REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL LAW AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 261 OF 2009

IN THE MATTER OF SECTION 3 AND PARTS IV AND V OF THE CONSTITUTION OF KENYA WHICH PARTS RELATE RESPECTIVELY TO

"THE JUDICATURE" "THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL"

IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70, 74 (1), 77 (1),77 (9), 77

(11), 79 (1), 79 (2b), AND SECTION 82 (2) AS READ WITH SECTIONS 3, 26 (2), 62 (1) (2) (3), 94), (5) AND (6) OF THE CONSTITUTION OF

KENYA AND WITH SECTIONS 6,8 AND 9 AND THE LONG TITLE OF THE JUDICATURE ACT, CAP. 8 OF THE LAWS OF KENYA

BETWEEN

MR. JUSTICE JOSEPH VITALIS ODERO JUMA.....PETITIONER

AND

THE HONOURABLE THE CHIEF JUSTICE OF KENYA.....1ST RESPONDENT

HONOURABLE MR. JUSTICE (Rtd.) ABDUL MAJID COCKAR.....2ND RESPONDENT

HONOURABLE MR. JUSTICE JOHN MWERA.....3RD RESPONDENT

HONOURABLE MR. JUSTICE LEONARD NJAGI.....4TH RESPONDENT

HONOURABLE MR. JUSTICE DANIEL MUSINGA.....5TH RESPONDENT

HONOURABLE MR. JUSTICE ISAACK LENAOLA.....6TH RESPONDENT

(THE 2ND TO 6TH RESPONDENTS BEING THE PERSONSAPPOINTED AS CHAIRMAN AND

MEMBERS

RESPECTIVELY OF THE TRIBUNAL TO INVESTIGATE THE CONDUCT OF PUISNE JUDGES)

THE HONOURABLE THE ATTORNEY GENERAL OF KENYA.....7TH RESPONDENT

JUDGMENT

The petitioner, **Mr. Justice Joseph Vitalis Odero Juma**, has moved this court by way of a constitutional petition pursuant to **Section 84 of the Constitution of Kenya.**
He asserted that his fundamental rights and freedoms under **Sections 70, 74 (1), 77(1), 77 (9), 77 (11), 79 (1), 79 (2b),** and **Section 82 (2)** have been contravened.
The Petitioner was appointed as a Puisne Judge on the 31st of October 1995. Prior to his appointment he served as an Advocate of the High Court. He was admitted to the role of Advocates in 1973 and had an illustrious career in the practice of law which also included service as a member of the Council of the Law Society of Kenya. Upon his appointment to the bench, he served in various High Court stations, namely; Nairobi, Meru, Nyeri, and Eldoret, until the 15th of October 2003, when he was suspended from performing the functions of his office as Puisne Judge.
The suspension of the Petitioner was effected by His Excellency The President of the Republic of Kenya after the committee popularly known as **"Ringera Committee"** presented its report to the Chief Justice. In its report, the Ringera Committee did give particulars of the Judicial Officers who had been implicated in **"corruption, unethical conduct and other forms of Judicial misbehavior".**
One of the Judicial Officers cited in that report was the Petitioner herein. And the particulars of the allegations against the Petitioner were cited as follows:-
"The allegation that the Judge called a party to the proceedings in his chambers, and advised the party, that to succeed in the case, he was to engage Wahome Gikonyo or Mukunya Advocates to represent him. When he refused to take the advice, a decision was given against him. This was in Succession Cause No. 60/1997 – Nyeri High Court. The informant said that Mr. Wahome Gikonyo Advocates was reported in Nyeri to be the conduit of transmitting bribes to Judge Juma.

- ***Another complaint was received in respect of Nyeri High Court Succession Cause 6/1999 – in the Estate of Peter Mbauni Maina. Justice Juma is said to have asked for KShs. 50,000/- from the informants. They could only raise KShs. 25,000/- which they sent somebody to take to him. He rejected the amount saying it was not enough. He is said to have taken money from the other side and gave judgment in their favour. He ordered that the land which was the subject matter of the Succession Cause be sub-divided equally between the two houses instead of between the children as provided under the Succession Act.***
- ***We believed this information and found this to be a case of direct corruption."***
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Upon receipt of the report of the Ringera Committee, the Chief Justice represented to the President that the question of removing the Petitioner from the office of Puisne Judge had arisen. It is our understanding that the Chief Justice did make a representation to the President that the question of the removal of the Petitioner ought to be investigated.
Acting on the said representation, the President appointed a tribunal to inquire into the matter and to report back to him, with a recommendation whether or not the Petitioner ought to be removed from the office of Puisne Judge.
Pursuant to the Provisions of Section 62(6) of the Constitution the President suspended the Petitioner from exercising the functions of the office of the Puisne Judge during the period when the tribunal was inquiring into the allegations against the Petitioner. **Section 62 (6)** provides as follows:
"where the question of removing a judge from office has been referred to a tribunal under this section, the president, acting in accordance with the advice of the Chief Justice, may suspend the judge from exercising the functions of his office and any such suspension may at any time be revoked by the President, acting in accordance with the advice of Chief Justice, and shall in any case cease to have effect if the tribunal recommends to the President that the judge ought not to be

removed from office.

The tribunal established by the President comprised the 2nd, 3rd, 4th, 5th and 6th Respondents.
Before the tribunal embarked on its appointed task, the Petitioner raised several objections. We have given careful consideration to the said objections, and come to the conclusion that they are similar, in substance, to the matters raised in the Constitutional Petition before us. For instance it was asserted:-
(a) that in framing the allegations against the Petitioner the tribunal acted unconstitutionally:
(b) That no representations by the Chief Justice to His Excellency the President had been revealed to the Petitioner, to show that there was a proper basis and foundation for the establishment of the tribunal:
(c) That there was a variance between the allegations of corruption, unethical conduct and other forms of judicial misbehavior as found by the Ringera Committee, if compared to the allegations drawn by the Assisting Counsel to the tribunal:
(d) That the rules of natural justice were breached by the conduct of the tribunal, the framing of allegations and the inordinate and unexplained delay.
In a considered ruling dated 16th February 2005, the tribunal overruled all the preliminary points of objection. Thereafter the tribunal proceeded to carry out investigations into the allegations made against the Petitioner, and the Petitioner participated in the said investigations.
After carrying out the said investigations, the tribunal presented its report to His Excellency President on the 2nd of May 2008.
By the said report the tribunal recommended to the President that the Petitioner ought to be removed from office.
Acting upon the said recommendation, the President did remove the Petitioner from the office of Puisne Judge of the High Court of Kenya, through a Gazette Notice No. 6236 dated 15th July 2008, which was published in the Kenya Gazette dated 17th July 2008.
Being aggrieved by the decision to so remove him from office, the Petitioner has now moved this court for the following declarations, orders and directions;

1. The investigations of the Petitioner by the 2nd,3rd,4th,5th, and 6th Respondents were inconsistent with the Constitution of Kenya and were void to the extent of that inconsistency in that they were founded on allegations that were not in any representation of the 1st Respondent to the President that formed part of the proceedings of the 2nd,3rd,4th,5th, and 6th Respondents and could not and cannot constitutionally or legally or validly sustain any recommendation for removal of the Petitioner under section 62 of the Constitution.

