandate to deal with all issues rather than taking a narrow view that each allegation must be dealt with by a separate Tribunal. This course, according to counsel, is supported by Article 75 of the Constitution. However, it is submitted that if the court finds the said words improper then in tandem with the decision in the South African case of **Minister of Health and Others vs. Treatment Action Campaign and Others [2002] 5 LRC 216**, the court can grant an appropriate relief with respect to the employment of those words but should not thereby declare the said Tribunal to be unconstitutional.

**50.** On media complaints, Mr. Muite submitted that this is a matter of public interest. That neither this court nor the Tribunal will decide the matter based on what is said by the media. The Nairobi Law Monthly being a premier legal publication, could not have turned a blind eye to the matters surrounding the Deputy Chief Justice.

**51.** On the rules of natural justice, it is submitted that the Petitioner was accorded audience several times by the Commission, to explain her side of the story and that distinguishes this case from decision in **Ole Keiwua's Case.** However, in light of Article 75 of the Constitution, which did not exist at the time **Ole Keiwua's Case** was decided, Mr. Muite urges the court to reconsider its decision in the said case and decide in light of the said Article.

**52.** Submitting on the role of the Attorney General, Mr. Muite states that the allegations made by the Petitioner have no basis since the Attorney General is only a member of the Commission and is not its legal adviser. He further contends that the contents of the supplementary affidavit sworn by the Petitioner in paragraph 21 contravene the rules guiding the swearing of affidavits, and the offending paragraphs should be struck out. It is counsel's submission that the Director of Public Prosecution is the one with the exclusive jurisdiction to decide whether or not to prefer criminal charges and not the Attorney General.

**53.** With respect to allegation of gender discrimination, counsel submits that in the composition of the sub committee three out of the seven members were women commissioners, thus allaying the fears that she was accorded unfair treatment due to her gender.

**54.** In conclusion, Mr. Muite submitted that not a single right of the Petitioner was violated since the Commission observed all the rules of Natural Justice and since the new Constitution was to restore confidence in the judiciary, that is exactly what the Commission is doing. Accordingly, counsel invited the Court to dismiss the petition in order to allow the Tribunal to proceed with its onerous duty of

investigating the Petitioner's conduct.

**Submissions in Opposition to the Petition by the 2nd to 10th respondents.**

**55.** Ms. Munyi, who represented the 2nd to the 10th respondents submitted, on the composition of the Tribunal, that under Article 163(2) the composition of the Supreme Court is 5 judges which means that over and above being the Deputy Chief Justice, the Petitioner is first and foremost a judge. According to counsel, Article 168(5)(b) covers the Petitioner since it is clear in its terms.

**56.** On the issue of the Gazette Notice, learned counsel submits that any Gazette Notice which appears on a day other than Friday is called a Special Gazette Notice and the same is guided by the timeframe. Therefore the impugned Gazette Notice was legal because time was of the essence under Article 168(5), which required the President to appoint a Tribunal within 14 days of receipt of the petition. Counsel does not see anything wrong with the wording relating to suspension and appointment of the Tribunal and submits that the court should be guided by the substance rather than the form. It is her submission, that the Commission duly informed the Petitioner of its decision vide a letter dated 19th January 2012. On breach of the rules of natural justice, learned counsel submits that the Petitioner appeared before the sub committee and therefore that issue has no substance. The Attorney General, it is submitted, is just one of the members of the Commission and is not the legal adviser to the Commission and has denied giving any legal advice to the DPP, otherwise the Petitioner would have been charged by now. Nor does he know the police officers who interviewed the Petitioner. Accordingly, the alleged conflict of interest does not exist. It is counsel's submission that the process was constitutionally procedural, was guided by the principles of Natural Justice, separation of power and was within the law. On the powers of the Commission, counsel submits that in light of the provisions of Articles 252(1)(a) and (d) and 171 as read with section 14 of the Judicial Service Act, the Commission had the power to delegate. In conclusion, learned counsel submits that the Commission acted within its mandate. Article 168(5)(a) in counsel's view caters only for the Chief Justice while (b) thereof caters for the rest of the judges including the Petitioner. In this case, it is submitted, the Commission initiated the process on its own motion and thereafter received a petition which was dismissed. According to counsel the Petitioner's rights and freedoms have not been violated since she was given a right to hearing and therefore the decision in **Ole Keiwua's Case,** which was decided in another regime is distinguishable. Counsel also urges the court to strike out paragraphs 21, 22 and 23 of the supplementary affidavit on the ground that they are scandalous and refers to The Judges Act of Canada section 63(1) and (3) in support of the Commission's decision to make the inquiries. In light of the provisions of Article 75 of the Constitution, counsel submits that the wording of the Gazette Notice cannot be faulted and in any case the offending portion may be dealt with separately from the rest.

**Rejoinder by the Petitioner**

**57.** In reply to the submissions of Mr. Muite and Ms. Munyi, Dr. Khaminwa filed written submissions. In the interest of justice we allowed the same to form part of the record. Dr. Khaminwa further submitted that Article 252 of the Constitution does not relate to the judges at all, save for where there is conciliation, mediation or negotiation. He further submitted that the court has no power to strike out portions of the Gazette Notice signed by the President. The only option is for the whole Gazette Notice to be struck out so that the whole process can start all over. For this submission the case of **Evan Rees and Others vs. Richard Alfred Crane [1994] 2 WLR** is relied upon. According to Dr. Khaminwa section 69 of the Interpretations and General Provisions Act prohibits amendments to Gazette Notices and he relied on, we believe although he neither provided the authority nor the citation, the case of **Republic of Kenya and Another vs. Coastal Acquaculture [2003] 1 EA 271** where it was held inter alia that once the responsible Minister certifies that the land is required for the purpose of the Land Acquisition Act, the acquisition can only be withdrawn as a matter of Ministerial discretion where the Minister is satisfied for any reason that it is no longer necessary or expedient to proceed with the acquisition and that a court of law cannot direct the Minister to withdraw the acquisition, save perhaps in proceedings where the legality of the acquisition is successfully challenged.

**58.** Since we have our own Constitution, it is submitted, the Canadian experience should not apply here where we have no provision for sub committees. The only provisions for such committees relate to

magistrates and not judges.

**59.** In the said written submissions in response, the Petitioner contends that the process of removal of a judge can only be initiated on own motion or on the petition of a party where there exists prior cogent/irrefutable state of facts establishing either or all of the grounds for removal under Article 168(1) e.g. a criminal conviction where the right to appeal has been exhausted, before the Commission intervenes and therefore the Commission cannot initiate the process of removal of a judge by witch-hunting. Since there is no procedure for the removal of Deputy Chief Justice, the composition of the Tribunal is similar to that prescribed for the Chief Justice since the appointment of the Deputy Chief Justice is similar to that of the Chief Justice.

**60.** We have read the said submissions and in our view the rest of the submissions filed simply reiterate the submissions made in prosecuting the petition and disclose nothing new.

**The Issues for Determination**

**61.** We have considered the petition, the supporting affidavits and the responses by the respondents. We have also considered the submissions, written and oral and authorities cited by the parties and in our view the following are the issues for determination:

**(1). What is the role of the Commission in the process of removal of a Judge as provided under Article 168 of the Constitution and whether the Commission adhered to its mandate to the letter.**

**(2) Whether the Commission has the power to delegate some of its functions to a sub committee and the effect thereof.**

**(3) What should be the composition of a tribunal formed to investigate the conduct of the Deputy Chief Justice under Article 168 of the Constitution and whether the Tribunal constituted to investigate the conduct of the Petitioner herein conforms with the Constitution.**

**(4) Whether the Petitioner was exposed to a process which is unconstitutional, unfair, unlawful, illegal and discriminatory.**

**(5) Whether the Petitioner's legitimate expectations have been violated, infringed or threatened.**

**(6) Whether the level of publicity generated by the incident can be such as to render a fair trial of the issues herein impossible or improbable.**

**(7) Whether the decision to send the petition to the President is contrary to the principle of proportionality.**

**(10) Whether the rules of natural justice were observed.**

**(11) Whether the principles of separation of power were observed.**

**(12) Whether the Petitioner was exposed to double jeopardy.**

**(13) Whether the Gazette Notice No. 664 dated 26th January 2012 is unconstitutional and illegal.**

**(14) Who should bear the costs of this petition.**

**The Principles**

**62.** The well known principles of constitutional interpretation, though not exhaustive, are as follows:

**(i) That the principles, which govern the construction of statutes, also apply to the interpretation of constitutional provisions. The widest construction possible, in its context, should be given according to the ordinary meaning of the words used and each general word should be held to extend to all ancillary and subsidiary matters. In certain contexts, a liberal interpretation of the constitutional provisions may be called for.**

**(ii) A constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such provision, the approach of the Court should be dynamic, progressive and liberal or flexible keeping in view ideals of the people socio-economic and political-cultural values so as to extend the benefit of the same to the maximum possible.**

**(iii) The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and the exhaustiveness and the rule of paramountcy of the written Constitution.**

**(iv) The words of the written Constitution prevail over all written conventions, precedents and practices.**
**(v) No one provision of the Constitution is to be segregated from the others and be considered alone, but all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.**
**(vi) The Constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Any law, which is inconsistent with or in contravention of the Constitution, is null and void to the extent of the inconsistency.**
**(vii) Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity.**
**(viii) Decisions from foreign jurisdictions with similar Constitutions are useful in helping in the interpretation of the Constitution.**
**(ix) Both purpose and the effect are relevant to the determination of the constitutional validity of a legislative or constitutional provision.**

**63.** Article 159(1) of the Constitution provides that Judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and tribunals established by or under the Constitution. The Constitution of Kenya which was promulgated on 27th August 2010 is arguably one of the most robust in the African continent. Not only does it expressly provide that all sovereign power belongs to the people of Kenya but also states that such power shall be exercised only in accordance with the Constitution. It provides for a robust Bill of Rights which deals with all aspects of human needs including the protection of the environment and consumer rights. Article 23(3) empowers this Court, in any proceedings brought under Article 22, to grant appropriate reliefs, including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation and an order of judicial review.

