1. **SHAH MUNGE & PARTNERS LIMITED**

2. **FRANKLIN KARIUKI KIRIGIA**

3. **ARTHUR RUNYENJE NAMU**

4. **JOHN PAUL MUNGE**

5. **PAUL ANTHONY SPENCE ……..……APPELLANTS**

V E R S U S

THE CAPITAL MARKETS AUTHORITY …...……..RESPONDENT

JUDGMENT OF KUBO, J

The issues for determination by this court in the present appeals may be clustered under the following broad sub-headings:-

1. **Background to the Appeals;**

2. **Jurisdiction;**

3. **Procedure;**

4. **Other issues including, Sanctions**.

This judgment is concerned with Procedure, with particular reference to delegation. Salient facts relating to the appeals as a whole have been amply set out by Waweru, J and it is not considered necessary to repeat them here, save where they may be necessary to give context to the issue of Procedure.

Challenge to Procedure of the subject Inquiry

When hearing opened before us on 20th February, 2006, the Appellants in Civil Appeal No. 913 of 2003 were represented by learned counsel **Mr. M. Kilonzo, SC** and **Miss D. Kilonzo**, the Appellant in Civil Appeal No. 930 of 2003 was represented by learned counsel, **Mr. S. Gautama, SC** and **Mr. S. Dhanji**, while the Respondent in both Appeals was represented by learned counsel, **Mr. G. Oraro.** The appeals were described as the first of their kind in this jurisdiction.

The grounds cited by the appellants in Appeal No. 913 of 2003 are numerous (99), tend to be rather wordy and, sometimes, repetitive; but the following grounds seem to represent the crux of the Appellants' case in so far as the issue of Procedure is concerned:-

Ground 2

"The Tribunal erred and misdirected itself in law in failing to find that the Board of the Respondent could

not delegate its disciplinary powers contrary to the principle in the case of **Vine -vs- Docks Labour Board (1956) 1 AII ER1."**

Ground 4

"The Tribunal erred in law in failing to find that the purported hearing of the Appellants by the sub-committee under section 11 (3) (h) of the Capital Markets Act ('the Act') was not only a fact-finding inquiry but also not a hearing or opportunity for the Appellants to be herd under sections 25 and 26 of the Act."

Ground 6

"The Tribunal erred in law and misdirected itself in failing to find that the Appellants were not afforded an opportunity to be heard within the meaning of sections 25 and 26 of the Act to their detriment."

Ground 7

"The Tribunal erred in law and misdirected itself in ignoring the law that the Board of the Appellant *(sic)* could only act through a quorum of 6 members under section 6 of the Act whereas on 14.10.02 when the sub-committee purported to hear the Appellants there were only 5 members of the Board present, and, hence, lacked any lawful quorum, to hear the Appellants, if at all, under sections 25 and 26 of the Act….".

Ground 9

"It was a grave error and misdirection in law and a flagrant disregard of the Act for the Tribunal to find that the fact finding proceedings before the sub-committee constituted a hearing under sections 25 and 26 of the Act thereby occasioning a miscarriage of justice to the detriment of the Appellants."

Ground 10

"(a) The Tribunal misunderstood and misapplied section 14 of the Act. It was not open in law for the Tribunal to find that the Respondent could appoint a sub-committee under section 14 of the Act in violation of section 6 of the Act.

(b) In so far as a committee appointed under section 14 can comprise persons not members of the Board, it cannot constitute the 'Authority' contemplated by sections 25 and 26 of the Act as read with section 6 of the Act."

Ground 12

"Further, the Tribunal erred and misdirected itself in law in failing to find that the sub-committee appointed under section 14 by the Respondent was not an ordinary committee but a sub-committee of the Board. This was a grave misdirection in law…."

Ground 14

"The finding that the sub-committee set up by the Respondent was, all at once:-

a) An inquiry under section 11 (3) (h) of the Act.

b) A committee under section 14 (1) of the Act.

c) The Respondent's Board under sections 25 and 26 of the Act for purposes of the Appellants is a grave misdirection in law and has occasioned a miscarriage of justice."

Ground 15

"It has always been the Appellant's case that an inquiry under section 11 (3) (h) cannot be a hearing under sections 25 and 26 of the Act and by failing to so hold the Tribunal erred in law."

Ground 16

"It is a contradiction in law to find that the Board sat to hear the Appellants on 16.10.02 and further find that the said Appellants were heard while at the same time finding that the Appellants were neither invited to the meeting nor entitled to so attend."

Ground 38

"In failing to direct their minds and make a finding on documents received by the Respondent from NSSF under cover of letter dated 19.09.02, the Tribunal erred and misdirected itself in law generally, and PARTICULARLY:

a) After the Appellants drew the attention of the Tribunal to the documents generally, and particularly the fact that the Respondent had never shown the documents to the Appellants before reaching their decision on 16.10.02 and never made any finding on them. The Tribunal erred and misdirected itself in law in failing to make a finding that this constituted a breach of the Rules of Natural Justice by the Respondent ...."

For his part, the appellant in Civil Appeal No. 930 of 2003 cited 18 grounds of appeal. The said grounds also tend to be wordy. In so far as the issue of Procedure is concerned, the following grounds seem to represent the crux of the said Appellant's case:-

Ground 10

"The Tribunal erred in law in not holding that the Authority had no legal authority or jurisdiction to delegate to a sub-committee to carry out investigations and then acting unilaterally and in the absence of the directors and with clear bias instilled by the report of that committee on the mind of the Authority and in breach of the rules of natural justice and in the absence of the Appellant and other directors then proceeded to rubber stamp the recommendation of the committee making a mockery of the rules of natural justice and ending in a complete miscarriage of justice both by the Authority and the Tribunal which is evident from the further fact that despite the absence of any cross-appeal by the Authority, the Tribunal unlawfully and wrongfully enhanced the period of disqualification again showing bias of an acute nature by the Tribunal against the company and its directors including this Appellant."