2. The Tribunal comprising the 2nd,3rd,4th,5th, and 6th Respondents was not judicious as was reasonably expected of it and was not an independent and impartial body in that the manner in which it summarized and dealt with the evidence was calculated to mislead and indeed misled the President that the Petitioner ought to be removed from office.

3. The 1st Respondent acted ultra vires **the Public Officer Ethics Act, 2003 and received a report on allegations against the Petitioner from a "subcommittee" that was not established by the Judicial Service Commission as mandated by parliament and none of the allegations investigated by the 2nd, 3rd,4th,5th, and 6th Respondent had ever been reported to the 1st Respondent or to the Judicial Service Commission before being so investigated.**

4. The 1st Respondent's failure to inform the Petitioner after receipt of the Ringera Committee Report of allegations in the Report concerning the Petitioner was inconsistent with the Constitution and a breach of the Petitioner's right to information properly and justifiably due to him in the democratic society of Kenya under section 79 of the Constitution and according to the Rules of Natural Justice pertaining to removal of judges and under international standards on removal of judges to which Kenya is a party.

5. The Rules of Procedure made by the 2nd,3rd,4th,5th and 6th Respondents that allowed the conduct of the inquiry into all and sundry matters contravened the Constitution: this was contrary to the directions of the High Court in Constitutional Division to the effect that Gazzette Notice No. 8829 of 2003 under which the Tribunal were acting had been declared to be unconstitutional in so far as it permitted the Tribunal to inquire into matters not included in representation of the 1st Respondent to the president under section 62 (5) of the Constitution.

6. In the High Court Miscellaneous Application no. 1062 of 2004 In Re Hon. Justice Amraphael

Mbogholi Msagha **had ruled that the formulation of allegations drawn by an Assisting Counsel to the Tribunal under order of the Tribunal members is a violation of Section 62 (5) of the Constitution of Kenya if the allegations are not specifically those in the "representation by the Chief Justice to the President which gave rise to or formed the basis of the question of removal of a judge before setting up the Tribunal."**

7. The allegations formulated by the Assisting Counsel were unduly delayed after His Excellency the President had referred the Petitioner's matter to the 2nd,3rd,4th,5th,th Respondent's when the President appointed them in Gazette Notice No. 8829 of 2003 on 11th December 2003. The delay was unreasonable and contravened section 77(9) of the Constitution of Kenya.

8. The allegations formulated by the Assisting Counsel were under the direction and order of the adjudicating authority, the 2nd,3rd,4th,5th, and 6th Respondents themselves: this contravened section 77(9) in that the adjudicating authority was not independent and impartial.

9. The investigation of the Petitioner by 2nd,3rd,4th,5th,and 6th Respondents was an abuse of the Petitioner's right to protection of the law and to an independent adjudicating authority under sections 70 (a) and 77(9) of the Constitution.

10. The 1st Respondent violated the Petitioner's right to protection against torture, inhuman and degrading treatment under section 74 of the Constitution of Kenya by denying the Petitioner the benefit of early information or any information regarding the findings if any in the Ringera Committee Report.

11. The 1st Respondent violated the Petitioner's right to protection of the law and to a fair hearing under section 77 (9), (10) and failed, declined, refused, neglected or ignored to present himself to the 2nd,3rd,4th,5th, and 6th Respondents in the Petitioner's matter.

12.The 2nd,3rd,4th,5th and 6th Respondents contravened section 82(2) of the Constitution of Kenya; they treated the Petitioner in a discriminatory manner. And on the allegations drawn and formulated by the assisting Counsel Philip Murgor in August 2004, the 2nd,3rd,4th,5th and 6th Respondents applied a standard of proof inconsistent with the standard they had set in the matter of Mr. Justice DKS Aganyanya and subsequently applied in the matter of Mr. Justice Amraphael Mbogholi Msagha**.**

13.The 1st Respondent violated the Petitioner's right to protection of the law and to a fair hearing under section 77(9), in that he failed, declined, refused, neglected or ignored to perform the administrative duty under section 60(5) of the constitution of Kenya to assign a judge to sit and hear and determine the Petitioner's case High Court Miscellaneous Civil Application No. 512 of 2004.

14.The recommendation of the 2nd,3rd,4th,5th and 6th Respondents to the President that the Petitioner be removed under section 62 of the Constitution was unconstitutional and unjustified and is quashed. Accordingly, Gazette Notice No. 6336 of 2008 is inconsistent with the Constitution and is void.

15. Unless the Petitioner is constitutionally and legally removed from office he is entitled to resume performing his functions as a puisne judge with appropriate:

(a) Remuneration pursuant to section 104 of the Constitution and the Constitutional Offices (Remuneration Act), and

(b) Seniority under section 8 of the Judicature Act.

16.There shall be an order that damages be assessed with appropriate accounts taken between the Petitioner and the offices of the 1st and 7th Respondents for the unconstitutional interference with the Petitioner's right to perform the functions of his office as a puisne judge and to enjoy the perks of office from 15th October 2003 to the date the petitioner is fully restored to his office and his remuneration packages.

17.The Petitioner is entitled to compensation by way of general damages for violation of his fundamental rights and freedoms as pleaded in this petition in such sum as the Court deems fit to grant in accordance with section 84 of the Constitution, the common law applicable and in the circumstances of the case.

Shortly after the petition was filed, the Honourable Attorney General entered appearance for all the 7 Respondents. However, when the matter came up in court thereafter, Mr. Menge the Learned State Counsel explained that the Attorney General had entered appearance in error, as the Respondents had not

been served.

According to the Petitioner, he had effected service on the 14th of May, 2009, at the offices of the Tribunal located at Anniversary Towers. The record shows that the Attorney General entered appearance on the 27th of May 2009.

When the case was in court on the 2nd of March 2010, Mr. Menge sought leave to cease acting for the 2nd, 3rd, 4th, 5th and 6th Respondents.

He explained that his reason for so doing was that the said Respondents had not been served with the petition, and had therefore not instructed the Attorney General to act for them. The learned state counsel filed a Notice of Withdrawal in respect to those Respondents.