**64.** In interpreting the Constitution we shall keep in mind the provisions of Article 259 of the Constitution which provides as follows:

**(1). This Constitution shall be interpreted in a manner that—**
**(a) promotes its purposes, values and principles;**
**(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
**(c) permits the development of the law; and**
**(d) contributes to good governance.**

**65.** We, however, must reiterate what we said in our ruling delivered herein on 15th February 2012 that these proceedings are not intended to be and are not an appeal from the decision made by the Judicial Service Commission. Nor are they an investigative forum but are only concerned with determination of the question whether or not the Petitioner's rights or fundamental freedoms in the Bill of Rights have been denied, violated or infringed, or is threatened rather than the merits or demerits of the allegations levelled against the Petitioner.

**66.** This petition brings to mind the words of Mpagi-Bahigeine, Judge of Appeal of the Court of Appeal of Uganda in the case of **Masalu and Others vs. Attorney-General [2005] 2 EA 165**, at 168 where faced with a matter revolving around allegations, made by members of the judiciary, of breach of the Constitution, the learned Judge of Appeal sitting in the Constitutional Court of Uganda stated as follows:

**"I would consider it regrettable that this matter has finally found its way before court, considering its nature and relation to all members of this Court. However, while we are aware that justice must not only be done but must be seen to be done, the court prides itself in its impartiality under the judicial oath. Most importantly, it is a fundamental fact that no other institution, except the Judiciary, can better discharge the task of resolving disputes impartially and independently, regardless of their nature. This caution should allay and or dispel any fears or scepticism that might otherwise throw this judgement under cloud".**

**The Findings**

**Article 168 of the Constitution**

**67.** Article 168 of the Constitution provides for the removal of a judge and provides:

**(1) A judge of a superior court may be removed from office on the grounds of—**

**(a) inability to perform the functions of office arising from mental or physical incapacity;**

**(b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;**

**(c) bankruptcy;**

**(d) incompetence; or**

**(e) *gross misconduct or misbehaviour.*** (Emphasis ours)

**68.** It is important at this stage to note that the only grounds upon which a Judge can be removed are the ones specified above.

**(2) The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.**

**(3) A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judges removal.**

**(4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.**

**(5) The President shall, within fourteen days after receiving the petition, suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission —**

(a) **in the case of the Chief Justice, appoint a tribunal consisting of—**

**(i) the Speaker of the National Assembly, as chairperson;**
**(ii) three superior court judges from common-law jurisdictions;**
**(iii) one advocate of fifteen years standing; and**
**(iv) two other persons with experience in public affairs; or**
**(*b*) in the case of a judge other than the Chief Justice, appoint a tribunal consisting of—**
**(i) a chairperson and three other members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such but who, in either case, have not been members of the Judicial Service Commission at any time within the immediately preceding three years;**
**(ii) one advocate of fifteen years standing; and**
**(iii) two other persons with experience in public affairs.**
**(6) Despite Article 160 (4), the remuneration and benefits payable to a judge who is suspended from office under clause (5) shall be adjusted to one half until such time as the judge is removed from, or reinstated in, office.**
**(7) A tribunal appointed under clause (5) shall—**
**(a). be responsible for the regulation of its proceedings, subject to any legislation contemplated in clause (10); and**
**(b). inquire into the matter expeditiously and report on the facts and make binding recommendations to the President.**
**(8) A judge who is aggrieved by a decision of the tribunal under this Article may appeal against the decision to the Supreme Court, within ten days after the tribunal makes its recommendations.**
**(9) The President shall act in accordance with the recommendations made by the tribunal on the later of—**
**(a). the expiry of the time allowed for an appeal under clause (8), if no such appeal is taken; or**
**(b). the completion of all rights of appeal in any proceedings allowed for under clause (8), if such an appeal is taken and the final order in the matter affirms the tribunal's recommendations.**

**(10) Parliament shall enact legislation providing for the procedure of a tribunal appointed under this Article.**

**69.** From the foregoing it is clear that he procedure for the dismissal of a Judge of Superior Court follows three stages: the Commission stage when the complaint is made ; the Consideration of determination of the Complaint by the Commission; the Presidential Stage when the Judge is suspended and a tribunal formed; the Tribunal stage when the Tribunal considers the facts in the petition to determine whether there are grounds for removal of a judge; and finally the Presidential or post-Tribunal stage when the president formally reinstates or removes the judge depending on the recommendation made to him. In both instances the President has no powers/jurisdiction to do anything outside the recommendation made to him by the Commission and/or the Tribunal.

**Mandate of the Commission**

**70.** The mandate of the Commission is covered under Article 168 of the Constitution. In performing and fulfilling its constitutional mandate, the Commission is empowered to carry out an inquiry. We must say that this ground was a cause of anxiety to us because on one hand the Commission was accused of conducting an inquiry when its mandate was limited to simply initiating the process while on the other the Commission has been accused of not affording the Petitioner opportunity to cross-examine the witnesses who appeared before the sub committee. Initiation, it was submitted by Dr. Khaminwa, means to cause or propose and did not encompass the collation of evidence and interviewing 15 witnesses as was done in this case. On the other hand, it was submitted that the Commission simply relied on reports received from third parties without conducting its own investigation. We now intend to unravel this paradox.

**71.** Article 168(4) provides that the Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses a ground for removal under clause (1), send the petition to the President. From the provisions of Article 168 it is clear that the proceedings for removal of a judge may be initiated only by the Judicial Service Commission. Such initiation may be triggered either by the Judicial Service Commission acting on its own motion, or on the petition of any person. Where it is by way of a petition, it is required to be in writing, setting out the alleged facts constituting the grounds for the judge's removal. On receipt of the petition the Commission is enjoined to consider the petition and, if it is satisfied that the petition discloses a ground or grounds for removal under clause (1), send the petition to the President. It is therefore clear that where the proceedings for the removal of a judge is by way of a petition, the Commission is under a duty to consider the same and only send the petition to the President on being satisfied that it discloses a ground or grounds for removal. Accordingly the Commission is not a conveyor belt but plays the role of a sieve in the process. Where it finds that the petition does not disclose a ground or grounds for removal of a judge the Commission is perfectly entitled to reject the same and we have noted one such petition against the Petitioner was considered and dismissed. Apart from the provisions of Article 168, Article 252(1)(a) provides that each commission, and each holder of an independent office may conduct investigations on its own initiative or on a complaint made by a member of the public. We have already elsewhere in this judgement held that part Fifteen of the Constitution applies to Judicial Service Commission. In order for the Commission to be satisfied that the complaints against the Judge merits a petition to the President to suspend the Judge and form a Tribunal, it is only fair and just that it evaluates the complaint before doing so. How else can it dismiss the complaint without evaluating the same? Such evaluation, with greatest respect to Dr. Khaminwa, does not mean the same thing as the inquiry as contemplated under Article 168(7)(b). If JSC, a State organ does something or omits to do something under the Constitution, and which contravenes that Constitution, that act or omission, if proved before the High Court, shall be invalid. If the process of removal of a judge as instigated or commenced by the JSC is unconstitutional, wrong, unprocedural or illegal, then this Court has the jurisdiction to address the grievances of the affected party. This court has jurisdiction to give a generous and sustainable full measure of the fundamental rights and freedoms. The question before us is whether JSC has interpreted its Constitutional mandate in a patently wrong and unreasonable fashion to require the intervention and proper guidance of this court. and We wish once again to revisit the **Ole Keiwua's Case** where the court expressed itself as follows:

**"in the court's understanding the role of the JSC is to determine whether the act complained about**

**is of the nature and degree to qualify as misbehaviour, misconduct or unethical behaviour sufficient to set in the process that may lead to an adverse representation being made by the Honourable the Chief Justice to the President. Another crucial function of the JSC is that upon receipt of an allegation of misbehaviour or misconduct of a judicial officer, it is to evaluate it in order to ascertain whether it should be advanced to the next stage, the act of removal exercise of a Judge under section 62. Looked at objectively, the JSC by a careful and thorough examination of the facts is required to extract what the issues have been and the material facts found in relation to the complaint and considered germane to a proper and balanced exercise of the JSC's discretion to make or not to make an adverse representation to the President that the question of removing a Judge from office ought to be investigated and such an examination would include seeing and hearing the complainant and the Judge separately for that would serve to inform and enhance a balanced and proper evaluation of the circumstances that have arisen which is likely to lead to removal of a Judge…The court also thinks that section 61(2) and 62(5) have to be read together with section 68 of the Constitution in instances where the removal of a Judge has arisen. The only sensible and practicable way to attend to the case of the applicant who had a complaint or complaints raised against him, was to invite him to answer the charges and thereafter determine the weight and the quality of the complaints tabled against him before authorising the Chief Justice to make representation to the President. That was not done and it is the applicant's case that the Chief Justice by-passed the JSC and made representation to the President before confronting him and giving him an opportunity to be heard on the allegations that were levelled against him. It is the case of the applicant that it was not within the powers of the Chief Justice to do so and he cannot derive any authority from the non-existence of a clear procedure in the Constitution. The Court thinks the sentiments by the applicant have merit because nothing would have been simpler for the Chief Justice than to confront the applicant either through the JSC or after he was sanctioned by the JSC to start the process of removal of the applicant. It was necessary to seek the advice, guidance and contribution of the entity that initially gave and whose advice was relied upon at the time when the applicant was appointed. The court will interfere only where a decision has no rationale basis or is so outrageous in its denial of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it".**