Ground 14

"The Tribunal erred in law in not holding that the Authority exceeded its jurisdiction and failed to follow the correct procedures in conducting their original inquiry and imposing sanctions and penalties and additionally that it failed to inform this Appellant of the results of the original inquiry or afford the Appellant an opportunity to defend himself or be cross-examined prior to imposition of the sanctions/penalties by the Authority and later by the Tribunal before enhancing the sanctions/penalties."

Ground 16

"The Tribunal erred in law in not finding that there was a flagrant breach of the rules of natural justice for the Board of the Authority to proceed on 16.10.02 to consider the report of the sub-committee in the absence of the Appellant and the other directors of the company and denying them the opportunity of being heard in their defence."

Ground 17

"It is a legal contradiction for the Tribunal to uphold the rule in the case of Wood –vs- Woad & Others [1874] L.R. 9 Ex. 190 on the one hand and find that the Appellants were given a fair opportunity to be heard on the other."

Essence of submissions of Appellants in Appeal No. 913 of 2003

The essence of submissions by counsel for Aappellants in Civil Appeal No. 913 of 2003 was that the Respondent, Capital Markets Authority ('the Authority'), reached its purported decision and imposed sanctions against the Appellants in breach of the rules of natural justice and in breach of the provisions of the Capital Markets Act. The Appellants felt aggrieved by the decision of the Authority and appealed against it to the Capital Markets Tribunal which on the whole upheld the decision of the Authority and enhanced the sanctions imposed against the appellants. The Appellants also felt aggrieved by the decision of the Tribunal and lodged the present appeals against the Tribunal's decision. These are, therefore, second appeals, which should be concerned with points of law only.

The Appellants in Appeal No. 913 of 2003 faulted the Tribunal's decision in so far as Procedure is concerned by contending that, contrary to the Tribunal's finding, the Authority has no power to appoint a special committee to investigate and inquire into the impugned KShs. 251,505,500/= transaction since, according to the Appellants, there is no provision for such committee in the Capital Markets Act. It was the Appellants' submission that the Authority's 'purported' delegation of its disciplinary function, which the Appellants contend is a *quasi-judicial* responsibility, and all actions thereunder, are null and void.

Taking issue with the Authority's letter dated 07.10.02 (page 392 Vol. A)

Counsel for Appellants in Appeal No. 913 of 2003 took issue with the Authority's letter dated 7th October, 2002 and complained that the letter constitutes evidence that the Authority had already reached conclusions of alleged wrong-doing on the part of the Appellants even before hearing the appellant firm, contrary to the rules of natural justice. For the record, the main points of the letter, which was addressed to the appellant firm, are:-

a) That the Authority had been carrying out an inquiry pursuant to the provisions of section 11 (3) (h) of the Act with respect to the appellant firm's retention of Kshs.251 million odd of the NSSF.

b) That as part of the inquiry, the Authority required the appellant firm to provide information pertaining to the questioned transaction and that the appellant firm's Chief Executive had complied and further appeared before the management of the Authority on 29.08.02 and 10.09.02.

c) That the Board of the Authority had reviewed the matter and appointed a special committee thereof to carry out the next phase of the inquiry and that as part of the exercise, the appellant firm was required to provide any additional information pertaining to the transaction in order for the committee to complete its investigations and further inquiry.

d) That the Authority of the Board, in exercise of its mandate, must accord the appellant firm an opportunity to be heard, pursuant to section 26 of the Act with respect to the following issues:

i. The improper manner in which the client's funds were handled as well as the unprofessional services provided by yourselves (appellant firm) with respect to the transaction in question.

ii. Your (appellant firm's) conduct as a licensee of the Authority was inconsistent with the requirements of the Capital Markets Act and the regulations issued thereunder.

e) That, consequently, the Authority was directing all the directors of the appellant firm, pursuant to the provisions of section 11 (3) (i), to appear before the special committee of the Board on 14.10.02 to be heard pursuant to the requirements of section 26 of the Act.

Taking issue with the Authority's letter dated 17.10. 02 (page 385 Vol. A)

Counsel for the Appellants in Civil Appeal No. 913 of 2003 also took issue with the Authority's letter dated 17th October, 2002. This letter, which was likewise addressed to the appellant firm, contains the following main points:-

a) The letter acknowledged that the appellant firm's directors had appeared before 'the Board of the Authority' (the appearance was actually before the special committee of the Board) on 14.10.02.

b) The letter also informed the appellant firm that the Board of the Authority had held a special meeting on 16.10.02, considered the matter relating to the questioned transaction and determined, *inter alia*, that the appellant firm was in violation of the requirements of the Act and regulations issued thereunder with regard to the handling and management of clients funds, in particular the depositing of the NSSF funds in the appellant firm's office account instead of clients account as required by regulations.

c) The letter further informed the appellant firm that the Board of the Authority had also found the appellant firm's professional conduct wanting and unsatisfactory in the handling of the particular questioned transaction.

d) Finally the letter informed the appellant firm that the Authority had decided to impose the subject regulatory sanctions, which later led to the unsuccessful appeal to the Capital Markets Tribunal and thereafter to the present second appeals against the Tribunal's Award.

Final attack by Appellants in Civil Appeal No. 913 of 2003 on Tribunal's Award

Counsel for Appellants in Civil Appeal No. 913 of 2003 finally submitted on the issue of Procedure that the 'purported' findings and sanctions by the Tribunal were in violation of the Capital Markets Act and Regulations made thereunder and that the said findings and sanctions had no legal basis in that:-

a) The purported 'special committee', on whose findings the Authority bases its decisions, sanctions and authority, was established in violation of the Act and had no legal authority to find the appellant firm and its directors in breach of any statutory provisions or at all.

b) The 'purported' findings of the committee were not communicated to the appellant firm and/or its directors.

c) Neither the firm nor any of its directors were afforded an opportunity to defend themselves against the findings of the sub-committee before the Authority reached its 'purported' decisions and imposed the 'purported' sanctions.

d) The Appellants requested for a copy of the proceedings of the meeting of the purported sub-committee of 14.10.02 and of the special meeting of the Board held on 16.10.02.