In a ruling delivered on the 16th of March 2010, the court struck out the Notice of Withdrawal, and directed the Attorney General to continue acting for all the 7 Respondents.

On the 21st of April 2010, the Attorney General applied to the court to have the Honourable Mr. Justice Dulu recuse himself from the proceedings. The reason for that application was that Dulu J had been part of the bench which heard and determined **Judicial Review Case No. HCJR No.2198/04 In the matter of Ole Keiuwa J.A.** After giving due consideration to that application, Dulu J disqualified himself from that case. Thereafter, the Honourable the Chief Justice appointed Ochieng J, in place of Dulu J.

Meanwhile the Respondents had filed a notice of Preliminary Objection dated the 15th of April 2010. When the matter came up for hearing, it was ordered, with the consent of all the parties herein, that the said notice of Preliminary Objection should constitute part of the Respondents' grounds of opposition to the petition.

Mr. Mwenesi the learned counsel for the petitioner submitted that we should find the following to be illegal and unconstitutional;

(a) The suspension of the Petitioner;
(b) The summons requiring the Petitioner to attend before the tribunal;
(c)The appointment of the tribunal;
(d) The proceedings of the tribunal;
(e) The recommendations of the tribunal; and
(f) All the steps taken in an attempt to remove the petitioner from his office of Puisne Judge.

He went on to ask us to find that the Petitioner was entitled to compensation, which he invited us to assess and then award to the Petitioner.

The Petitioner submitted that all the steps taken, in the attempt to remove him, were inconsistent with the Constitution, and in particular with the procedure for the removal of a Judge. It was his submission that the procedures did not take into account the rules of natural justice, that are the bedrock of a fair trial. He asserted that sections 77 and 79 of the Constitution were not followed. Furthermore, the provisions of the Public Officer Ethics Act were also not followed. For those reasons he urged us to find that the suspension of the Petitioner by the President, the proceedings of the tribunal and the findings made by the tribunal were all illegal and a violation of the Constitution.

The Petitioner invited us to hold that because he was removed from office in a manner that was not in compliance with the Constitution, he ought to resume the functions of his office, with restoration of appropriate rank in seniority.

As far as the Petitioner was concerned, his rights had been trampled upon at every stage, in a manouver to remove him from office. In an endeavuor to demonstrate that assertion, the Petitioner has placed before this court the whole evidence which the tribunal had gathered. He asked us to re-assess that the said evidence, in order to verify how he had been deprived of his rights. The rights he alludes to are those that are contained in Chapter 5 of the Constitution, to which any person in Kenya is entitled, even if he was not a Kenyan.

As an example of how his fundamental rights had been violated, the Petitioner, submitted that it was now accepted internationally that a Judge is in a need-to-know position when he was being removed from his office. He needs to be told of the allegations before him. But in this case, it was contended that his rights under section 77 of the Constitution were violated because he was not informed timeously of the allegations that had been made against him.

A second example put forward by the Petitioner is as regards his contention that he had been subjected to degrading treatment. In his considered view, the office of a Judge enjoys a privileged constitutional status.

The Petitioner added that in the light of their privileged constitutional status, Judges are entitled to some decorum in the manner in which they are treated. To that end, a Judge ought not to learn of allegations against him, from junior officers; he should also not read of the said allegations in the press before he had been informed of them.

Contrary to his expectations, the Petitioner was subjected to mental torture, by not being informed of the allegations against him in a manner befitting of a Judge. That, to the mind of the Petitioner, constituted unfair and degrading treatment.

A third example put forward by the Petitioner was about the discrimination meted out against him. He asserts that the tribunal was guilty of intellectual dishonesty. The basis of that contention is that he was treated differently from the other Judges who were suspended at the same time as he. For example, Aganyanya J. (as he then was) was also the subject of investigation by the same tribunal and in determining their investigations the tribunal did establish the standard of proof.

According to the Petitioner, the said standard of proof was followed by the tribunal when determining the allegations against Mbogholi Msagha J., in **HON. JUSTICE AMRAPHAEL MBOGHOLI MSAGHA –VS-THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA & 7 OTHERS, H.C. MISC. APPL. NO. 1062 OF 2004.**

The said standard of proof was expressed in the following words;

"we conclude our view that the standard of proof required that the allegation of misconduct must not only be fully substantiated but must also be one of sufficient gravity to justify removal of a judge"

The Petitioner pointed out to us that he drew the tribunal's attention to that holding. Therefore, in his considered view, he was being discriminated against when he was not accorded the same or similar treatment. He feels very badly wronged, considering that his matter was determined on the same date as that of Msagha J., on the 8th of May 2008, yet he was treated differently from the other judges who were being investigated by tribunals.

The fourth example given by the Petitioner was that the tribunal was not properly established, was not independent and impartial, and did not give him a fair hearing within a reasonable time. He says that he did raise those concerns as preliminary objections before the tribunal.

In particular, the Petitioner asserted that it was demeaning and abusive of the process, for the secretary to the tribunal to issue a notice to the public to call for complaints against the petitioner. According to him, that implied that the complaints against him were not real. If the complaints had been real, they should already have been in existence by the time the tribunal established. Thereafter, the tribunal should have limited itself to such complaints, if any, as were made prior to its establishment.

To date, the Petitioner believes that he is entitled to know what caused the tribunal to be established against him.

When the Petitioner raised issues with the tribunal , he says that the tribunal gave him an assurance that those issues which he was complaining about would come to light at a later date. Yet that never came to pass.

In an effort to further demonstrate how unfairly he was treated, the Petitioner pointed out that the notice to the public was published in 2003. Thereafter, it was not until 2004, that the allegations were made out against him by the Assisting Counsel to the tribunal.

That would imply that the complaints which were investigated against him came into being well after the tribunal was established. If that be the case, the Petitioner submitted, the tribunal lacked a basis to proceed to look into his removal from office.

In an effort to ascertain the allegations made against him before the tribunal was set up, the Petitioner says he did ask the tribunal to issue summons to the Honourable the Chief Justice. He had wished to have the Chief Justice lay the foundation for the setting up of the tribunal. But the tribunal is reported to have said to the Petitioner that it was not necessary for the tribunal to summon the Chief Justice.

The Petitioner told us that he was advised by the tribunal to summon the Chief Justice if he wished him to appear before the tribunal. In his view, that was a most unwarranted step, in the light of the testimony tendered by Registrar of the High Court. The Registrar of the High Court of Kenya, is also the secretary to the Judicial Service Commission. In that capacity, the Petitioner believes, that if any allegations were made to the Judicial Service Commission, about him, the Registrar ought to have had the information. However, when the Registrar testified before the tribunal he indicated that it was then that he was learning about the allegations against the Petitioner, for the first time.