**72.** In our view, both the principles of Legitimate expectation and natural justice dictate that before the Commission sends a petition to the President, it must evaluate the veracity of the allegations made against a judge in order to satisfy itself that the complaints merit forwarding to the next stage. The position would be intolerable if the Commission's only role in the process of the removal of a judge was that of a messenger assigned the unenviable task of sending all manner of complaints levelled against a Judge to the President. It is important to clearly understand the role of the President. On receipt of the petition from the Commission, the President has no option but to act within fourteen days to suspend the Judge and appoint a tribunal. The word used is "shall' which connotes that it is mandatory that the President must suspend the Judge and appoint a Tribunal within the stipulated period. Therefore the President's powers are restricted by this provision and there is no room for manoeuvre. The role of the Tribunal is quasi-judicial and whereas like any other Tribunal, its process is subject to supervisory jurisdiction of the High Court under Article 165(6) of the Constitution, its final verdict is not subject to that jurisdiction but is appealable to the Supreme Court. This is one of the few instances where the Supreme Court entertains an appeal which has neither passed through the High Court nor the Court of Appeal. On the exhaustion of the process, the President again has to act in accordance with the recommendations of the Tribunal since those recommendations are binding on him. If the Tribunal recommends that the Judge should be removed from the office so be it. If the Tribunal declines to recommend the removal of the Judge, the Judge must resume his duties. The President again has no option in the matter. One would imagine the number of Tribunals that would be formed if for every complaint received a Tribunal would result.

**73.** On the other hand, where no petition is presented, how is the Commission to initiate the process on its own motion? The Commission was accused of relying on media reports and statements from the street. Whereas, we do not expect the Commission to rely on gossips, we are not aware that the Commissioners have some supernatural abilities that would enable them initiate such proceedings without some empirical data. It is only sensible that the Commission must rely on some source even if they were to initiate their own proceedings and that source must, in our view, be evaluated. In **Barnwell vs. Attorney General**

**[1994] 3 LRC**, a Guyana case which involved removal of a judge from office – the Court found that the JSC should have heard the judge before making its representation to the President. This is the approach the Kenya JSC took and indeed the allegations about the purported incident were properly before the JSC. The approach is in line with Article 17 of the United Nations Basic Principles on the Independence of the Judiciary which provides that:

**"A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the witness in its initial stage shall be kept confidential unless otherwise requested by the judge".**

**74.** In **Evan Rees and Others vs. Richard Alfred Crane [1994] WLR** it was held:

**"The Commission was not intended simply to be a conduit by which complaints are passed on by way of seriousness of the charges against the Respondent, including misbehaviour"**

**75.** The Commission's role is limited to determining whether there is a *prima facie* case made against a Judge. In our view, therefore, it is not for the Commission to make definitive findings whether the allegations made against the judge have been proved or not. That is a matter for the Tribunal to decide. Unless the role of the Commission at this stage is properly understood, we may have a situation whereby the Commission would conduct a fully-fledged trial and thereby usurp the role of the Tribunal. It is not for this Court or the Commission to find that the allegations made against the Petitioner did not amount to gross misconduct. In fact according to Professor Yash Ghai's ***Kenya's Constitution: An Instrument for Change,*** cited by the Petitioner "whether a conduct is gross or not will depend on the matter as exposed by the facts" which facts it is the duty of the Tribunal to establish. It is also not for this Court to make definitive findings with respect to the so called confessional statement since to do so is likely to prejudice not only the proceedings before the Tribunal but any criminal proceedings that may be instituted either against the Petitioner or any other person who was involved in the said incident. We cannot also determine whether the statement recorded before the CID has any probative or evidential value. We are not conducting a trial within a trial and we do not have jurisdiction to assess and determine the veracity, probative or evidential value of the said statement. It is also outside our jurisdiction to say that the process leading to obtaining of the statement was gravely flawed or tainted with illegality since this court's jurisdiction is limited to the process. Without sounding repetitive it is outside the jurisdiction of this court to determine what the Commission relied upon in submitting its Petition to the President. We cannot substitute our discretion with that of the Tribunal and we are bound to respect the Constitutional boundaries and perimeters of the Commission. In this case we are unable to find any transgression, trespass or any omission committed by the Commission in the exercise of its powers. The petitioner contended that she signed the so called confession under the belief that she would later take refuge in the law. With the greatest respect, by making such a statement to us we think the petitioner misconstrued our mandate and jurisdiction.

**Sub committee**

**76.** We now wish to deal with the thorny issue of the appointment of the sub committee. We agree with Dr. Khaminwa that there is no express provision for the appointment of a sub committee in the Constitution. However, we also acknowledge that the Constitution provides the broad principles of governance, the skeleton upon which the flesh (legislation) rests. Therefore the details of governance cannot be expected to be found in the Constitution otherwise the Constitution would be senselessly and unimaginably expansive. The drafters of the Constitution recognized this and therefore in Article 252 provided that each commission, and each holder of an independent office may conduct investigations on its own initiative or on a complaint made by a member of the public; has the powers necessary for conciliation, mediation and negotiation; shall recruit its own staff; *and may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution*. Any doubts as to whether this provision applies to Judicial Service Commission is dispelled by the fact that it is expressly provided under Article 248 which falls under part Fifteen dealing with Commissions and Independent Offices that this Chapter applies to the Commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides

otherwise, while under clause (2)(e) thereof the Judicial Service Commission is specified as one of the Commissions to which the part applies.

**77.** It follows, therefore, that the Commission has power to perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by the Constitution. What, then are powers prescribed by legislation? The legislation in question is none other than the Judicial Service Act No. 1 of 2011. It expresses in the preamble to the Act that it is an Act of Parliament to make provision *inter alia* for judicial services and administration of the Judiciary; to make further provision with respect to the membership and structure of the Judicial Service Commission; *the appointment and removal of judges* and the discipline of other judicial officers and staff. Section 14 provides that subject to the provisions of the Constitution or any other law, the Commission may hire such experts or consultants, or *delegate such of its functions as are necessary for the day-to-day management of the judicial service to subcommittees or to the secretariat*. Therefore it is expressly clear that the Commission has power to delegate. In this case the sub committee comprised of members of the Commission. It was not an independent Board. Its findings were subject to approval by the Commission itself. The Commission had not given the sub committee the powers to directly transmit a petition to the President. It is not the petitioner's case that the sub committee had sent or transmitted the petition to the President. There is a distinction between this case and the case of **Barnard and Others vs. National Dock Labour Board and Others [1953] 2 QB 18** where the London Dock Labour Board delegated its disciplinary functions under the disciplinary Code to port manager who actually effected the suspension of the plaintiffs. In that case, obviously the port manager, being not the local board had no such powers. In this case, however, the sub committee did not purport to author the petition but only presented its findings to the Commission which findings were reconsidered, discussed, deliberated upon and determined by the Commission as a whole.

**78.** The Commission was at liberty to reject or accept the same. The minutes of the Commission's meeting held on 13th January 2012 annexed to the affidavit of Gladys Boss Sholei aforesaid states that the sub committee's findings were deliberated upon. We have no evidence upon which we can find otherwise. No irregularity has been demonstrated with regard to the Commission adopting the said findings since it was within its Constitutional and legislative mandate to accept or reject the same. We cannot therefore fault the Commission in adopting the sub committee's report after a thorough and clear deliberation and consideration.

**Composition of the Tribunal for the removal of a Judge of the Superior Court other than the Chief Justice.**

**79.** An issue has been raised with respect to the composition of the tribunal mandated to hear and determine the petition against a Judge.

**80.** As already stated above, Article 168 of the Constitution is the provision that deals with removal of a judge of a superior court. Superior Courts under Article 162 of the Constitution are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2) thereof which refers to courts established by Parliament with the status of the High Court to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land. These, then are the judges whose removal are dealt with by Article 168. However, in case of the Chief Justice, Article 168(5)(a) places him in a different stature when it comes to his removal. The Tribunal to remove him is to be chaired by the Speaker of the National Assembly with other members being, three superior court judges from common-law jurisdictions, one advocate of fifteen years standing, and two other persons with experience in public affairs

**81.** Clause 5(b) of the same article deals with a "judge other than the Chief Justice" and provides a different composition from that of the Chief Justice. According to that clause, a Tribunal to investigate a Judge other than the Chief Justice is a chairperson and three other members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such but who, in either case, have not been members of the Judicial Service Commission at any time within the immediately preceding three years; one advocate of fifteen years standing; and two other persons with

experience in public affairs.