Plea for present Appeal to be allowed

Based on the grounds stated and submissions made above including the authorities cited, counsel for Appellants in Civil Appeal No. 913 of 2003 urged this court to allow the present Appeal.

Submissions of Appellant in Civil Appeal No. 930 of 2003

Counsel for Appellant in Civil Appeal No. 930 of 2003 essentially adopted the grounds cited by him above in support of his contention that the Procedure adopted in going about the inquiry and 'purported' hearing in this case was fatally defective. He also associated himself with the submissions of counsel for Appellants in Civil Appeal No. 913 of 2003 and likewise urged this court to allow Appeal No. 930 of 2003.

Submissions of Respondent in both appeals

The submissions of counsel for the Respondent in both appeals now under consideration on the issue of Procedure may be summarized as follows. The appeals arise out of disciplinary action taken by the Respondent against the Appellants. The findings of the Capital Markets Authority complained of led to an inquiry by the Capital Markets Tribunal under section 35A (4) of the Capital Markets Act. Respondent's counsel submitted that the Tribunal conducts an appeal, not by way of review but by way of an inquiry which is not a legal trial as we know it. He said the Procedure for hearing by the Tribunal of an appeal is regulated by the Act and referred in this regard to section 35A (5) and (6). Sub-section (5) is to the effect that the Tribunal has powers like the High Court to summon witnesses and take evidence on oath or affirmation. Sub-section (6) is to the effect that the Tribunal may receive evidence by way of affidavit or administer interrogatories.

Respondent's counsel also alluded to sub-section (7) which is to the effect that in determining any matter, the Tribunal is not bound by the strict rules of evidence regarding admissibility of evidence. He likewise pointed out that the powers of the Tribunal on appeal are set out in section 35A (16) and that there is no provision for cross-appeal. He emphasized that there is no provision in the Act for hearing by the Authority (as commonly known in judicial proceedings) but there is provision only to inquiry. He referred in the latter regard to section 11 (3) (h).

Respondent's counsel drew attention to the Authority's power to impose sanctions under sections 25 (4) and 26 (1) and said that if, after inquiry, sanctions are contemplated, the person affected must be given an opportunity to be heard by virtue of section 26 (2) and that there is no prescription for hearing at the inquiry, neither is prescription given on how the inquiry is to be conducted. He pointed out that in the present case the Authority first conducted an inquiry, then made recommendations to the Authority's Board which acted on the recommendations. He submitted that the Act and rules made thereunder were complied with at the Authority level.

On the issue of power to delegate, Respondent's counsel submitted that such power is expressly provided for in the Act – attention is drawn in this regard to section 14 (1). Respondent's counsel pointed out that the Authority appointed a committee from its own membership which deliberated and made recommendations to itself and that the Authority then acted on those recommendations. Respondent's counsel added that the appellants were given a chance to answer questions. It was Respondent counsel's submission that it is permissible to delegate to a committee as was done in the present case. He noted that detailed Minutes were recorded at the committee's deliberations (see Vol. 2 pages 760 - 764 of the parties' numerous and bulky documents).

Regarding a complaint by Appellants' counsel that not all documents were shown to the Appellants, Respondent counsel's rejoinder, as I understood it, was that it was enough for the Appellants to be given the gist of the case they had to answer. Respondent's counsel relied in this regard on **Doody –vs- Secretary of State for the Home Department & Other Appeals [1993] 3 AII ER 92.**

Respondent's counsel pointed out that there was an initial investigation. I interpose here to record that on 29th August, 2002 (see Vol.2 pages 708 – 710) there was a meeting between a management team of the Respondent and the Chief Executive (Arthur Namu) of the appellant firm herein and that at that initial investigatory meeting observations were made which were uncomplimentary of the conduct of the appellant firm, *inter alia*, with regard to the questioned transaction. Observations 4 and 5, instructively, pointed out that the stockbroker (appellant firm) acted outside its regulatory conduct and in contravention of the Capital Markets Act and regulations issued thereunder; and that the stockbroker should confirm to the Authority latest by 2nd September, 2002 whether the moneys would be returned to NSSF by the (Euro) Bank. Respondent's counsel pointed out that the Board of the Authority appointed a committee (see Vol. 2 pages 758 – 759); that the committee conducted an inquiry, heard the Appellants and made recommendations (see Vol.2 pages 760 and 755 -779). He repeated that there is no procedure prescribed by the Act for conducting an inquiry, and that the bottom-line was for the Authority to act fairly. He referred in this regard to **Re Pergamon Press Limited [1970]3 All ER 535.**

It was Respondent counsel's contention that fair hearing in administrative tribunals can range from mere consultation to an entitlement to make written or oral representations and that if Parliament intended fully

fledged trials at the Capital Markets Authority level, Parliament would have underpinned such intention in the Act (which was not done). Respondent's counsel submitted that administrative Tribunals should be left to be masters of their own procedure unless Parliament prescribes otherwise. Respondent's counsel said there is no provision in the Capital Markets Act requiring the framing of charges; that the Capital Markets Tribunal is not technical, as section 35 (16) prescribing what it may do upon any appeal reveals; and that it does not make sense to expect a hearing on culpability and a separate hearing before imposition of sentence. He submitted that the Appellants cannot import judicial procedure in administrative proceedings; that fair administrative procedure is infinitely flexible and cannot be compartmentalized as required in judicial proceedings; and that it is not the intention of the Legislature to contemplate adversarial procedure in disciplinary proceedings. Respondent's counsel urged the court to dismiss both Appeals.

Reply by appellants

In reply, counsel for Appellants in both Appeals basically reiterated their earlier submissions.

Court's evaluation of the Appeals

I have duly considered the rival submissions of the parties on the issue of Procedure, with particular reference to delegation.

Numerous authorities were cited before us. Lots of them emanate from common law jurisdictions. By virtue of section 3 (1) of Kenya's Judicature Act, Cap. 8, common law considerations are subordinate to statutory law which in turn is subordinate to constitutional law. And the Kenya Court of Appeal in **Civil Application No. NAI 92 of 1992 (NAI. 40/92 UR)** between **The Speaker of the National Assembly and the Hon. James Njenga Karume** (unreported), unreservedly accepted the following submission by counsel:

'... that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.'