The Petitioner also told us that the Registrar of the High Court confirmed his lack of knowledge of any

complaints lodged against the Petitioner, with the Judiciary. In the light of that testimony, the Petitioner wondered where the allegations being investigated by the tribunal emanated from. It is in that respect that he believes that the person best placed to tell the tribunal where the complaints emanated from was the Chief Justice .In the circumstances, the Petitioner submitted that the Chief Justice was not only a necessary witness, but a critical witness, if the Petitioner's rights were to be meticulously safeguarded. He therefore reiterated that the tribunal should have summoned the Chief Justice.

He informed us that in other jurisdictions, Chief Justices would volunteer to give evidence of the reasons for recommending that a tribunal be set up to investigate complaints against a Judge. In contrast, the Petitioner noted that the Chief Justice of the Republic of Kenya not only failed to appear before the tribunal, but also failed to file a Replying Affidavit in this matter.

The Petitioner asserted that he was not treated in a befitting manner even though he did draw the tribunal's attention to the ruling in **High Court Miscellaneous Case No. 1062 of 2004.** In that case, the Constitutional Division of the High Court is said to have ordered the striking out of the wording which would have otherwise empowered the tribunal to have had open-ended investigations.

In the light of that decision, the Petitioner feels that he was discriminated against by the tribunal when it continued with its open-ended investigations, instead of limiting their investigations to the complaints which were in existence before the tribunal was established.

His biggest complaint, in that respect is that when he sought to know of the details of the complaints made before the tribunal was established; and which would presumably have been the basis for the recommendation by the Chief Justice to His Excellency The President, the tribunal indicated that the same were confidential.

Thereafter, the tribunal through its secretary asked members of the public to bring forth such complaints, if any, as they may have against the Petitioner. In effect, the Petitioner believes that the allegations which the tribunal investigated emanated from the said tribunal, and not from the Chief Justice.

The tribunal was also criticized for ousting the **Evidence Act** whereas they were acting as an adjudicating body, which was to make a determination on the basis of evidence. The said ouster of the **Evidence Act** is said to have played havoc on the conduct of the tribunal and on the Petitioner's rights. The Petitioner therefore, believes that before the tribunal could pass Judgment on him on the basis of alleged corruption, there should have been a criminal case in which he had been tried and convicted in respect of any such alleged corruption.

As regards the independence and impartiality of the tribunal, the Petitioner submitted that it was non-existent. His reason for so saying is that the secretary to the tribunal was also its Assisting Counsel. As the secretary, he was involved in formulating the charges. Thereafter, in his capacity as Assisting Counsel, he was involved in the preparation of the final report. By playing that dual role, the secretary-cum-Assisting Counsel demonstrated the lack of independence and impartiality on the part of the tribunal.

By the time the tribunal was handling the Petitioner's matter, three other similar matters had been determined and in those three matters, the tribunals or the High Court had held that a Judge against whom allegations had been made, was entitled to know of the said allegations before the tribunal was set up. It was the submission of the Petitioner that the tribunal herein erred by not upholding the law in that regard. His reason for so saying is that whereas the tribunal was established in December 2003, it was not until October 2004 that the Petitioner first saw the list of allegations made against him**.**

In any event, the list of allegations drawn up by the Assisting Counsel are said to be completely different from those that were cited in the report of the Integrity and Anti corruption Committee of the Judiciary, commonly known as the **'Ringera Committee Report'**. Thus the Petitioner believes that if the Chief Justice recommended to the President that a tribunal be set up to investigate him it could only have been on the basis of the Ringera Committee Report, which preceded the establishment of the tribunal. But because the allegations were only drawn up by the Assisting counsel, after the tribunal was established, that confirms that the allegations which were investigated did not emanate from the Chief Justice.

As regards his benefits, the Petitioner indicated to us that the Registrar wrote to him, informing him, that his salary would be stopped following his suspension. Upon receipt of the said letter, the Petitioner moved the High Court to challenge the decision to stop his salary. The court case which he filed has, reportedly, not been determined todate.

Meanwhile, all the other Judges who were being investigated by tribunals, are said to have retained not only their vehicles and security, but also their salaries. Therefore, the Petitioner believes that he was unjustifiably discriminated against. He therefore wonders why he appears to have been targeted for unfair treatment and removal from the Office of Puisne Judge. Finally, the Petitioner invited us to find that he

was entitled to compensation for the pain and suffering that he has undergone for the seven (7) years when he was under suspension. He asserts that the pain he has suffered, his humiliation and indignity is not measurable. Therefore, he feels that he ought to be compensated by a sum exceeding that which he would have been awarded for defamation of character. He also invited us to order his return to the Office of Puisne Judge.

In answer to the Petition, the Respondents submitted that the tribunal followed the correct procedure when investigating the allegations against the Petitioner.

Mr.Menge, the learned state counsel appearing for the Respondents, submitted that the Honourable Chief Justice acted in compliance with the Constitution when he recommended to the President that a tribunal be set up to investigate the Petitioner. Thereafter the tribunal is said to have properly carried out the duties assigned to it by the President, and finally concluded that the Petitioner be removed from the office of Puisne Judge. When the tribunal handed over its report to the President, the latter removed the Petitioner from the office of the Puisne Judge. It is only thereafter that the petition herein was filed.

In any event, the Respondents' submitted that the Constitution does not have any provisions requiring the Chief Justice to show to a Judge the allegations made against him before the Chief Justice can recommend to the President that a tribunal be set up. As far as the Respondents are concerned there was no ambiguity in the Constitution, which required any interpretation in that respect. Therefore, it is the Respondents' contention that had the Chief Justice given to the Petitioner the particulars of the allegations against him before the Chief Justice made his recommendation to the President, the Chief Justice would have rewritten the Constitution.

Because the Petitioner has readily conceded that he did not have notice of the complaints which formed the basis of the recommendation to the President, the Respondents believe that the Petitioner cannot be heard to suggest that the complaints investigated by the tribunal were not the same as those which formed the basis of the Chief Justice's recommendations to the President.

As regards the alleged failure by the tribunal to call crucial witnesses, the Respondents submitted that the Petitioner had failed to demonstrate how the exclusion of the Chief Justice from the tribunal, hindered the work undertaken by the said tribunal. In any event, submitted the Respondents, the Petitioner could have requested the Chief Justice to testify on his behalf. He cannot therefore complain, when he had an avenue through which he could have got the Chief Justice or any other critical witness to testify.