**82.** The first issue for determination is whether the Deputy Chief Justice is a judge other than the Chief Justice because if that is the position then it necessarily follows that his or her removal can only be as provided under Article 168(5)(b). The Petitioner, however, contends that since the appointment of the Deputy Chief Justice follows a procedure similar to that of the Chief Justice, her removal should also follow the same procedure as that of the Chief Justice. Who then is the Deputy Chief Justice? Under Article 161(2)(b), the Deputy Chief Justice is the Deputy Head of the Judiciary while under Article 163(1)(b) he or she is the deputy to the Chief Justice and the vice-president of the Supreme Court. It is true that his or her appointment under Article 166 goes through the same process as that of the Chief Justice, although their qualifications for appointment are the same as those of the other judges of the Supreme Court. However, under Article 167(2) the tenure of office of the Chief Justice is a maximum of ten years or until attaining the age of seventy years whichever is earlier. As for the other judges the retiring age is simply seventy years with an option to retire earlier on attaining the age of sixty-five. Can it therefore be argued that since the appointment of the Deputy Chief Justice follows the same procedure as that of the Chief Justice, their tenure of office must similarly be the same so that just like in the case of the Chief Justice the Deputy Chief Justice may only serve for a maximum of ten years? If the drafters of the Constitution had intended that to be the position, nothing would have been easier than for them to have expressly stated so. Similarly, if the same drafters had intended that the procedure for the removal of the Deputy Chief Justice would be the same as that of the Chief Justice, nothing would have prevented them from expressly stating so. In **Barnes v Jarvis, (1953) 1 W.L.R.L. 649** Lord Goddard CJ.said that **"A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered".** In **Warburton v Loveland (1832), 5E.R. 499**, a case decided in 1832 held that **"Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."** In **Nambuye's Case** it was stated that **"in interpreting the Constitution one must take into account the words used and whether or not they are ambiguous because the spirit of the Constitution must derive from the words used and not those implied. I find no ambiguity in the words used under section 62 of the Constitution."** In the case of **James vs. Commonwealth of Australia [1936] AC 578** it was held that "**A Constitution must not be construed in a narrow or pedantic, manner and that construction must be beneficial to the widest possible amplitude of its powers, must be adopted or that a broad and liberal spirit should inspire those whose duty is to interpret the Constitution".**

**83.** In **Justice Alliance of South Africa vs. President of South Africa & Others [2011] ZACC 23**, at page 42 it was stated that "**where the Constitution seeks to single out the Chief Justice and the Deputy Chief Justice, it does so deliberately and plainly. It does so solely in creating the offices of the Chief Justice and the Deputy Chief Justice, and in making special provision for the President to appoint them"**. It is therefore clear that the composition of a Tribunal for removal of a Judge is to be done by the President from the persons specified therein. We therefore find that Article 168(5)(a) has expressly singled the composition of a Tribunal to investigate the conduct of the Chief Justice and that composition, being a Constitutional requirement, we cannot, under Article 259 aforesaid, import a different provision not found therein or infer a different intention. It is obvious that all the provisions relating to the Chief Justice cannot be made applicable to the Deputy Chief Justice. The provisions above removal, retirement and remuneration are different for the two offices. The Chief Justice is governed by Article 168(5)(a) while the Deputy Chief Justice is governed by Article 168(5)(b). It is therefore not permissible to import words in the specific provision in the Constitution. The distinction between the two offices has been recognised by the Constitution and we cannot equate the office of the DCJ to that of the Chief Justice.

**Discrimination.**

**84.** The foregoing issue ties with the next issue which is whether the petitioner has been treated in a discriminatory manner. We acknowledge there is a distinction between the Chief Justice on one hand and the Deputy Chief Justice and other judges on the other hand, in relation to the composition of the Tribunal for their removal. However, this distinction or so called discrimination is sanctioned by the Constitution itself and the provisions of Article 2(3) bar us from questioning the validity of the Constitution. In

interpretation of the Constitution we must bear in mind the principle that as far as possible the words used should be given their ordinary and plain meaning and those words must be interpreted in the context of the Constitution in which they are used, but not in abstract. Again in performing our task we must recognize that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and the exhaustiveness and the rule of paramountcy of the written Constitution. Therefore we are unable to find that, by setting a different standard for removal of the Deputy Chief Justice from that of the Chief Justice, the Petitioner herein has been discriminated against or that the principle of legitimate expectation has been breached. The issue of discrimination was dealt with *in extenso* in the case of **Federation of Women Lawyers Kenya (FIDA-K) and others vs. Attorney General and others High Court of Kenya at Nairobi Petition Number 102 of 2011** which cited several decisions and stated:

**"In the case of MAQOUN V ILLINOIS TRUST BANK (1898) 170 US 283 to BAYSINE FISH CO. V GENTRY (1936) 297 US 422 it was held;**

**"The rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes, there cannot be any exact exclusion or inclusion of persons and things".**

**As the Supreme Court of India has observed in the case of KEDAR NATH v STATE OF W. B. (1953) SCR 835 (843):**

**"Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary: that it does not rest on any rational basis having regard to the object which the legislature has in view."**

**In Civil Case No.1351 of 2002 R. M v GAO & Attorney General Nyamu J *(as he then was)* and Ibrahim J rendered themselves in the following words;**

**"The equal provisions do not in our view require things which are different in fact or in law to be treated as though they are the same. Indeed the reasonableness of a classification would depend upon the purpose for which the classification is made. There is nothing wrong in providing differently in situations that are factually different. The law does all that is needed when it does all it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and as fast as its means allow."**

**The equal protection and non-discrimination principles are not abstract propositions. They are expressions of policy arising out of specific difficulties and historical injustices to be addressed so that specific goals and remedies are achieved. The Constitutions does not require things and circumstances which are different in fact or in opinion to be treated in law as though they were the same.**

**As noted from the quoted cases hereinabove it is an important aspect that lack of equal protection is to be found in the exercise of an invidious discrimination. Drafters are entitled to hit the evil that exists and they are not bound to take account of new and hypothetical inequalities that may come into existence as time passes or as the conditions change. Borrowing from those cases and paraphrasing them, a mere production of inequality is not enough to hold that equal protection has been denied. The inequality produced in order to encounter the challenge of the Constitution must not be actually and palpably unreasonable and arbitrary. The law of equality permits many practical inequalities...When a provision is challenged as offending against equal protection the question for determination by the courts is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of the legislation. In our view mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any basis having regard to the object which the legislature has in view or which**

**the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution".**

**85.** The role of the Chief Justice was restated in the **Ole Keiwua's case** as follows:

**"However, the Chief Justice is the head of Judiciary which is the third arm of Government and by virtue of that position he exercises ministerial duties in the day to day running and management of the judiciary. In that regard the Chief Justice in exercise of his ministerial duties is not acting as a judge in a court of law. In exercise of his powers under the constitution, it cannot be said that the Chief Justice is only a judge of the High Court and Court of Appeal. Apart from being a Judge of the High Court and Court of Appeal he is at the pinnacle of the Judiciary and for that matter he is the administrative head of the Judiciary. Indeed it cannot be said that in making a representation to the President under section 62(5) of the Constitution the Chief Justice is exercising his judicial function. To the contrary he is exercising his constitutional and administrative functions and in that regard he is amenable to the supervisory jurisdiction of the High court and is subject to judicial review orders. In our view the Chief Justice wears three hats; (1) Judicial, (2) administrative & ministerial (3) Constitutional. In exercising his powers as a judge, he makes judicial determinations in matters that are filed by parties".**

**86.** The issue for our determination is, therefore, whether the selection or differentiation is unreasonable or arbitrary: that it does not rest on any rational basis having regard to the object which the legislature has in view. We must never loose sight of the fact that there are three arms of the Government, the Judiciary, the Legislature and the Executive. As far as we are concerned the three arms are equal and complimentary. The three arms are headed by the Chief Justice, the Speaker and the President respectively. Accordingly, the three institutions hold a special place in the Republic of Kenya and deserve special treatment. The removal of the persons who hold the said positions should therefore not be taken lightly hence the elaborate procedures for their removal.

**87.** The Chief Justice, for example, sits in and is the Chair person of the Judicial Service Commission while the Deputy Chief Justice is not necessarily a member of the Commission unless elected to sit on the Commission by the Supreme Court. In a nutshell, whereas the procedure for appointment of the Deputy Chief Justice is similar to that of the Chief Justice, they are not necessarily at par in the performance of their duties and functions. It does not follow that all the procedures performed by or applicable to the Chief Justice must apply to the Deputy Chief Justice. We accordingly find that there is a justification for the distinction between the procedure for the removal of the Chief Justice from that of other judges. We find that the right to fair administrative action under Article 47, and the right to fair hearing under Article 50 were not thereby violated.

**88.** Still on the same issue of discrimination, so far the only step that has been taken towards the removal of the Petitioner, in our view, is that of the Commission. The sub committee that was appointed was composed of 7 commissioners, 3 of whom were women. In fact all the women members of the Commission were in the sub committee. The secretary of the said sub committee was also of female gender extraction. We therefore are unable to find any basis for the allegation that the Petitioner has been confronted with acts of gender discrimination in these proceedings. The mere fact that the petitioner was interrogated by policemen *per se* cannot, in our view constitute gender discrimination as discussed above. We are therefore unable to discern any empirical evidence of discrimination as contemplated under Article 27 of the Constitution.