By accepting this submission, the Court of Appeal made a pronouncement on it, which is binding on the High Court.

Counsel for Appellants in Civil Appeal No. 913 of 2003 drew our attention early in their arguments to **Vine –vs- Docks Labour Board**. That English case decided in 1956 related to a dock labour scheme. The plaintiff was a registered dock worker employed by the defendants, National Dock Labour Board set up under the Dock Workers (Regulation of Employment) Order, 1947 to administer the scheme provided by the order. The national board had power to delegate to local boards, constituted by the order, certain disciplinary functions. By clause 16 (2) (c) of the scheme the local boards were given power to give 7 days notice of termination of employment to any registered dock worker who failed to comply with any provision of the scheme. The plaintiff failed to comply with a provision of the scheme (i.e., failed to obey a valid order to report for work) and the local board instructed their disciplinary committee, which consisted of only 2 members of the local board, to consider the case.

The dock labour scheme contained no provision for the delegation of a disciplinary matter by a local board. The disciplinary committee, having considered the plaintiff's case, decided that he should be given 7 days notice of termination of his employment and he was given (by the committee) the said 7 days notice of termination of his employment. The disciplinary committee's decision was upheld by the appeal tribunal.

The appeal tribunal's decision was eventually challenged before the Court of Appeal which held that the local board had no power to delegate its disciplinary powers conferred by clause 16 (2) (c) of the scheme to a disciplinary committee consisting of two of its members, and that the purported dismissal of the plaintiff and the subsequent proceedings before the appeal tribunal were therefore, illegal, *ultra vires* and invalid.

The case now before this court is governed by the Capital Markets Act. Section 14 (1) thereof empowers the Capital Markets Authority to appoint committees, whether of its own members or otherwise, to carry out any of its functions as the Authority may care to delegate to committees, depending on the particular objective the Authority seeks to achieve through the assistance of a committee towards the discharge of the Authority's various functions.

Vine's case above is clearly distinguishable from the present case in that the dock labour scheme which governed Vine's case contained no provision empowering the local board to delegate its disciplinary authority to a disciplinary committee while in the present case the Capital Markets Authority has been vested by section 14 (1) with express power to appoint any committee and delegate to such committee any of the Authority's powers as the Authority may deem appropriate. This court must be and stands guided by the specific provisions of section 14 (1) of the Capital Markets Act on the issue of delegation before it. I accordingly declare Vine's case distinguishable and inapplicable to the case at hand. It constitutes no authority for depriving the Capital Markets Authority of its statutorily vested power to delegate functions it deemed appropriate to a committee it appointed for a specific purpose.

Vide ground 17 of their grounds of appeal, counsel for the Appellants in Civil Appeal No. 913 of 2003 said of the Capital Markets Tribunal, essentially, that it contradicted itself by upholding the rule in the case of **Wood –vs- Woad & Others** on the one hand, and also found on the other hand, that the Appellants were given a fair hearing. In this regard it is important to note that the reference by the Tribunal to the case of **Wood –vs- Woad** came about in a general discussion on what the expressions 'a hearing' or 'opportunity to be heard', as a component of the rules of natural justice, entail when used in legislation.

The general tenor of the Tribunal's discussion on the subject (see handwritten pages 1490-1491 in Vol. 3) was that while the *audi alteram partem* rule generally denotes a hearing at which oral submissions or evidence may be tendered as a mechanism for achieving a fair hearing, whether at a strictly legal tribunal or at any tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals, it does not follow that for a hearing to be fair it needs to be modeled strictly on court procedure; nor need hearings always be oral. As I understand it, the Capital Markets Tribunal was saying that what the *audi alteram partem* rule guarantees is an opportunity to be heard, not necessarily that the hearing must be oral before the decision maker.

With respect, I hold that the Tribunal had that far, in the context of the present case, interpreted the *audi alteram partem* rule correctly. Sub-sections (5) and (6) of section 35A of the Capital Markets Act illustrate the above point. They state:

'(5) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.

(6) Where the Tribunal considers it desirable for the purposes of avoiding expenses or delay or any other special reasons so to do, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.'

Under the aforesaid sub-sections, the Tribunal can call oral evidence and call for production of books and other documents; the Tribunal can also under the Act, for good cause, receive evidence by affidavit or receive information through interrogatories for purposes of making its decisions. There is nothing to stop the Tribunal from acting on information received through the interrogatories or documents on the basis thereof in making its decisions.

Among precedents relied on by the appellants in the present case was Kenya Court of Appeal **Civil Appeal No. 152 of 1986, David Oloo Onyango –vs- The Attorney-General.** The facts of that case are peculiar and bear repetition. The appellant who was the accused in the lower court was on 1st November, 1982 convicted of a seditious offence under the then section 57(1) and (2) of the Penal Code, Cap. 63, and sentenced to 5 years imprisonment. Upon his admission to prison, he was entitled under section 46(2) of

the Prisons Act, Cap. 90-

'to be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.'

By virtue of section 46(1) of the Prisons Act a person convicted of a criminal offence and sentenced to imprisonment for a period exceeding one month may by industry and good conduct earn remission of 1/3 of his sentence, provided that in no case shall any remission granted result in the release of a prisoner until he has served one calendar month. For the purpose of giving effect to sub-section (1), each prisoner shall on admission be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence. And by virtue of section 46(3) a prisoner may lose remission as a result of its forfeiture for an offence against prison discipline.

On 17.02.03 the Commissioner of Prisons wrote to Kamiti Main Prison where the appellant, David Oloo Onyango, was serving sentence and stated that he, the Commissioner had considered that it was in the interests of Onyango's reformation and rehabilitation that he be deprived of remission earned under section 46(1) of the Prisons Act. There was no indication by the Commissioner as to what information or factors he had taken into account as the basis of his decision to deprive Onyango of remission.