Mr. Menge submitted that the Petitioner was not subjected to any degrading treatment. In his view, nobody can believe that the Petitioner could be treated in a degrading manner by his own brothers on the bench.

He further submitted that as the investigations were ongoing, it was in order to deprive the Petitioner of some of his rights.

On the question of the Petitioner's entitlement to a fair trial, the Respondents submitted that that was duly accorded to the Petitioner. Their reasons for so submitting are that the Petitioner not only examined the witnesses who testified but also gave evidence on his own behalf.

On the issue of the standards applied by the tribunal, the Respondents submitted that the tribunal was not obliged to apply standards consistent with those applied by the tribunals which investigated Aganyanya J and Mbogholi Msagha J, respectively. It was submitted that the tribunal had a right to apply standards determined by the circumstances of the particular case before them.

In relation to the allegations against the Petitioner, it was asserted that the Assisting Counsel simply drew up allegations which were consistent with those that formed the basis of the recommendation by the Chief Justice to the President.

On the question of compensation, the Respondents submitted that the Petitioner cannot be entitled to the same at all. The Respondents submitted that the investigations against the Petitioner were carried out in accordance with the requirements of the Constitution. Therefore, the Petitioner cannot use that process as a basis for seeking compensation against the Respondents.

The Respondents did submit that the Petitioner had failed to demonstrate any foundation, in fact or in law, to warrant the declaration that he should resume the functions of his office as a Puisne Judge.

In any event, the Respondents who constituted the tribunal are said to have been irregularly joined to the petition. First they are said to have become *functus officio* immediately after they presented their report to His Excellency the President. Secondly, the tribunal is said to have done nothing to warrant the filing of the Petition, because they are said to have done nothing more than to search for the truth as was presented by the witnesses.

It was the contention of the Respondents that the petition was nothing more than a mask intended to

circumvent the provisions of **sections 14(2) of the Constitution.** It was said that the real person against whom reliefs were sought is the President of the Republic of Kenya, who had removed the Petitioner from the Office of Puisne Judge. As the President has already taken action, on strength of the recommendations made by the tribunal, the Respondents submitted that this court has no jurisdiction to reopen the matter.

Furthermore, and in any event, it was submitted that pursuant to Section 62 (5) (a) of the Constitution, the Chief Justice has the limited role of handing over to the President such complaints as are made against Judges, if in his view the complaints deserve the setting up of tribunals. Therefore, the Chief Justice is said to have done nothing wrong.

In so far as the Attorney General was concerned, it was asserted that he was a complete stranger to the proceedings before the tribunal. He was thus irregularly enjoined to this petition.

Finally, the Respondents submitted that they carried out their mandate in accordance with the rules of natural justice. Therefore, they believe that the reliefs sought were not justified.

When called upon to reply to the Respondents submissions, the Petitioner pointed out that he did ask the tribunal to issue summons to call the Chief Justice to testify. The tribunal failed to issue the said summons. Therefore, the Petitioner believes that there was no other way that he could have compelled the Chief Justice to testify.

The Petitioner also reiterated that the tribunal herein acted as an investigator, the prosecutor, the jury and the Judge. Therefore, in his view, the tribunal was neither impartial nor independent.

The above is a summary of the salient issues that were raised in support of and in opposition to the Constitutional Petition before us. To the best of our knowledge the said issues are unprecedented in our jurisprudence. In so saying, we have not overlooked the similarities that were drawn to our attention between this case and the cases of Mbogholi Msagha J., on the one hand and Ole Keiuwa J.A. on the other hand.

The primary distinction between this case and those other two cases is that the Petitioner has moved this court by way of a Constitutional Petition after the tribunal had concluded its functions, whereas in the other two cases, the High Court was moved by way of Judicial Review challenging the on-going proceedings before the tribunal.

To our minds, it is significant that the Petitioner readily admitted that he decided not to challenge the tribunal by way of Judicial Review.

The question that is uppermost in our minds is whether or not we have the jurisdiction to grant the orders, declarations and directions sought by the Petitioner, considering that;

1. We have not been constituted as an Appellate Court;
2. The tribunal which was made up of the 2nd to the 6th Respondents is no longer in existence, having concluded its functions.
3. Judicial officers enjoy immunity from being sued for work done in the course of the work. Such immunity is provided in Section 6 of the Judicature Act. The said section provides as follows;

“ No judge of magistrate, and no other person acting Judicially shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.”

Reverting to the reliefs sought, we note that the Petitioner has at all times emphasized that the Chief Justice failed to make available to him a copy of the document embodying the allegations which were the foundation of the recommendation made to the President, for the establishment of a tribunal to investigate him.

In our considered view, although there might not be an express requirement that a Judge be provided with a copy of the recommendation forwarded by the Chief Justice to the President, it is undoubtedly only fair and reasonable that the Judge be notified by the Chief Justice of the allegations which form the foundation for such recommendation as the Chief Justice was making to the President.

Indeed, it is not sufficient that he be notified: the notification ought to be made before the Chief Justice forwards his recommendation to the President.

We say so because by so doing the Judge will have been given the first opportunity to determine for

himself whether or not he ought to defend himself in the event that the recommendation was forwarded to the President.
Should the judge decide not to challenge the allegations against him, he would then be accorded an opportunity to vacate his office without any undue funfair. In that regard, we agree with the holding in; **HON. MR. JUSTICE PHILIP N. WAKI J.A. TRIBUNAL MATTER NO. 1 OF 2004**, in which the Tribunal expressed itself, in the following words;
***"Although no procedure is laid down in the Constitution regarding the making of such a representation to the* President, should the Chief Justice in the process of satisfying himself whether he should make such a representation, not first seek the response of the affected Judge to the complaint or misconduct? The rules of natural justice in our view, demands that that should have been done."**

In the case of **HON. MR. JUSTICE A. MSAGHA Vs THE HONOURABLE THE CHIEF JUSTICE & 7 OTHERS H.C.MISC.APPL.NO. 1062/04** their Lordships expressed themselves thus, at Page 75;
"contrary to the submissions by Professor Muigai, that once a Judge is under investigations, any other issue relating to the suitability to hold office cannot be blocked otherwise there would be need for several tribunals to be set up against the same Judge to investigate each complaint, we are of the view that the only issue to be placed before the Tribunal is the representation by the Chief Justice to the President which gave rise to or formed the basis of the question of a removal of a Judge before setting up the Tribunal. It is therefore not open to the tribunal or the Assisting Counsel to frame any other issues beyond that which formed the basis of representation to the President for removal of a Judge. It would become a free-fall for all manner of calumny against a hapless Judge, and contrary to the provisions of Section 62 (5) of the Constitution which clearly predicates the removal of a Judge upon the existence of a question necessitating the setting up of a Tribunal to inquire into that question; not any other question which did not form the substance of the representations to the President."

