



**Trivedy v Kenya Medical Practitioners & Dentists Council; Mwangi & 2 others
(Interested Parties) (Petition E462 of 2023) [2025] KEHC 9492 (KLR)
(Constitutional and Human Rights) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E462 OF 2023

LN MUGAMBI, J

JULY 3, 2025

BETWEEN

DR. JYOTEE TRIVEDY PETITIONER

AND

KENYA MEDICAL PRACTITIONERS & DENTISTS COUNCIL RESPONDENT

AND

DR. JOSEPH CHEGE MWANGI INTERESTED PARTY

LION SIGHTFIRST EYE HOSPITAL INTERESTED PARTY

DR. MAHESH CHANDERGI INTERESTED PARTY

JUDGMENT

1. The Petition dated 20th November 2023 is supported by the Petitioner's affidavit in support of even date. The key contention in this Petition is that the Respondent and its Preliminary Inquiry Committee (PIC) in adjudicating the 1st Interested Party's case against the Petitioner, failed to adhere to the provisions of the *Medical Practitioners and Dentists Act* and the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules as a consequence violated the Petitioner's right to fair administrative action under Article 47 of *the Constitution*.
2. The Petitioner thus seeks the following reliefs:
 - i. A declaration be issued that the conduct of the Respondent with respect to the complaint by the 1st Interested Party against the Petitioner failed the test of a fair administrative action that is required by Article 47 of *the Constitution*.



- ii. An order of judicial review by way of Certiorari be issued to bring into this Court and quash the entire Ruling of the Preliminary Inquiry Committee of the Respondent dated August 2019.
- iii. An order of judicial review by way of Certiorari be issued to bring into this Court and quash the entire resolution of the Respondent adopted at its 10th meeting adopting and approving the Ruling of the Preliminary Inquiry Committee of the Respondent dated August 2019.
- iv. An order do issue to the Respondent to refund the Petitioner the sum of Ksh.150,000 together with interest thereon at commercial rates that the Petitioner paid to the Respondent in compliance with Order Number (iii) of its Ruling dated August 2019.
- v. An order do issue compelling the Respondent to pay the Petitioner compensation for the injury that the Respondent's unlawful and unreasonable administrative action has caused to the Petitioner's professional reputation, interests, liberty and livelihood.
- vi. Costs of the Petition be borne by the Respondents.
- vii. Any other order(s) this Court shall deem fit.

Petitioner's Case

3. The Petitioner stated that she is an ophthalmologist who specializes in cornea, refractive and cataract surgery. She was an employee of the 2nd Interested Party (Lion Sight First Eye Hospital) from 1st June, 2003 to January, 2018.
4. On 7th September, 2015; the 1st Interested Party visited the Lion Sight First Eye Hospital (2nd Interested Party) where the Petitioner was working at the time. After registration and the vision check was done by the nurse, the 1st Interested Party was referred to the Petitioner where he presented with a history of hypertension, significantly impaired vision in both eyes and had persistent watering from his right eye.
5. The Petitioner diagnosed the 1st Interested Party's as suffering from bilateral cataracts (in both eyes) along with trichiasis in the right eye (a condition where the eyelashes abnormally turn inward causing irritation in the eyeball). Additionally, the 1st Interested Party had unaided vision of 6/36 in the right eye and 6/24 in the left eye.
6. The Petitioner cataract surgery in both eyes but before surgery; electrolysis to remove the inward turning lashes in the right eye. Electrolysis procedure was done successfully on 15th September 2015 in the right eye. The cataract surgery for the left eye was scheduled for 15th October 2015 but the 1st Interested Party was unavailable. It was pushed to 26th November, 2015 but again he did not show up. It was postponed to 3rd December, 2015.
7. The Petitioner avers that due to the 1st Interested Party's persistent unavailability for almost two months, the vision continued to deteriorate in both eyes.
8. On 3rd December, 2015; the Petitioner deponed that she duly complied with the 2nd Interested Party's pre-operative standard procedures and protocols and went ahead to perform a successful surgery of the 1st Interested Party's left eye. She similarly carried out the surgery of the right eye on 10th December 2015. She however indicated that while performing the 2nd Surgery, she noted that the 1st Interested Party kept moving on the table and advised him not to move because it was raising the pressure in the eye.
9. The Petitioner scheduled subsequent reviews. On 14th December 2015, the vision in the right eye was 6/9 showing an improvement of 96% and this was also recorded on 28th December 2015 with