Onyango filed a notice of motion in the High Court under Orders XIV, rule 2 and L rule 1 of the Civil Procedure Rules plus section 3A of the Civil Procedure Act, Cap. 21, challenging the legality of deprivation of his remission. Section 53 of the Prisons Act provides that no prisoner shall be punished for a prison offence until he has been given an opportunity of hearing the charge against him and making his defence. Onyango averred that prior to receiving the Commissioner's letter, he had not been charged, tried and found guilty or punished for any offence against prison discipline; that he was not informed of what he had done to warrant reformation and rehabilitation over and above the lawful sentence (after remission); that he was not given an opportunity to be heard or explain or make representations as to why he should not be deprived of his remission; that the Commissioner's decision was arbitrary and in breach of the rules of natural justice, *ultra vires* section 46 of the Act and, therefore, null and void. Onyango sought declarations to the above effect.

The High Court (Sheikh Amin, J – as he then was) found for the respondent on the basis of arguments advanced in the proceedings under the notice of motion. Onyango appealed against the High Court decision to a 3–Judge Bench of the Court of Appeal. In their separate Judgments the Judges of Appeal upheld Onyango's appeal and declared the Commissioner's decision to deprive him of his remission a nullity.

The point that a hearing need not necessarily take an oral form for it to be deemed to meet the test of fairness as required by natural justice did, however, receive wide coverage by the Judges of Appeal. Highlighting the Commissioner's faults in the manner he went about depriving Onyango of his remission, the late Nyarangi, JA (as he then was) had the following to say:

'To summarize and answer the principal substantive point of this appeal I would say the Commissioner erred in law in that he decided to deprive the appellant of his rights without affording him an opportunity to be heard. The Commissioner is required to act fairly towards the appellant. At the very least, the Commissioner ought to do the following acts:

1. To <u>inform the appellant in writing</u> in a language the appellant understands the disciplinary offence he is alleged to have committed and the particulars of the offence.

2. To afford the appellant an opportunity to be heard in person and to fix reasonable time within which the appellant (or inmate) must submit his w<u>ritten *answer</u> to the officer in charge of the particular* **prison for onward transmission to the Commissioner.**

3. Thereafter within reasonable time, the Commissioner should inform the appellant (or the inmate concerned) that pursuant to section 46 (3A)(a) he has directed his mind at the allegation made

against the appellant that he requires further reformation and rehabilitation, has considered the grounds for the allegation and the defence of the appellant (or inmate) and has decided to deprive the appellant of all remission granted to him under section 46(1) of the Prisons Act ….'

For his part, Platt, JA (as he then was) concurred and, *inter alia*, added:

'It is … queried whether the Rules of Natural Justice applied to the making of the decision of the Commissioner in this case. In the course of decision making, the Rules of Natural Justice may require an inquiry, with the person accused or to be punished present and able to understand the charge or accusations against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and after whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the Rules of Natural Justice apply depends on the particular nature of the proceedings.'

The third Judge, Gachuhi, JA (as he then was) shared the views expressed by his aforesaid colleagues.

Inquiries under the Capital Markets Act are given a fair amount of leeway as witness the following examples:-

(a) No specific mode of conducting an inquiry by the Authority is prescribed under section 11(3)(h).

(b) No specific mode of conducting an inquiry by the Tribunal upon an appeal to it is prescribed under section 35A(4). Indeed under section 35A(7) the Tribunal is at liberty, in determining any matter, to take into consideration any evidence it considers relevant to the subject of an appeal before it notwithstanding that such evidence would otherwise be inadmissible under the law relating to evidence. In the context of Kenya, this means that the Tribunal is not necessarily bound by the strict rules of evidence as contained in the Evidence Act, Cap. 80.

The absence of rigid formalities in inquiries under the Capital Markets Act appears to be on purpose. Had the Legislature desired that inquiries under the Act be subjected to rigid formalities, there was nothing to stop the Legislature from providing for such rigid formalities in the same way as has been done elsewhere in Kenyan law. An illustration of this may be found in section 3(3)(a)(ii) of the Commissions of Inquiries Act, Cap 102 which is to the effect that the person adversely affected by the inquiry shall be given an opportunity not only to be present in person or by advocate at the hearing of evidence, to cross-examine any witness testifying thereto and to adduce material evidence on his behalf in refutation of or otherwise in relation to the evidence.

I am not persuaded by the Appellants' attempts to introduce in the case before us rigid rules for conducting inquiries under the Capital Markets Act where the Legislature did not deem it fit to provide for such rigidity, and I reject the invitation to do so.

Appointment of sub-committee to inquire into the questioned KShs. 251 million odd transaction

Counsel for Appellants submitted that there is no provision for appointment of the above committee as was done by the Capital Markets Authority. It was counsel's contention that the Board, through which the Authority ordinarily transacts its formal business, cannot delegate the disciplinary responsibility arising from the Kshs.251 million transaction which counsel deemed to be a *quasi-judicial* function. According to Appellants' counsel, the 'purported' delegation and all actions thereunder are null and void and that the Capital Markets Tribunal erred in law in upholding the Authority's action of delegating such responsibility and in not nullifying the said delegation.

On the issue of delegation to committees, section 14(1) of the Capital Markets Act provides:-

'14. (1) The Authority may appoint committees, whether of its own members or otherwise, to

carry out such general or special functions as may be specified by the Authority, and <u>may delegate</u> to any such committee such of its powers as the Authority may deem appropriate.'

Clearly, the Authority has been given wide discretion under section 14(1) to appoint any committee, by whatever title called, and delegate to such committee any of its powers as the Authority deems fit.

In the present case, an extract from the Minutes of the Board meeting held on 2nd October, 2002 (see Vol. 2 handwritten pages 758-759) shows that members of the Board noted that management of the Authority had carried out preliminary investigation on the subject transaction and determined a *prima facie* violation of the Capital Markets Act on the part of the stockbroker, i.e. the appellant firm herein. The Board then appointed a 4-member 'sub-committee' of the Board with the following mandate:-

(a) Carry out further inquiries on the NSSF (questioned) transaction pursuant to section 11(3) (h) of the Act in light of the Act and where necessary to require any additional information pursuant to section 13(1) of the Act;

(b) Hear the licensee (appellant firm) in compliance with section 26(2) of the Act;

(c) Consider the appropriate action to be taken in such a case; and

(d) <u>Make recommendations to the Board based on the findings of the committee.</u>

The Board added, significantly, that it delegated to the committee its full powers, as provided for under section 14(1) of the Act, to carry out its mandate and to prepare a detailed report together with its recommendations and table it at a special board meeting scheduled for 16.10.02.