Although the Petitioner was not provided with a copy of the allegations which formed the basis of recommendation by the Chief Justice to the President, it is clear that the Tribunal did not limit itself to those allegations. We say so because it is clear that the Tribunal itself did direct its Assisting Counsel to draw up allegations against the Petitioner. With due respect to the learned state counsel Mr. Menge, there would have been no need for the Assisting Counsel to draw up the allegations on the basis of complaints that he had called for, from the public, if the said allegations were the same as those which informed the decision by the Chief Justice to recommend to the President that a Tribunal be set up.
We have perused the record presented to us by the Petitioner and have found that the following are the allegations which were formulated by the Assisting Counsel, and which formed the basis of the investigations against the Petitioner;
"ALLEGATIONS AGAINST THE SUBJECT OF INQUIRY
1. **Corruptly soliciting and receiving a sum of KShs.25,000/- from the Petitioner and or/her agents in the civil case in which Your Lordship was the Presiding Judge namely, NYERI HIGH COURT SUCC. CAUSE NO. 9 OF 1999: IN THE MATTER OF THE ESTATE OF PETER MBAUNI MAINA (DECEASED), as an inducement to deliver a ruling favourable to the Petitioner**

2. **Corruptly soliciting and/or receiving various sums of money from the objector in the aforesaid case as an inducement to deliver a ruling in his favour.**

3. **Inability to effectively perform the duties of the office of a Judge of the High Court of Kenya by refusing and/or failing to deliver the ruling in H.C. Succession Cause No. 6 of 1999 until 11th February 2003, the parties having closed their respective cases by 9th October 2002.**

4. **Gross misbehavior by advising the Objector to change advocates in a case in which your Lordship was the presiding judge namely Nyeri High Court Succession Cause No. 60 of 1997: In the Matter of the Estate of Wathuku Ngure (deceased), so as to accord the objector preferential treatment while presiding over the said matter.**
5. **Gross misconduct by accepting a sum of KShs.200,000/-, in the form of a donation, from the objector in the said H.C. Succession Cause No. 60 of 1997, whilst well knowing that Your Lordship**

was presiding over the matter in question.

6. **Having an improper and/or corrupt interest in the matters in question as borne out by your Lordship's action in soliciting and/or receiving the said benefits from the aforesaid parties.**

7. **Intentionally denying select parties in the aforementioned matters their rights to the due process of the law by failing to determine the matters in question in accordance with the law and the available evidence, hence eroding the public's confidence in your Lordship's ability to discharge the duties of your office as a judge of the High Court of Kenya with competence and impartiality.**

8. **Abusing your office as a judge of the High Court of Kenya to advance the private interests of the parties in the cases in question.**

9.**Bringing the administration of justice in Kenya into disrepute as a result of your Lordship's alleged corrupt conduct in the aforesaid matters and hence eroding the confidence of the public in the Kenyan judicial system as a whole.**

10.**Gross misbehavior by being unduly familiar to select parties and initiating, permitting and/or condoning communication with them and/or their agents without the knowledge of other parties in the aforesaid cases.**

11. **Conducting yourself in a manner inconsistent with a holder of the office of a judge of the High Court, by selectively associating with the parties, entertaining and/or hosting them whilst well knowing that Your Lordship was presiding over disputes between the parties.**

12. **Failing to uphold your Lordship's judicial oath of office of a judge of the High Court of Kenya to administer justice without favour and bias, as exhibited by your conduct in the aforementioned cases.**

A comparison between the report of the Ringera Committee and the allegations drawn up by the Assisting Counsel to the tribunal, indicates that the issues pertaining to the Petitioner, in both respects, were those that arose from two cases namely: **Succession Cause No. 6 of 1999 and Succession Cause No. 60 of 1997.** In effect, although the details of substance might not have been precisely the same, there was very little divergence between the two sets of allegations.
In the light of the foregoing, the fact that the Assisting Counsel drew up allegations after the Tribunal was set up would not, by itself, render the suspension of the Petitioner unconstitutional. To our minds, once the Chief Justice was reasonably satisfied that there existed complaints against a Judge to warrant the setting up of a Tribunal to investigate the said Judge, the Chief Justice was entitled to recommend to the President that a Tribunal be set up. And when the question of removing a Judge from office has been referred to a Tribunal under **Section 62 of the Constitution** the President may suspend the Judge from exercising the functions of his office.
Provided that the Chief Justice had received complaints against the Petitioner to warrant the setting up of a tribunal, the establishment of the tribunal would not be construed as unconstitutional.
As to whether or not,
(a) the tribunal acted in a judicious manner; or
(b) was or was not independent and impartial; or
(c) acted *ultra vires* the **Public Officer Ethics Act 2003,**
would, to our minds, be issues which can only have been properly given consideration through an appellate exercise. Therefore, in so far as we are NOT sitting as an Appellate Court we decline the invitation of the Petitioner to make the findings he seeks in that respect.
The Tribunal in; **IN THE MATTER OF HON. MR. JUSTICE DANIEL S.K. AGANYANYA, TRIBUNAL MATTER NO. 3 OF 2004** expressed itself in the manner following in its final report;
"We accept the undeniable fact that the member of the bench, by reason of the nature of his work, is highly susceptible to attacks on his honesty, integrity and impartiality by dissatisfied litigants. A litigant who has lost his case, generally, would not have any kind words for the Magistrate or the Judge concerned. That is human nature – to readily put the blame of loss on somebody else, and in

litigation the object of such undeserved blame is generally the member of the bench concerned. The tribunal is, therefore, enjoined by the nature of this undertaking to exercise that much extra care when evaluating the evidence and the credibility of every witness."

We are in full agreement with the above-quoted remarks.
However, we also hold the considered belief that the process of re-evaluating the evidence which was tendered before the Tribunal, with a view to determining whether or not the decision it arrived at was correct, would be deemed as exercising an appellate role over the said Tribunal.
This court is not sitting in the capacity of an appellate court. It therefore lacks, in this case, the jurisdiction to exercise the function of an appellate court.
In **KINYANJUI Vs. ATTORNEY GENERAL [2005] 2 KLR 454**, the Court, by a majority decision, expressed itself thus, at page 468;
"It was common ground that there are no pending proceedings in either the subordinate court or the High Court. The question is whether proceedings finalized in the High Court can constitute or form the basis of a constitutional application. In our view they can, as long as the applicant can demonstrate any contravention of his fundamental rights."