**Legitimate Expectation.**

**89.** Legitimate expectationrequires, according to the **Modern English Legal System (5th Edn.)** at page 472 that **"those who act in good faith on the basis of the law as it is or seems to be should not be frustrated in their expectations".** Our task, therefore is to determine whether the Commission acted in good faith on the law as it is or seems to be. Litigants expect to enjoy certain rights unless it has been communicated in writing and on rational grounds why the right is being withdrawn.

**90.** Since we have already found that there is a distinction between the composition of a Tribunal

formed to investigate the conduct of the Chief Justice from that of the Deputy Chief Justice, and that, that distinction is justifiable, it follows that the argument that the Petitioner had legitimate expectation, that the tribunal for her removal should be similar to that of the Chief Justice has no basis. It has also been submitted that the Petitioner had legitimate expectation that she would hold the position of the Deputy Chief Justice till the age of 70. However, that expectation was not an absolute one, but was subject to the provisions of the Constitution which provide for removal from office before the attainment of that age. For us to find that putting in motion of the process of removal of the Petitioner from office constitutes a breach of her legitimate expectation to stay in office till the age of 70 would in effect be declaring the whole process of removal of a Judge from office before attaining the age of 70 unconstitutional. By doing so we would have declared one part of the Constitution unconstitutional, and thus by a stroke of the pen undermined the sovereignty of the people of the Republic of Kenya contrary to Article 1(1) of the Constitution, which provides that all sovereign power belongs to the people. Even before the promulgation of the Constitution of Kenya, 2010, the position in Kenya was restated by Justice Mohammed Ibrahim in **Re: Harmonised Draft Constitution of Kenya: Bishop Kimani and 2 others v The Attorney General** Mombasa HCCP No. 669 of 2009 (Unreported) where he stated:

**"Courts must be wary to undermine the presumption of Constitutionality of legislation and it must reject any invitation to question or interpret the Constitutionality of the Constitution itself."**

**91.** We accordingly, find that we have no jurisdiction to interpret the Constitution in a manner that would have the effect of rendering part of the Constitution unconstitutional. As to whether or not the case merits the upholding of that expectation is to be decided by the Tribunal.

**Proportionality**

**92.** Proportionality principle requires that a degree of legal coercion used in the circumstances be commensurate with the matter being referred to. **The Committee of Ministers of the Council of Europe** viewed it as "an appropriate balance that must be maintained between the adverse effects which an administrative authority's decision may have on the right, liberties or interest of the person concerned and the purpose which the authority is seeking to pursue". It requires, according to the **Modern English Legal System (5th Edn.)** at page 472 that **"the individual should not have his freedom of action limited beyond the degree necessary for the public interest"**. For one to succeed on that ground he must prove that the test of proportionality has not been met or to show that there is a right, which right is enforceable and has been infringed and the same infringement or limitation is not justifiable in a democratic state. In other words the court has to test the proportions of the restrictions againstthe objects intended to be achieved by the restriction. A law which seeks to limit or derogate from the basic right of an individual on the ground of public interest will be saved by the Constitution if it satisfies two requirements. Firstly, such law must be lawful in the sense that it is not arbitrary. It must make adequate safeguards against arbitrary decisions and provide effective controls against abuse of those in authority when exercising their powers. Secondly, the principle requires that the limitation imposed must not be more than necessary to achieve the legitimate object. In **Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others [2006] 2 EA 117** the court held that proportionality test must meet the following:

(i). That it be rationally connected to its objective;

(ii). That it impairs the right or freedom as little as possible; and

(iii). That there is proportionality between its effects and its objectives.

**93.** The question that arises, therefore, is whether, the Commission in deciding to petition the President did take into account the principle of proportionality. What then were the options open to the Commission? It has been submitted, and we agree, that the Commission could reprimand the petitioner or opt for conciliation, negotiation or mediation, or as it did, petition the President. Did the Commission, by opting for the petition, act in a manner not commensurate with the complaint before it? It has been submitted that the incident was too trivial to warrant petitioning the President. From the record, the Commission considered the allegation was of such a nature as to justify the petition. It is our considered

view that whether or not to resort to the alternatives such as conciliation, negotiation or mediation, is a matter which must again depend on merits of the case and as we held in our ruling dated 15th February, 2012, we are not in this judgement, concerned with the merits of the case and it is not our role to substitute our discretion for that of the Commission. What we are concerned with is whether the decision of the Commission is *ultra vires*, irrational, unreasonable, arbitrary or capricious within the ***Wednesbury's*** principles. The Tribunal tasked with conducting the inquiry will, in our view, be better placed to deal with the issue whether the said alternatives were more appropriate in the circumstances of this case in which event they may take the option of dismissing the petition. We cannot in this judgement make the decision one way or the other on the issue whether the Commission should have resorted to more "friendly options" than the drastic step it took of petitioning the President to set up a Tribunal. **In Potato Marketing Board vs. Merricks [1958] 2 LU ER 538**, Lord Devlin held that while the Board had been unnecessarily heavy handed, there was no sign of bad faith. A similar situation arose in **Westminster Bank Ltd vs. Minister of Housing and Local Government** where a public authority had at its disposal alternative ways of achieving a desired end and the court considered whether a choice between alternatives available to parties can be invalidated. Lord Reid said:

**"No doubt there might be special circumstances which make it unreasonable or an abuse of power to use one of the methods, but there was none".**

**94.** The use of power which can validly be chosen cannot be upset simply because it means greater loss or inconvenience to those affected, if another available power had been used. In the absence of bad faith, the decision by the Commission to send a petition to the President does not offend the proportionality test. The court cannot direct JSC on which option to apply whether it be negotiation, conciliation, mediation or appointment of the tribunal.

**Rationality**

**95.** Coupled with the principle of proportionality is the principle of rationality. It is a well known principle of administrative law since the case of **Associated Picture Houses Ltd vs. Wednesbury Corporation [1947] 2 All ER 680** that a decision of a person or body exercising a statutory discretion will be quashed for irrationality or for being unreasonable, and the exercise of discretionary powers involving a large element of policy will be quashed on the basis of manifest unreasonableness in exceptional cases, as it is incumbent upon such bodies exercising administrative authority, to give reasons for administrative actions. It is mandatory that such decisions be reasonable in the circumstances of the case. Decisions of persons and bodies which perform public duties or functions will therefore be liable to be quashed or otherwise dealt with by an appropriate order where the Court concludes that the decision is such that no person or body properly directing itself and the relevant law, and acting reasonably could have reached the decision.

**96.** The issue that we have to consider is whether the decision by the Commission was reasonable, and whether it considered irrelevant matters or failed to consider relevant matters. In his statement dated 13th January 2012, the Chief Justice stated that "after lengthy deliberation, evaluation of witnesses' testimonies and other material evidence submitted, the JSC has now resolved that pursuant to Article 168(4) it will send a petition to the President with a view to suspending Justice Nancy Baraza as judge of the Supreme Court and Deputy Chief Justice of the Republic of Kenya and to appoint a tribunal to investigate her conduct". We have not seen any evidence, apart from the media coverage which we shall consider shortly, to show that the decision to petition the President was unreasonable or was based on irrelevant material or was not based on relevant material to justify our interference.

**Natural Justice and Right of Cross-examination**

**97.** The petitioner also contends that the rules of natural justice were not adhered during the process complained of. In support of the Petition Dr. Khaminwa cited the South African case of **Van Rooyen and Others vs. State and Others [2003] 1 LRC 533.** According to that decision at page 588, the South African Constitution makes provision for a two-stage process. Section 177(1) thereof requires an initial **investigation** to be carried out by the Judicial Service Commission and if the Commission finds that **grounds exist for the removal of the judge** from office, that finding is subject to confirmation by the

National Assembly by a resolution supported by at least two thirds of its members.

**98.** The South African system therefore expressly requires the Judicial Service Commission to conduct an investigation and is empowered to make a finding whether grounds exist for the removal of the judge from office. The South African Commission, therefore, is bound to have reliable evidence before it to warrant such action and it would have to conduct its affairs in a manner consistent with natural justice since there is no other avenue available for a judicial hearing. In those circumstances it is only just that the person against whom the complaint is made, not only be given an opportunity to be heard, but also be afforded opportunity of testing the veracity of the evidence adduced. In our case the Commission's role is to initiate the process, and only to satisfy itself whether the petition, where one is made, discloses a ground for removal. It does not have to make a finding as to the existence of the said ground since those findings, in the form of binding recommendations, are to be made by the Tribunal exercising the powers conferred upon it under Article 168(7)(b) of the Constitution.

**99.** The Tribunal is obligated under Article 168(7) to regulate its own proceedings and in our view, the Tribunal being a quasi-judicial body is obliged to comply with the rules of natural justice. We do expect that the Tribunal will in their proceedings, for example, ensure due compliance with the **Bangalore Principles of Judicial Conduct** with respect to the minimum requirements for a fair trial which include recognition that a party has a right to (a) adequate notice of the nature and purpose of the proceedings; (b) be afforded an adequate opportunity to prepare a case; (c) present arguments and evidence, and meet opposing arguments and evidence, either in writing, orally or by both means; (d) consult and be represented by counsel or other qualified persons of his or her choice during all stages of the proceedings; (e) consult an interpreter at all stages of the proceedings, if she or cannot understand or speak the language used in the court; (f) have his or her rights and obligations affected only by a decision based solely on evidence known to the parties to public proceedings; (g) have a decision rendered without undue delay. The involved parties should be provided with adequate notice of, and the reasons for, the decision; and (h) appeal, or seek leave to appeal, decisions to a higher judicial tribunal, except in cases of final appellate court. To hold that the Petitioner's right to a fair trial is likely to be breached before even the rules are promulgated would, in our view be premature. The functions of the Commission are administrative, statutory and constitutional.