For the record, section 13(1) of the Act, alluded to at (a) above provides:

'13. (1) The Authority or any person officially authorized in that behalf by the Authority may, by notice in writing, require any person to furnish to the Authority or to the authorized person, within such period as is specified in the notice, all such returns or <u>information</u> as specified in such notice.'

Sections 14(1) and 13(1) of the Act make it abundantly clear that the Capital Markets Authority had power to delegate the responsibility for inquiring into and gathering information from all concerned on the questioned transaction to a committee, and for such committee to forward its findings and recommendations thereon to the Authority's Board for consideration and action as the Board may deem appropriate.

<u>Quorum for committee deliberations</u>

Counsel for Appellants submitted that the Capital Markets Authority Board could only act through a quorum of 6 by virtue of section 6(2) of the Act; that on 14th October, 2002 when the sub-committee met to hear the Appellants, there were only 5 members present, and that there was no hearing within the meaning of sections 25 and 26 of the Act.

I note with regard to this submission that the provision for quorum in section 6(2) of the Act relates to Board meetings. As noted earlier, the Authority acts through a Board of the Authority. The Authority consists of 11 members who include the Chairman and the Chief Executive under section 5(3) of the Act. There is no specific quorum prescribed by the Act for committee or sub-committee deliberations. I find that the Board of the Authority, which under the Act coincides with the Authority itself, has a free hand in determining the size of any committee.

In the present case, the Board appointed a committee of 4 members (which the Board called a sub-committee), with the Authority's management providing secretarial services, to carry out the subject inquiry from all concerned, hear the responses of the Appellants to the allegations or accusations that they (Appellants) had, in respect of the questioned transaction, violated the Act and Regulations made

thereunder and 'make recommendations to the Board based on the findings of the committee'.

There is no provision in the Capital Markets Act that recommendations of a committee are binding on the Board. I find that such recommendations are not binding on the Board and that the Board can accept or reject the findings and recommendations of a committee. In the case at hand, the Board accepted the bulk of the findings and recommendations of the committee, acted on them and varied the period of disqualification of the Appellants. I find no fault with the act of the Capital Markets Authority Board in accepting the findings and recommendations of the committee. Equally I find no fault with the act of the Capital Markets Tribunal endorsing the action of the Authority's Board.

Whether it was a must for the Authority's Board to hear the appellant firm's directors at the full Board meeting before deciding on action against the appellants

It was contended by counsel for the Appellants that the Authority had no legal authority or jurisdiction to delegate to a sub-committee to carry out investigations and then act on the sub-committee's recommendations unilaterally in the absence of the Appellants. This submission ignores the fact that the inquiry was conducted in phases:-

i. Initial investigation at management level on 29.08.02 for the Authority to get preliminary data or information from the appellant company's Chief Executive, *inter alia*, on the questioned transaction.

ii. Thereafter the Authority's management briefed its Board on its preliminary impressions or findings on the matter. On 02.10.02 the Authority's Board appointed the sub-committee of 4 members with a mandate as already recorded.

iii. In discharging its mandate, the sub-committee convened a meeting between its members and the 4 directors of the appellant firm (being the 2nd, 3rd and 4 appellants in Civil Appeal No. 913 of 2003 plus the appellant in Civil Appeal No. 930 of 2003) on 14.10.02. The Minutes of that meeting (see Vol. 2 pages 765-773) show that the questioned KShs. 251 million transaction was the sole subject for discussion at the meeting and that the directors of the appellant firm were given a hearing. Various questions, as recorded, were put to the appellant firm's directors and the latter's answers were recorded. The Minutes show (page 770) that after the answers of the appellant firm's directors were recorded, the Chairman of the sub-committee thanked the said directors and told them that they would receive communication from the Authority's Board in due course. Although the Minutes do not expressly record that the directors left the meeting at that stage, what is recorded next are the various findings and recommendations of the meeting. The tenor of the findings and recommendation point to the said findings and recommendations as having been made in absence of the appellant firm's directors. The sub-committee found the appellants at fault and recommended to the Authority's Board for the subject regulatory sanctions to be taken against the appellants.

iv. The sub-committee prepared detailed Minutes of the inquiry conducted on 14.10.02 plus its findings and recommendations thereon and tabled the Minutes at the special Authority's Board meeting on 16.10.02. The Board considered the report of the sub-committee, accepted the sub-committee's findings and recommendations and imposed the subject regulatory sanctions against the appellants. The appellants felt aggrieved and appealed against the Board's decision and sanctions to the Capital Markets Tribunal which substantially upheld the Board's decision and sanctions but enhanced the regulatory sanctions imposed by the Board against the appellants.

The Appellant's responses to allegations or accusations put to them during the inquiry at sub-committee level were availed to the Board which considered the said responses and accepted the findings and recommendations of the Board thereon. The Appellants' appeal to the Tribunal against the Board's decision and sanctions failed and in fact the Tribunal basically upheld the decision of the Board and enhanced the disqualification of the Appellants. The Tribunal essentially found no fault in the Procedure adopted by the Authority in going about the inquiry.

We have been urged by the Appellants to upset the decision of the Tribunal that found no fault with the

Procedure of the Authority's inquiry. The Appellants' submission was premised on the ground that the Authority had no power to delegate any part of the inquiry to the sub-committee alluded to. I have already reproduced section 14(1) of the Act which clearly shows that the Authority is empowered to appoint committees, whether of its own members or otherwise, and delegate to such committees any of the Authority's powers as the Authority may deem appropriate. That is what the Authority did in the present case. The fact that the entity the Authority delegated its powers to was described as a sub-committee is in my view of no moment in this case.