On the basis of that holding, Nyamu J. (as he then was), together with Emukule J. proceeded to conduct an inquiry into the manner in which the High Court [B.P. Kubo J. and L. Kimaru Ag. J.] had dealt with **Criminal Appeal No. 544 of 1999,** as consolidated with **Criminal Revision No. 13 of 1999.**
In particular, the Court inquired into the issue as to whether or not the fundamental constitutional rights of the applicant had been violated. The court also inquired into the question of the alleged violation of the applicant's right to Natural Justice.
After conducting the said inquiry, the court held that the applicant's constitutional rights had not been violated.
However, in his dissenting judgment, Ibrahim J. expressed himself thus, at page 488**;**
"The applicant has submitted that these proceedings are not an appeal on the substantive findings on the merits made by the criminal court. He contends that the application herein is an inquiry of the alleged violations of his fundamental rights and freedoms as protected by section 70, 72, and 77 of the Constitution. It is my view that any answers to the questions put forward for this Court's determination; the possible grant of the declarations sought; the order of release from custody; and general damages sought would certainly interfere with the decision of the High Court in the consolidated suit herein. There can be no doubt that if successful, any decision made by this Court would interfere with and purportedly reverse the decision of the criminal court. Whatever name one gives to the process, it would amount to this Court sitting on judgment of the said decision. To me, this would amount to an appeal against the said decision. There can be no two ways about it."

To our mind, the dissenting judgment was reflective of the correct legal position, and we do accept the same as the correct enunciation of the law.
In **JASBIR SINGH RAI & 3 OTHERS Vs TARLOCHAN SINGH RAI & 4 OTHERS, CIVIL APPLICATION NO. 307/2003,** Omolo J.A. stated as follows;
"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other day."
To the reasons why a decision may be wrong, we could add that, the court may have failed to either analyse the evidence properly or may have arrived at the wrong decision because it either took into account some extraneous consideration or because it did not take into account some relevant fact or law.
It is noteworthy that in the case of **Jasbir Singh** the Court of Appeal was giving consideration to an application founded, *inter alia*, on **Section 77(9) of the Constitution,** which has also been invoked in the matter before us. In that case, the allegations ranged from:
(a) the lack of independence of impartially on the part of the court,
(b) the failure to give a fair hearing,
(c) the failure to observe the rules of natural justice and
(d) the perversion of justice.
Those issues compare well with those raised in the matter before us.

In his Judgment in the **Jasbir Singh Rai** case Bosire J.A. quoted with approval the following words from the decision of the Court of Appeal in England, in the case of **Sirros v. Moore [1974] 3 WLR 459; "If the reason underlying this immunity is to ensure *'that they may be free in thought and independent in judgment'* it applied to every judge whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: if l do this shall l be liable to an action? He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction – in fact or in law – but so long as he honestly believes it to be within his jurisdiction, he should not be liable. …. He should not be plagued with allegations of malice or ill will or bias or anything of the kind…"**

Having adopted the foregoing words, Bosire J.A. went on to express himself thus;
"that is why a Judge enjoys the priviledge of not being compelled to answer any questions as to his own conduct in court as such Judge or Magistrate, or as to anything which came to his knowledge in court as such judge.- See Section 129 of the Evidence Act.
However, that is not to say that allegations of bias or malice may not be raised at all against judges. It all depends at what stage of the proceedings such allegations are made."
The learned judge concluded that allegations of bias should not ordinarily be raised against a Judge after judgment in a matter before court.
In the matter before us, the Petitioner says that the Tribunal did not analyse the evidence which was before it.
The only way that we can determine whether or not the petitioner's said assertion is correct, is by carrying out a re-evaluation of the evidence adduced before the Tribunal.
As we have already stated herein, that would be tantamount to sitting on an appeal over the Tribunal, yet we have not been constituted as an appellate court, for the purposes of determining the matter before us.
If the High Court were to put on the cloth of an appellate court whilst it is constituted to determine a constitutional issue, it may become possible for parties who otherwise had no right of appeal, or who had missed the opportunity to either appeal or to seek judicial Review, to circumvent the legal process by filing a constitutional petition.
The question that must be faced head-on is whether or not such a party should be told;
"Even if all that you say is correct, yet the decision has been made and you must learn to live with it";
to borrow the phrase used by Omolo J.A. in case of **JASBIR SINGH RAI,** (above-cited).

In all the cases cited by the petitioner, in which other judges had been the subject of Tribunals which were formed to investigate allegations of impropriety made against them, the issues were raised by way of Judicial Review. In none of the said cases did a Judge go through the proceedings before the Tribunal, and thereafter seek to challenge the legality of the process, as the petitioner has done herein.

Of course, it is not wrong for the petitioner to seek to be the pioneer in that regard.

However, we hold the considered view, that to allow the petitioner to challenge the parties before us as he has done herein would imply that there was always room for a party to have a second bite at the cherry, by opening an investigation through an alleged violation of his constitutional rights.

But, if the person can actually demonstrate that his constitutional rights had been infringed, should the court shut the door on his face, simply because he did not raise the issues whilst the proceedings against him were still ongoing?

In this case, the Tribunal has already done its duty. It may have done so commendably or miserably. But, the Tribunal is now not in existence.
It handed over its verdict to the President, who has already given effect to the Tribunal's recommendation.
The matter is now past the stage of execution, if this case could be compared to a civil case in which a decree that is drawn up after a judgment is thereafter executed.

Alternatively, if the case was compared to a criminal case, it can be said to have raised issues after the accused had served sentence.

Of course, a party may choose to pursue his appeal to its logical conclusion, even if others consider that it had been overtaken by events. The party may end up clearing his name, if nothing else.

But if the party failed to either appeal or to seek such other relief as might have been available to him, such as Judicial Review, should he nonetheless be permitted to come to court by way of a

constitutional petition?

As an example, there are a large number of persons who were first brought before the court many days after they were arrested. They were tried and convicted.

Thereafter, they could move the court to have their convictions quashed and sentences set aside, because their constitutional rights had been violated.

However, if the issue was not raised in an appeal, but by way of a constitutional petition, we highly doubt that the court would simply say that it did not matter that the person had not raised the issue either before the trial court or before the appellate court.

But then again, if the High Court, which is clothed with unlimited original jurisdiction, were to say that it could not grant the reliefs simply because it was not sitting either on an appeal over the tribunal or in its capacity as a court handling an issue for Judicial Review, would the court be abdicating its responsibility?