**100.** The Petitioner also states that she was not accorded the right to cross-examine the witnesses in breach of the rules of natural justice, thereby violating her fundamental rights and freedoms. The Petitioner also contends that she was not given an appropriate notice to prepare for her defence and that her attempts to obtain a copy of the proceedings of the subcommittee were equally thwarted. We have partly dealt with the issue hereinbefore. The principle of natural justice, also known as *audi alteram partem* (or hear the other side)" requires, according to the **Modern English Legal System (5th Edn.)** at page 472 that **"persons affected by an adverse position must be given an opportunity to make representations".** We have perused the proceedings and whereas it is true that the Petitioner did not cross-examine the witnesses who appeared before the sub committee, we must reiterate the fact that the Committee was simply evaluating the circumstances surrounding the evidence in question and was not and could not conduct a hearing which is Constitutionally, a preserve for the Tribunal. We wish to refer to **High Court Miscellaneous application No.764 of 2004 - In the matter of Lady Justice Roselyn Naliaka Nambuye versus The Chief Justice and 5 others** in which this court stated as follows:

**"Although the Chief Justice does occupy the pinnacle of Judicial hierarchy in the administrative structure, as a judge he is one among equals because the concept of independence of judges does encompass the principle that Judges are independent of each other. In some cases a determination by the Chief Justice of certain questions and his liberty to pry into Judges affairs would compromise that independence. It seems to me that failure to confer on the Chief Justice here in Kenya and even in Tobago a specific right to hear complaints against Judges and to make a determination on them as the first port of call was deliberate on the part of the Framers of our Constitution perhaps in the deference to this principle. Hence in the case of Trinidad & Tobago the first right of hearing is conferred on the Legal Services Commission and where the Chief Justice is a member and the second right of hearing is conferred on the Judicial Committee i.e. the Privy Council and in the case of Kenya on the Tribunal where the Chief Justice is not a member. The**

**ideal situation in Kenya would be the Judicial Service Commission as the first port of call and the Tribunal as second port of call…….In interpreting the Constitution one must take into account the words used and whether or not they are ambiguous because the spirit of the Constitution must derive from the words used and not those implied…The only constitutional right of hearing is conferred by s 62(5) by virtue of the appointment of a Tribunal and the applicant has not been denied that right. In fact she has participated in the Tribunals hearings. I find that as regards the proceedings at the tribunal the applicant's legitimate expectation is that of being accorded a fair hearing and there is nothing to show that this has not been accorded".**

**101.** We agree that the first port of call is the Judicial Service Commission but that first port of call's jurisdiction is limited to evaluation of the circumstances and it should not trespass into or usurp the jurisdiction of the Tribunal. The second port of call where the actual hearing takes place is the Tribunal. Accordingly, we find that the failure to accord the Petitioner the right to cross-examine the witnesses before the sub committee or by the Commission does not amount to breach of the rules of natural justice. Had the Commission collected the evidence and without hearing the Petitioner's version made recommendations to the President, we agree that may have been in breach of the Petitioner's legitimate expectation. We say "may" because in **Rees vs. Crane** (ibid) the Privy Council dealing with the procedure for removal of a judge in Trinidad and Tobago citing several cases stated as follows:

**"In most types of investigation there is in early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of penal sanction or to damaging someone's reputation or to inflicting financial loss on someone the more necessary it becomes to act judicially, and the greater the importance of observing the maxim *audi alteram partem*…It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at that particular stage in question. Essential features leading the courts to this conclusion have included the fact that investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage…….Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will generally decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage…….There are…….no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, much assistance [cannot be derived] from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case".**

**102.** However, in this case, it is clear that the Commission accorded the Petitioner an opportunity to and she did present her case before the Commission. We agree with the position taken in **Ridge vs. Baldwin (1968) All ER 66** that "a man is entitled to have chapter and verse quoted against him and a full opportunity to rebut the allegation". In the case **Kanda vs. Government of Malaysia [1962] AC 322-337** relied upon by Dr. Khaminwa, it was stated that:

**"If the right to be heard is to be a real right which is worth anything, it must carry in the accused man to know the case made against him. He must know what evidence has been given and what statements have been made affecting him, and then, he must be given an opportunity to correct and contradict them".**

**103.** We are satisfied that the Petitioner was made aware of the allegations against her and accorded an opportunity to correct or contradict those allegations. Whether the Commission should have believed her or not is not for us to decide. Rebutting allegations by giving her version, however, does not, necessarily, encompass cross-examination at that inquiry stage. The **Ole Keiwua's Case** is distinguishable from this case since in that case the judge was never afforded an opportunity to appear before the **Ringera Committee** at all.

**The Media & Publicity (Article 31 of the Constitution)**

**104.** The Petitioner has extensively dwelt on the media coverage that was generated by the incident, as having influenced the decision of the Commission and therefore lending credence to the fact that the decision may have been based on irrelevant factors, moreso taking into account the fact that one of the publications namely the ***Nairobi Law Monthly***, which covered the episode, is published by a Commissioner. We must acknowledge the fact that the incident was given an exceptionally wide media coverage. The Petitioner, it is undisputed, is not an ordinary person taking into account her position both in Kenyan judiciary and in the society. An incident surrounding her would, not unexpectedly, attract more than average media coverage. In **Abuse of process and fairness in court proceedings** by David Corker and David Young it is stated that "modern media is able to create and orchestrate, an unprecedented level of hostility towards a particular defendant which has attracted substantial, predominantly hostile media publicity". However, publicity alone does not vitiate proceedings unless it is shown that the coverage was such that the Commission is likely to have been influenced or affected by the media reports provoked by the incident.

**105.** The offending edition of the said publication is for the month of February 2012. The petition to the President was vide a letter dated 19th January, 2012. Can it therefore be said that the decision was influenced by the said publication? With respect to the publication and commentaries in the daily media there were both negative and positive commentaries. In the case of **R vs. Horsham, Justice, Ex Parte Farquhason [1982] QB 762,** at 794, Lord Denning held that the risk really must be substantial since the sole consideration is the risk to the administration of justice and whoever has to consider it should remember that at trial, judges are not influenced by what they may have read in the newspapers. Nothing has been presented to demonstrate that the media reports in this matter are such that the Commission properly addressing its mind to the law and the issues before it is likely to arrive at a determination based on the said reports. We appreciate the fact that in his press release, the Chief Justice alluded to the wide spread media coverage of the incident. However, if it is true that the Commission simply relied on the media reports without conducting its own evaluation, that is an issue that will become clear when the matters go for trial before the Tribunal since the issue goes to the merit of the Petition.

**Impartiality, Separation of Powers and the role of the Attorney-General and the Police**

**106.** We have also been addressed on the issue of separation of powers and several authorities were filed by the Petitioner on this aspect. It was submitted by Dr. Khaminwa that the fact the Attorney-General, the Principal Chief Government adviser, also sits on the Judicial Service Commission constitutes a conflict of interest and hence contrary to the principle of separation of powers and the independence of the judiciary. We do recognise that in any democratic system, the importance of the doctrine of separation of powers and the independence of the judiciary cannot be over-emphasised. The independence of the judiciary is provided for under Article 160 of the Constitution. Under Article 160(1) it is expressly provided, that in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority. We agree with the decision in **Van Rooyen and Others vs. State and Others [2003] 1 LRC 533** at 559 that in Constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the judiciary to uphold the Constitution.

**107.** In exercising such powers, obedience to the doctrine of the separation of powers requires that the judiciary, in its comments about the other arms of the state, show respect and courtesy, in the same way the other arms are obliged to show respect for and courtesy to the judiciary. It is not in dispute that the Attorney-General is a member of the executive arm of the Government. However, there is a difference between his position as a member of the Judicial Service Commission to perform a duty which calls for

an independent decision and being therein to perform that duty in accordance with the wishes of the executive. In **Van Rooyen's Case** (ibid) at 579, it is stated thus:

**"The mere fact…that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence...In many countries, in which there is an independence of the judiciary and a separation of powers, judicial appointments are made either by the Executive or by Parliament or by both. What is crucial to the separation of powers...is that it should function independently of the Legislature and the Executive...The JSC contains significant representation from the judiciary, the legal professions and the political parties of the opposition. It participates in the appointment of the Chief Justice, the President of the Constitutional Court and the Constitutional Court judges, and it selects the judges of all other courts. As an institution it provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments".**

**108.** Under the provisions of Article 171(2) of the Constitution, the Commissionconsists of the Chief Justice, who is the chairperson of the Commission; one Supreme Court judge elected by the judges of the Supreme Court; one Court of Appeal judge elected by the judges of the Court of Appeal; one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates; the Attorney-General; two advocates, one a woman and one a man, each of whom must have at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates; one person nominated by the Public Service Commission; and one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly. Although the Attorney-General is a member of the Commission, there is no other role reserved for the holder of that position in the Commission. During the hearing of the petition, we rejected the submissions to the effect that the Attorney General is the legal adviser to the Commission. In any case there is no evidence before us to suggest that the Commission solicited and he provided legal advice in any matter or steps concerning the incident that occurred on 31st December 2011 involving the Petitioner herein. In this case the Attorney-General was not even a member of the sub committee. Fortified by the decision in **Van Rooyen's Case** (ibid) we find that the presence of the Attorney General in the Commission does not constitute a conflict of interest nor compromise the independence and impartiality of the Commission. It is contended that the Attorney General handled the matter in a very malicious manner to the extent of encroaching on the DPP's Constitutional mandate to achieve ulterior motives only to him. The petitioner is also apprehensive of the Attorney General's impartiality and fairness in the incident. It is also contended that the Attorney General gave a hurried advice to the President to suspend the Petitioner and form a Tribunal. We have thoroughly and meticulously gone through all the documents and the materials before us and we do not find any evidence to support the allegations made against the Hon. Attorney General. There is no evidence that the Attorney General acted in a particular manner whether maliciously or otherwise in order to achieve ulterior motives. We therefore find the allegations and apprehensions against the Attorney General in the way he conducted himself as utterly misplaced and without merit.