I find that the Authority validly delegated the responsibility for physically inquiring into the questioned transaction, questioning the appellant firm's directors thereon and recording their responses to their questioned conduct, making findings and recommendations thereon to the Authority's Board which considered the matter, accepted the sub-committee's findings and recommendations which then became the Authority's own and imposed the regulatory sanctions in question. The Appellants appealed unsuccessfully against the Authority's decision and sanctions to the Tribunal. In my view, there was no fault in the delegation, which is the essence of the Tribunal's decision regarding the Procedure of the inquiry, and I would uphold the Tribunal's aforesaid decision. The Appellants' submission in this regard must fail.

Whether the deliberations at the sub-committee level on 14.10.02 could constitute an inquiry and a hearing at the same time.

It was submitted by Appellants' counsel that the deliberations of the sub-committee on 14th October, 2002 could not constitute an inquiry under section 11(3) (h); further, that the sub-committee could not be a committee under section 14(1), or the Authority under sections 25 and 26 of the Act. I have already reproduced the text of section 14(1) above. For the record, section 11(3) (h) provides:-

'11. (3) The Authority may exercise, perform or **discharge all or any of the following powers, duties or functions –**

(h) inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence, and any public company the securities of which are traded on an approved securities exchange'.

The relevant provisions of section 25 are:

'25. (4) Where the Authority is satisfied that a licensed person has –

(a) acted in contravention of this Act, or any rules or regulations made thereunder; or

(c) is guilty of malpractice or irregularity in the management of his affairs, the Authority may –

(i) direct the person to take whatever action the Authority deems necessary –

(A) to correct the conditions resulting from any contravention of any provisions of this Act or any rules or regulations made thereunder; and

(B) to come into compliance with the provisions of the Act or any rules made thereunder; or

(ii) suspend or impose restrictions or limitations on the license granted to the person.'

As for section 26, the relevant provisions are:

'26. (1) The Authority may revoke a licence or approval if it is satisfied that the licensed person –

(d) is guilty of malpractice or irregularity in the management of his business.

(2) In all cases where action under sections 25 and 26 is taken, the Authority shall give the person affected by such action an opportunity to be heard.'

I have already recorded above that the inquiry into the impugned KShs. 251 million transaction was conducted in phases. The appellant firm's Chief Executive, i.e., Mr. Arthur Namu (3rd Appellant in Civil Appeal No. 913 of 2003) was summoned before the management of the Authority on 29th August, 2002, *inter alia*, in connection with the KShs. 251 million transaction (see Vol. 2 handwritten page 708). Observations made to him (page 710) were, *inter alia*, as follows:

1. The stockbroker (appellant firm) should have returned the funds back to NSSF if the moneys could not be deposited in the client's account at Stanbic Bank;

2. That the stockbroker deposited the moneys with Euro Bank knowing that it did not have a strong financial base and that there was no client's account at that Bank;

3. The Stockbroker acted outside its regulatory conduct and in contravention of the Capital Markets Act and the Regulations issued thereunder;

4. The Stockbroker should confirm to the Authority latest by 02.09.02 whether the moneys would be returned to NSSF by the (Euro) Bank.

I interpose with regard to observation 4 above that Respondent's counsel stated from the bar during his submissions, without demur from Appellants' counsel, that up to the time of hearing of the present appeals before us nobody knew what happened to the KShs. 251 million deposited in Euro Bank.

I have already recorded hereinabove that subsequently there was a meeting of the sub-committee of the Authority's Board which questioned the Appellants herein on the questioned transaction, recorded their responses and forwarded a detailed report to a special meeting of the Board of the Authority) which considered the matter. As noted earlier, the Capital Markets Act does not prescribe any particular Procedure for conducting an inquiry under the Act.

I reiterate that the Authority was at liberty to conduct the inquiry in the manner it did. The important thing was to obtain the Appellants' version or explanation of the questioned transaction which the management initially obtained through the appellant firm's Chief Executive, Arthur Namu, then handed the matter over to the sub-committee which formally heard the appellant firm's or company directors' responses to the questions put to them. Thereafter the sub-committee made a detailed report of the inquiry it had conducted under delegated powers and forwarded its report with findings and recommendations to the Authority's Board which accepted and acted on them with some modifications as the Board, exercising its plenary power, deemed fit.

The Tribunal which heard the Appellants' first appeals, *inter alia*, against the Procedure adopted by the Board found no fault with the Procedure. Neither do I on second appeal and I would uphold the Tribunal's decision endorsing the Authority's Procedure of conducting the subject inquiry.

Whether it was mandatory for all documents concerning the inquiry to be availed to the appellants in order for the inquiry to be valid.

Counsel for the appellants complained that the Capital Markets Authority received certain documents from NSSF under cover of letter dated 19th September, 2002, that the Authority's Board never showed the documents to the Appellants for comment before reaching its adverse decision against them on 16th October, 2002 and that the Capital Markets Tribunal never made any finding on the Appellants' complaint.

If the Appellants' contention is that the fact of the Appellants not having been physically shown the actual documents before they (Appellants) were questioned by the sub-committee regarding the impugned

transaction is an omission which resulted in unfairness of such magnitude as to vitiate the multi-pronged inquiry conducted by the Authority through its appointed agents, my finding is to the contrary. As Lord Mustill observed in Doody's case (*supra*-page 106):

"(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their applications to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects … (5) Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will often require that he is informed of the gist of the case which he has to answer.'

In the present case, the appellant firm's Chief Executive was on 29th August, 2002 given by the Capital Markets Authority's management an outline of the general public concern, *inter alia*, about the KShs. 251 million transaction. The management of the Authority pointed out to the Chief Executive of the appellant firm what wrongs the Authority considered the firm to have committed. The Authority's management administratively suggested what looks like some interim remedial measure while further inquiry was going on. As already recorded above, counsel for Appellants in Civil Appeal No. 913 of 2003 earlier complained that the Authority's letter of 7th October, 2002 evidenced that the Authority had as at that date, and before hearing the appellants, already concluded that the appellants were guilty of wrong-doing.