To our minds, it must always be borne in mind that the justice system has well defined procedures to enable it conduct its affairs in an orderly manner. It is for that reason that the courts may tell a claimant that even though he might have a claim which appeared legitimate, he had come to court too late. For that reason, a claim founded on tort will not be entertained if it is brought more than three (3) years after the cause of action accrued. Similarly, a claim founded on an alleged breach of contract would be said to be time-barred, if lodged more than six (6) years after the cause of action accrued.

The point we are making is that a claim, even though it may appear legitimate, could be shut out from accessing the reliefs that it may otherwise have been entitled to.

But yet again, we recognize that there has been no prescribed period of time within which a claim founded on an alleged violation of a fundamental constitutional right, has to be brought to court.

Indeed, in numerous appeals, the Court of Appeal did entertain claims founded on alleged violations of Section 72 (3) of the Constitution even though the appellants had not raised such issues when their cases were before the trial court or the first appellate court.

Is it arguable that it was alright to raise such issues simply because the matters were within appeals? Would that be a sound reason to deny the Petitioner the opportunity to raise issues of alleged violations of his constitutional right, through a petition?

Whereas we fully appreciate the important public policy that there must be an end to litigation, we are equally anxious that the said policy should not stand between a person and his fundamental rights. It is all a question of striking the right balance.

In **JULIUS KAMAU MBUGUA Vs. REP CR. A. NO. 50/2008**, the Court of Appeal addressed itself thus;

“I see no reason to vindicate the right of one who allows the process to run its full course without objection or complaint and then asserts the right only at its culmination.

In weighing, the competing rights in this case, we must also bear in mind the fact that the members of the tribunal investigating the Petitioner herein were appointed because they were Judges of the High Court. Had they not been Judges they could not have qualified for appointment. Therefore, it does follow that although they constituted a tribunal, they were performing a judicial function.

In our considered view, it would be completely wrong to order the members of the tribunal, who were performing a judicial function, to pay compensation attributable to their alleged faults in the manner in which they carried out their said functions. We say so because if a person carrying out a judicial function were to be compelled to pay compensation to one or the other party to a case in respect of which he had adjudicated, the person will have lost the protection accorded to him by law. He would be constantly and consistently worrying about the possibility that any decision he gave could result in a claim against him; and that would not augur well for the independence of the judicial officer concerned.

In effect, we find and hold that the Petitioner is not entitled to an award of damages against any of the members of the tribunal. We also find that the Petitioner had failed to make out a case for compensation as against either the Chief Justice or the Attorney General.

In the case of **HON. MR. JUSTICE MOIJO OLE KEIWUA J.A**. It was held as follows:-

“**We think the Ringera Committee was a creation of the office of the Chief Justice and/or Judicial Service Commission and were perfectly within their terms to collect information concerning corruption, affecting individual or particular groups of judicial officers.”**

Therefore, we hold the view that the Chief Justice cannot be faulted in appointing the Ringera Committee,

or by taking action on the basis of the report prepared by the said Committee.
As regards the failure of the Chief Justice to give evidence before the tribunal, we hold the view that the Petitioner was not as helpless as he has suggested before us. Whereas the tribunal did not summon the Chief Justice to appear before it, at the request of the Petitioner, it made it clear that if he wished to call the Chief Justice, he had the liberty to do so. If the Chief Justice declined to come, the Petitioner could have followed due process of the law, including Judicial Review. Being a person well learned in the law, and having had the wealth of experience such as he did, we believe that the Petitioner should have had no difficulty in seeking and obtaining such an order of *mandamus*. Indeed, it is noteworthy that the Petitioner's advocate Mr. Mwenesi, also acted for the other judges who were the subject matters of tribunals; and he did file applications for Judicial Review for the said other Judges. We therefore hold the view that the Petitioner should have had no difficulty at all in taking the necessary steps had he been so minded. However, and for reasons which have not been made known to us, the Petitioner made a conscious decision not to file an application for Judicial Review seeking an order of mandamus or other appropriate order to compel the Chief Justice to testify before the tribunal, or to challenge the decisions by the tribunal on the issue of the procedures adopted.
At paragraph 17 of his Affidavit sworn on 4th May 2009, the Petitioner said:
"THAT I did consider taking out judicial review proceedings and thereby staying the further hearings of the Tribunal in my matter. However, I considered that it was best to see the nature and status of the evidence the Tribunal would call against me first. I would then be able to establish the validity and propriety of such evidence in relation to the allegations and the antecedents to my purported suspension. Only then could I determine whether the evidence was sufficient to cause a Tribunal to be established."

Had the Petitioner moved the court by way of Judicial Review, as did those other Judges, we believe that he should have expected similar outcomes. However, he appears to have accepted the rulings made by the tribunal, and to thereafter, have subjected himself to the proceedings of the tribunal, without further legal challenge. He cross-examined the witnesses and thereafter gave his own defence. He then waited for and thereafter received the verdict of the tribunal. Even at that stage, if he felt aggrieved, the Petitioner had a window of opportunity to seek orders of the High Court to stay the execution of the orders made by the tribunal. However, he did not take any immediate action in that regard. Instead, he waited until the 4th of May 2009, which was almost ten months after his removal from office, to institute the proceedings before us. It strikes us that the action taken by the Petitioner was no more than an after thought.
Notwithstanding the foregoing, we have no hesitation whatsoever in concluding that there is no legal justification for according the Petitioner treatment that was not consistent with that accorded to the other judges who were the subject of investigations by tribunal set up pursuant to **section 62 of the Constitution**. Those other Judges were, reportedly, paid their salaries; provided with their official vehicles; and they also had security provided by the Judiciary. Therefore, the Petitioner should have been provided with his salary, security and vehicle during the period he was under investigation, just as happened to all the other judges. To the extent that he was deprived of any of these, we find that he was discriminated against, in an unfair and unacceptable manner. To that end, we order that any part of his salary which was withheld should be paid to him forthwith.
Finally, because the Petitioner has sought to shut the stable door after the horse had bolted, we are not able to order that he be reinstated. Pursuant to the provisions of **Section 62(6) of the Constitution of Kenya,** the suspension of a Judge ceases to have effect if the tribunal investigating the question of his removal recommends to the President that the Judge ought not to be removed from the office. In this instance, the tribunal recommended that the Petitioner be removed from the office. The President has acted upon that recommendation, and removed the Petitioner from office. There is no constitutional provision empowering us to order the revocation or annulment or recall of the order for removal. We therefore decline to make any such order.
As the petition has only been partially successful, we order that each party shall bear his own costs save for the costs awarded to the petitioner earlier.
Dated, Signed and Delivered this 20th day of December, 2010

…….
K.H. RAWAL
JUDGE

…….
MARTHA K. KOOME
JUDGE

……...
FRED A. OCHIENG
JUDGE