**109.** The same issue was raised with respect to the criminal proceedings. It was contended on behalf of the Petitioner that the Commission relied on the criminal investigation results, hook line and sinker as it were, compromising its own independence and impartiality. We are not satisfied at this stage that the basis for the decision by the Commission to send the Petition to the President was solely the result of the police investigations. It was contended that the Commission should not have relied on the confession as a basis for petitioning the President. The reliance on the criminal processes rendered the decision of the Commission lacking in independence and impartiality. As stated earlier, we cannot determine whether the Commission solely and singularly relied upon the alleged confessionary statement. It is our view that to go into the merits and demerits of what the Commission relied upon would be in excess of our jurisdiction. At this stage the less said about the issue the better since we do not intend to make findings that may be construed to bind the Tribunal in its proceedings.

**Double jeopardy**

**110.** On the issue of double-jeopardy, we must stress that so far the petitioner has not been tried and convicted. As far as we know there are no criminal proceedings against her pending in any court. Further as rightly submitted by Dr. Khaminwa, a conviction of a criminal offence is not necessarily a ground for removal of a judge unless the said conviction can be construed to constitute one of the grounds under Article 168(1) of the Constitution. Conversely lack of a conviction does not necessarily mean that the conduct in question does not constitute a ground under the said article. In other words misconduct contemplated under Article 168(1) cannot be equated to a finding of guilt in a criminal process. We therefore do not agree that the mere fact that criminal charges may be preferred against any of the parties to the incident in question or both, bars the Commission from carrying out its Constitutional mandate as provided under Article 168(2) of the Constitution. On the issue whether the Commission should have suspended its mandate and awaited for a conviction before taking the steps taken, we are not aware of any criminal proceedings that have been commenced so far and we cannot speculate that a criminal trial will be commenced against the petitioner. The DPP is on record as saying that he will await the conclusion of the process commenced by the JSC.

**111.** Here it is important to mention the incident in the case of the Hon. Mr. Justice G B M Kariuki. The petitioner's contention is that the two incidents have not received the same treatment. In order to enable us make an informed finding on whether or not the two incidents were not accorded the same treatment, it was necessary for the petitioner to place before us sufficient material to enable us do so. In the absence of such material, we would be groping in the dark if we were to attempt to contrast the two incidents. We do not wish to venture into that futile trip.

**Notice**

**112.** The Petitioner has also taken issue with the adequacy of the notice that was given to her. The Petitioner's contention is that she received notification at 9.00 a.m. on 12th January, 2012 when she was on her way to Naivasha on official duty requiring her to appear before the Commission at 2.00 p.m. In **R vs. KMTC ex parte James Chepkonga Kendagor** it was held that sufficient time must be given between the issuance of the notice and the meeting itself as this is what is called due notice. Whereas we feel that the Commission was rather economical with its timetable, we must reiterate that the proceedings were not a hearing and the Petitioner has not alleged that she requested for more time and was denied by the Commission. We accordingly, do not hold that the failure to give the Petitioner more time violated her right.

**113.** On the issue of failure by the Commission to supply the Petitioner with the report of the Sub committee, we have stated that the sub committee's role was limited to reporting back to the Commission. It is our view, therefore, that the Petitioner will be entitled to be furnished with the charges and the materials to be used against her before the Tribunal as required under the Constitution. That is, however, a bridge that will be crossed by the parties when they are before the Tribunal.

**Gazette Notice**

**114.** The petitioner's other complaint was that the Gazette Notice was in reference to a person other than the Petitioner herein since it referred to "the Deputy Chief Justice, Supreme Court of Kenya" while the Petitioner is the Deputy Chief Justice and the Vice President of Supreme Court of the Republic of Kenya. Whereas it is true that the Gazette Notice could have been better drafted, it is important to note that the person whose conduct is being investigated is a Judge of the Superior Court other than the Chief Justice. We do not believe that this misdescription has violated any of the Petitioner's fundamental rights or freedoms since her name is expressly stated in the said Gazette Notice.

**115.** The other issue raised on the same document is the fact that the suspension of the Petitioner seems to have been preceded with the setting up of the Tribunal contrary to the provisions of Article 168(5). In our view the two events, suspension and the setting up of the Tribunal, are meant to be undertaken concurrently and not consecutively hence the stipulation of the same period within which the said actions are to be undertaken. In any case, the defect, if any is within the provisions of Article 159(2)(d) of the Constitution which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. It is

in the same spirit that we have not acceded to the respondents' prayer that we strike out some of the provisions of the petitioner's affidavits.

**116.** On the validity of the special Gazette Notice in the circumstances of this case, apart from submissions from the bar, we have not been referred to any authority one way or the other about the issue. The burden, however, in these matters was upon the petitioner to satisfy us that the document that purported to set up the Tribunal, is not a legal document for the purpose for which it was meant, or that it was not known to law, or that it was not the document through which such a Tribunal can be formed. We, accordingly, are unable to find in favour of the Petitioner on that issue.

**117.** The impugned Kenya Gazette Notice No. 664 of 26th January 2012 mandated the said Tribunal to investigate the conduct of the Petitioner on the basis of the cited provisions of the Constitution and Judicial Service Code of Conduct and Ethics, Legal Notice No. 50 of 2003 and other relevant laws and matters including but not limited to the allegations contained in the petition by the Judicial Service Commission of Kenya dated 19th January, 2012.

**118.** From the wording of Article 168, can it be said that on receipt of a petition from the Commission by the President, he can empower the said Tribunal to inquire into matters other than the matters which were considered by the Commission and found to disclose a ground for removal? We are cognisant of the fact that a constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come. Therefore, while interpreting such provision, the approach of the Court should be dynamic, progressive and liberal or flexible keeping in view ideals of the people socio-economic and political-cultural values so as to extend the benefit of the same to the maximum possible. To permit the President to empower the Tribunal to conduct itself in such a manner would imply by-passing the Commission with respect to complaints not considered by the Commission or those considered by the Commission and found wanting.

**119.** It is our view that the Tribunal set up for the removal of a judge can only inquire into the matters submitted in the Petition to the President by the Commission. Complaints that come after the suspension cannot form part of the Tribunal's mandate. The President is bound by the facts as set out in the Petition sent to him by the Commission and if the gazette notice purports to create jurisdiction to inquire into more matters outside the petition by the Commission, it is ultra vires Article 168. As was rightly pointed out in **Justice Amraphael Mbogholi Msagha vs. The Chief Justice & 7 Others** High Court Misc. Application No. 1062 of 2004, the Tribunal can only inquire into the facts presented by the Commission to the President, since the President only forwards the petition presented to him by the Commission. He cannot purport to enlarge the mandate or jurisdiction of the tribunal. The Constitutional powers of the President are Constitutional and that Constitutional mandate is restrictive and/or limited to the petition presented to him by the Commission. The President is like a conveyor belt and forwards the petition to the tribunal and cannot purport to include matters which were not considered and determined by the Commission. The president enjoys no discretion and has to execute his mandate mandatorily in accordance with the petition presented by the Commission.