The complaint is exaggerated. It was the duty of the Authority's management after gathering initial data on the questioned transaction to inform the Appellants of the general nature of the accusations they would have to answer. Thus on 14th October, 2002 the directors of the appellant firm/stockbroker were summoned to, and appeared before, the sub-committee of the Board to formally answer questions on the transaction based on focused accusations. The committee then complied a report and forwarded it to a special meeting of the Authority's Board which, as stated earlier, adopted the committee's findings and recommendations and imposed the subject sanctions. The Appellants unsuccessfully appealed against the decision and sanctions by the Authority to the Tribunal which basically upheld the decision of the Authority but enhanced the sanctions imposed by the Authority.

Given the above scenario, I find that it was enough for the Appellants to be given the gist of the complaints against them and to be asked to respond thereto as was done in this case. I find no fault with the Procedure adopted by the Authority in going about its subject inquiry. The Tribunal was correct in upholding the Authority's findings, the bulk of the recommendations from the sub-committee of its Board and the sanctions with some modification.

The issue of the need to act fairly also fell for consideration in **Re Pergamon's case** (*supra*) although in a somewhat different, but illuminating, setting. That case related to an investigation of the affairs of a company by the Board of Trade. In September, 1969 the Board appointed inspectors to investigate the affairs of P Ltd. In October, 1969 L Corporation (which had a sufficient holding in P Ltd for the purpose) removed M and other directors from the board of P Ltd, and in November, 1969 began proceedings in the USA against M charging fraud and deceit in connection with the sale of shares in P Ltd and claiming US$ 22,000,000.

M and the other directors were apprehensive that the inspectors might make an interim report which could be used against them in the USA litigation and that allegations might be made reflecting on their conduct. The inspectors wished to hear evidence in private from the directors who at the outset of the investigation asked for assurance that, if allegations were made against them, they should be allowed to read transcripts of the evidence adverse to them, to look at documents used against them and to cross-examine witnesses. The inspectors were not prepared to allow the directors a right to peruse the transcripts of evidence but **made it clear that no one would be criticized in any report without first being afforded an**

opportunity to give an explanation, that this involved that the person concerned should be told in general terms of the allegation against him and that the inspectors would provide him with the purport of the relevant evidence and documents. The directors were not satisfied with these assurances and when called to give evidence to the inspectors they refused to do so.

The inspectors certified the directors' refusal to give evidence to the court pursuant to a provision in the relevant Act, and the court having inquired into the case held that the directors were not justified in their refusal. The directors appealed. The Court of Appeal held as follows:-

i. **Although the proceedings before the inspectors were only administrative, and not judicial or** quasi-judicial**, yet the characteristic of the proceedings required the inspectors to act fairly, in that if they were disposed to condemn or criticize anyone in a report they must first give him a fair opportunity to correct or contradict the allegation, for which purpose <u>an outline of the charge would usually suffice.</u>**

ii. **Save for the requirement to act fairly, the inspectors should not be subject to any rules of procedure and should be free to act at their own discretion; accordingly, as the inspectors had shown they intended to act fairly and had given every assurance that could reasonably be required, the directors' refusal to give evidence was unjustified**.

In the appeals now before us, the 2nd, 3rd and 4th Appellants in Civil Appeal No. 913 of 2003 plus the Appellant in Civil Appeal No. 930 of 2003, being directors in the 1st appellant firm in Civil Appeal No. 913 of 2003, were given the gist or outline of the allegations/accusations against their firm. I associate myself with the general position taken in **<u>Doody's case</u>** and **<u>Re Pergamon's case</u>** (*supra)* that the test of acting fairly in inquiries, such as the inquiry subject matter of the two appeals before us, can be adequately met by providing the parties affected by such inquiries with the gist or general outline of the case which they have to answer, for purposes of getting their answer, if any, and that the said test was met in the case subject matter of the two appeals before us. I find the Appellants' complaint of not having seen the subject documents not to constitute an adequate ground to vitiate the inquiry in this case, and the said complaint must fail.

<u>Challenge to the Tribunal's enhancement of the Appellants' disqualification</u>

It was submitted by Appellants' counsel that the Tribunal unlawfully and wrongfully enhanced the period of disqualification in the absence of cross-appeal by the Respondent. Section 35A (16) of the Act provides as under:

'35A. (16) Upon any appeal, the Tribunal may –

(a) confirm, set aside or <u>vary</u> the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority or any of its committees in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.'

The enhancement by the Tribunal of the period of the Appellants' disqualification was a variation of the regulatory sanctions imposed by the Authority on the Appellants. The variation falls squarely within section 35A (16) (a) of the Capital Markets Act and was within the Tribunal's power upon <u>any appeal</u>, which power did not require any cross-appeal for the Tribunal to exercise the said power. There is no merit in the Appellants' complaint against the Tribunal's enhancement of the Appellants' disqualification and this complaint must also fail.

<u>Fate of Appeals against the Procedure of the Inquiry</u>

I find the grounds of appeal urging this court to find fault with the Procedure adopted by the Capital

Markets Authority in conducting the subject inquiry, and urging us to upset the Tribunal's decision endorsing the Authority's adopted Procedure, to have no merit. The appeals, in so far as they challenge the said Procedure, ought to fail and be dismissed.

I have read in draft the judgment of Waweru, J. I agree, for the reasons given by the learned Judge, with the conclusions he has arrived at with regard to the issues of jurisdiction that he has dealt with. I also agree with the orders that he has proposed.

I have also read in draft the judgment of Kasango, J. I agree with the learned Judge's findings on the issue of the sanctions as imposed by the Tribunal upon the 1st, 2nd, 3rd and 4th Appellants.

With regard to the 5th Appellant, both Waweru and Kasango, JJ have held that the Tribunal erred in finding him substantively culpable for the questioned transaction, and that his appeal, as far as the sanctions imposed upon him are concerned, ought to be allowed. I agree. I also agree with the order for costs proposed by Kasango, J.

I agree with the final orders as proposed by Waweru, J. As Kasango, J also agrees, there will be orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2009.

B. P. KUBO

JUDGE