**120.** In this case, the Gazette Notice No. 664 of 26th January, 2012 issued under Article 168 (5) (b) of the Constitution of Kenya purporting to appoint Chairperson and Members of tribunal to investigate the Conduct of the Petitioner on matters *'including but not limited to'* the allegations contained in the Petition by the Judicial Service Commission dated 19th January, 2012, is to that extent *ultra vires* the powers conferred upon the President under Article 168(5). In reaching this decision we derive comfort from the decision in **Ole Keiwua's Case** where the court expressed itself as follows:

**"In the absence of a representation that was handed over to the President, the President had no powers to empower the tribunal to engage in an investigation and inquiry. The role of the tribunal was to establish whether the issues and complaints that were contained in the representation made to the President, was enough or not enough to sustain the removal of the applicant under section 62 (4), (5) and (6) of the Constitution. We think that the tribunal misdirected itself by assuming that it had powers to carry out an investigation process and frame its own charges against the applicant. The powers of the tribunal was limited or conditional upon the charges that were the**

**subject of the representation that was made to the President. The representation arises from the Ringera committee's recommendations. And anything that was outside the Ringera report and outside the representation made to the President by the Honourable the Chief Justice, could not be a basis for inquiry or investigation by the tribunal. The tribunal misconstrued the words in the gazette notice <u>but not limited to</u> by purporting to gather evidence and engaging investigators to the field to sustain what they were calling charges against the applicant. That power was *ulra vires* their mandate and therefore illegitimate and an illegality. We also made a finding that the President had no powers to empower a tribunal to conduct an inquiry or investigation other than or outside the representation he received from the Honourable the Chief Justice. In essence the powers of the President was conditional and restricted to the representation he received from the Chief Justice in exercise of his powers under section 62 (4) and 62(5)(a) is concerned. The President had no powers to direct the tribunal to investigate the conduct of the applicant by using the words *'including but not limited to'*. We find the inclusion of the said words in the gazette notice No.8828 of 2003 was in contravention of constitutional powers of the President as enshrined under section 62 of our Constitution. That was a manifest and patent contravention of our Constitution. By extension the engagement of the tribunal in a mandate outside the provisions of the Constitution was also an illegality and unconstitutional. In our humble view the issues to be investigated by the tribunal should only comprise those complaints and/or questions that were contained in the representation made to the President and not the general conduct of the applicant as a whole. The tribunal was not given an open ended mandate but their powers and jurisdiction were only within the boundaries of the representation that were made to the President and as in the gazette notice. The tribunal cannot arrogate itself powers to frame issues which were not before the Ringera committee and which were not subject of the representation and subsequent gazette notice No.8828 of 2003. The assisting counsel had no powers to frame charges or engage in an investigation process and place the results before the tribunal because that would be open to abuse and witch-hunting. Besides, the applicant would find it difficult to know and prepare the case he would be facing before the tribunal".**

**121.** This was also the position in **<u>Justice Amraphael Mbogholi Msagha vs. The Chief Justice & 7 Others</u>** High Court Misc. Application No. 1062 of 2004.

**122.** Mr. Muite, who was supported on this line of submissions by Ms. Munyi, as we have stated earlier, sought refuge under Article 75 of the Constitution and submitted that since the above case was decided at the time when the said Article was not in existence, the said decision should be re-looked afresh. With due respect, we are unable to agree with Mr. Muite's argument that under Article 75 of the Constitution, the Tribunal once set up should inquire into all complaints tabled before it. In our view, Article 75, which deals with the Conduct of State officers, may be invoked to constitute a ground for removal of a Judge under Article 168 of the Constitution, but only through a Petition to the Commission or by the Commission on its own motion. It cannot, on its own, constitute an allegation upon which the Tribunal may base its proceedings unless the same is contained in the Petition emanating from the Commission. Article 75, in our view cannot be considered as constituting a separate and distinct procedure for removal of a Judge from the office. In our view that will also remove an important and Constitutional stage in which JSC is empowered to evaluate and determine whether the allegations are of such a nature to warrant making a petition to the President. In the second stage where the President appoints a Tribunal, he does not enjoy absolute, unrestricted and/or unchecked powers in appointing a Tribunal to investigate and conduct an inquiry into the conduct of a judge. The powers of the President are subject to the petition presented to him by the JSC. It is therefore not within the powers and province of the President to formulate issues other than what is contained in the petition. The President cannot therefore purport to go outside the petition presented to him by the Commission. It is also not within the powers of the president to enlarge the powers, responsibilities and duties of the Tribunal. In essence the powers of the President and the Tribunal are restricted by the Constitution. The powers of the President and the Tribunal cannot be exercised independently outside the petition by JSC. It is JSC which has a leeway and latitude to consider, evaluate and determine complaints and allegations against a judge. To argue otherwise would render the elaborate constitutional procedures and mechanisms for the removal of a judge a mirage. We therefore hold that the only legal and Constitutional procedure for the removal of a judge is through an initiation by the Judicial Service Commission, either on its own motion or upon a written petition by a

person. We further hold that in determining the issue whether or not to remove a judge, the Tribunal can only consider the grounds which were submitted to the President by the Commission in the petition presented pursuant to the provisions of Article 168(4) of the Constitution. To quote, Emukule, J in **Republic vs. Institute of Certified Public Accountants of Kenya ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,**

**" in the absence of a rational explanation, one must conclude that the decision to refer the inquiry to a party who was not a member of the Disciplinary Committee and thus expand the inquiry outside the provisions of Statute can only be termed irrational within the meaning of the Wednesbury unreasonableness, was in bad faith and constitutes a serious abuse of statutory power. It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith"**

**123.** We hold that the expansion of the mandate of the Tribunal, by permitting it to investigate the conduct of the Petitioner, on matters other than those in the Petition by the Commission to the President, can only be termed irrational, unreasonable, arbitrary, capricious and exercised in bad faith. This constitutes a serious abuse of both statutory and Constitutional power. It is unacceptable and amounts to an infringement of the Petitioner's legitimate expectation that the Tribunal can only deal with the matters referred to the President by way of a petition. The action of enlarging the powers of the Tribunal by including the words "*including but not*" amounts to an infringement of the Petitioner's rights, which in our view, is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom. To that extent therefore, the Kenya Gazette authorizing the Tribunal to investigate the conduct of the Petitioner on matters *including but not limited* to the petition by the Commission, that Gazette Notice are unreasonably and arbitrarily worded and consequently amenable to the remedies provided under the Constitution.

**124.** Dr. Khaminwa has argued that once we find that one part of the said Gazette Notice is unreasonable we have no powers to strike out that portion but to strike out the whole Gazette Notice. Mr. Muite, however, submitted that we have the powers to only strike out the unnecessary words and leave the rest of the Notice intact. As we had indicated earlier in this judgement, Article 23(3) empowers this Court in any proceedings brought under Article 22, to grant appropriate reliefs. Article 2(4) on the other hand ordains that any law, including customary law that is inconsistent with this Constitution is void ***to the extent of the inconsistency***. It is therefore our view that where any provision is contrary to the Constitution, only the inconsistent portion is to be declared void. In the case of **Minister of Health and Others vs. Treatment Action Campaign and Others** (Ibid), it was stated at page 249 as follows:

**"Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of s 172(1)(a) a court may also 'make any other order that is just and equitable' (s 172(1)(b))…Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights…The courts have a particular responsibility in this regards and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal…Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of state in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of state power as between the Executive and the Judiciary is to negate a foundation value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights".**

**125.** On that note we wish to comment briefly on the orders granted by the Court in **Ole Keiwua's Case and Mbogholi's case**. Those cases were decided before the promulgation of the Constitution of Kenya, on 27th August 2010. The defunct Constitution, as we have already observed was very limited in terms of scope of the remedies available. The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises.

**126.** We are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables as to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights. For the Petitioner to be confronted with fresh allegations, complaints and charges by the Tribunal which were not sieved through by the Commission or which were so sieved and dismissed by the Commission goes against the principle of legitimate expectation. However, in arriving at our decision, we must recognise that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument. The purpose of the instrument, in this case the Gazette Notice, has put in motion the process of inquiry into the conduct of the Petitioner which had been initiated by the Commission and not to initiate its own process.

**Conclusion**

**127.** Now, having considered all the grounds raised by the Petitioner and the response by the respondents, we think that the issues raised cannot entitle the Petitioner to the orders sought, in particular the Commission did not commit any errors or omissions in the manner in which it conducted the inquiry which is the subject of our determination. We have no evidence that in making a petition or representation to the President, the Commission relied on the confessionary statement alone. We have evidence that confirms that the Commission did not only rely on the confession as there are statements of other witnesses and other direct evidence in respect of the incident presented to the Commission. We cannot also fault the Attorney General as there is no evidence that he misconducted himself in any manner. We have no evidence to show that he handled the matter in a malicious manner and there is nothing to show that he encroached on the DPP's Constitutional mandate. We also think that there is no prejudice suffered by the Petitioner in the way the JSC dealt with the matter. The Petitioner cannot expect that the JSC should have waited for a criminal trial to be commenced and concluded. In our view, that would amount to directing the Commission as to the manner and mode of the exercise of its Constitutional and Statutory functions. We think the Petitioner did not suffer any inhumane treatment and that there is no evidence that she was exposed to an administrative act that was unlawful, unreasonable and unprocedural. The issues of her right to privacy, professional career, integrity, reputation, livelihood and dignity cannot in any way be linked to the process undertaken by the Commission. We also did not find any defect in the composition of the Tribunal to investigate the conduct of the Petitioner. The Petitioner will be given adequate opportunity by the Tribunal to contest the evidence, cross-examine witnesses and give rebuttal evidence in order to exonerate herself. All in all we find no merit in the allegations and the issues raised by the Petitioner.

**128.** Before we conclude we must express our gratitude to counsel for thorough research and very eloquent submissions made in the prosecution and opposition of this petition. If we have not referred to all the authorities referred to us by counsel, it is not due to disrespect or out of lack of the appreciation for counsels' industry. Having duly considered the lengthy pleadings and arguments by the parties, we decline to grant the prayers sought, save part of prayer (q).

**129.** As regards part of prayer (q) and in order to give effect to the purport and intent of the Gazette notice No. 664 dated 26th January 2012 we order that the words ***"including but not"*** be and are hereby struck out from the said Gazette Notice. It means, for purposes of clarity, that the Tribunal shall only consider the petition or representation from the Commission.

**130.** We shall make no order as to costs since the issues raised herein were issues of great national importance.

**Judgement read, signed and delivered in court this 13th day of March, 2012.**

**MOHAMMED WARSAME**
**JUDGE**

**HELLEN OMONDI**
**JUDGE**

**GEORGE ODUNGA**
**JUDGE**