- intraocular pressure of 16mmHg (normal pressure ranges 10-20mmHg). She prescribed reading glasses and advised review on 18th January, 2016. On 11th January 2016, the Interested Party went back seeking one week sick off but on checking the right eye, the Petitioner says it was completely normal.
10. On 21st January 2016, six weeks post-surgery, she said on review of the Interested Party's right eye, she discovered the vision had reduced to 6/24 while intraocular pressure was 14mmHg even though the 1st Interested Party was faring well. On 1st February 2016, the 1st Interested Party presented with a drop in vision in the right eye and upon examination, she found that he had Posterior Capsule Opacity (PCO) in the right eye, that is, whitening of the posterior capsule eye and some iris pigment on the implanted lens. She recommended the YAG laser procedure be undertaken which was successfully conducted on 19th February 2016. She explained that Posterior Capsule Opacity is a common occurrence after cataract surgery and can manifest from six to five years after surgery in 30% of the cases.
 11. During the review on 4th March 2016, the 1st Interested Party presented with a sudden loss of vision in the right eye with the vision reduced to hand movement level (eye could only see the movement of the hand). The recommended a B-Scan (ultra sound) of the eye but did not notice detachment of the retina, the B-scan on 4.3.2016 revealing inflammation of vitreous (the jelly at the back of the eye) whose treatment required the services of Posterior Segment Surgeon. The Petitioner thus referred the 1st Interested Party to the 3rd Interested Party who is a Posterior Segment Surgeon.
 12. The Petitioner stated that the 3rd Interested Party attended the 1st Interested party the same day, 4th March, 2016 and diagnosed his right eye partial posterior vitreous detachment (PVD) with total retinal detachment with choroidal detachment which would require multiple surgeries in view of the proliferative vitreo-retinopathy (PVR) changes (meaning that the retina was detached, the jelly at the back of the eye was detached partially, and the same jelly was inflamed) and advised right eye vitrectomy and blood tests at the earliest.
 13. That although the 3rd Interested Party had diagnosed total retinal detachment, his intraoperative notes (notes taken during surgery) stated that the 1st Interested Party's right eye retina was on, meaning it was attached and there was total choroidal effusion (meaning the choroid layer, which is behind the retina was infiltrated with fluid) along with proliferative vitreo-retinopathy (inflamed jelly).
 14. The Petitioner deponed that a retinal tear occurring on 4th March, 2016, three months after cataract surgery, could not possibly have been related to, or occasioned by cataract surgery, given that the retinal tear occurred beyond the healing period for cataract surgery, which is six weeks.
 15. That the 3rd Interested Party stated in his intraoperative notes that there was a retinal hole in the right eye which was lasered (sealed using endolaser) to prevent retinal detachment. The Petitioner explained that retinal holes can be caused by posterior vitreous detachment which is a natural process that happens with ageing of the vitreous as it dries up with age in some cases. That going by the 3rd Interested Party's intraoperative notes, it was evident that at the operative table, there was no retinal detachment of the 1st Interested party's right eye and therefore, the 3rd Interested Party's preoperative diagnosis of retinal detachment changed at the time of surgery to retinal hole and proliferative vitreoretinopathy for if it had remained the same, the 3rd Interested Party would have performed retinal detachment surgery. The 3rd Interested Party intraoperative (theatre) notes however indicate that on 7th March, 2016; he performed PPV (parsplana-Vitrectomy) + MP (membrane peeling) + PFCL (perfluoro carbon fluid) + EL (endolaser) + FAX (fluid air exchange) + SOI (silicon oil insertion) under LA (local anaesthesia) meaning the 1st Interested Party was injected inside the right eye, and anaesthetic medicine entered behind the retina and in the globe.



16. That the 3rd Interested Party's theatre notes demonstrate that the intraocular lens implant that the petitioner had done was intact, there was no retinal detachment as presumed by 2nd Interested Party after ultra sound, there was a small tear in retina which was laser sealed, and there was mild choroidal effusion.
17. The 3rd Interested Party thereafter performed the vitrectomy surgery on 7th March 2016 whose aim was to remove inflamed vitreous (removal of the jelly at the back of the eye because it was inflamed). That the 3rd Interested Party saw the 1st interested Party on 8th March, 2016; in which he noted the right eye conjunctiva suture was on and the PCIOL (lens implanted during surgery was sitting well) and retina was on and that there were no problems with the cornea. That the 3rd Interested Party reviewed 1st Interested Party on 12th March and noted that the right eye had cornea perforation and wondered whether it was caused by peripheral corneal degeneration (that is, the cornea which is the transparent layer of the eye had become thin and given way with protrusion of the iris).
18. The 3rd Interested Party referred the 1st Interested Party back to the Petitioner the same day to manage corneal perforation which upon diagnosis, the Petitioner confirmed 3rd Interested Party's diagnosis of inferior cornea perforation with iris prolapse on the right eye.
19. The Petitioner explained that corneal degeneration has a variety of causes including trichiasis (constant rubbing of the eyelashes on cornea, steroid treatment on a thin cornea, ageing related degeneration of cornea, herpes, growth of conjunctiva on the cornea or marginal degenerative diseases such as peripheral ulcerative disease or trauma. The Petitioner recommended blood tests to establish the cause of peripheral cornea degeneration on the 1st Interested Party's right eye in view of the many possible causes but he declined. She contended that the corneal perforation with prolapse occurring on 12th March, 2016 (three months after retinal tear surgery) could not plausibly have been related to or occasioned by, the cataract surgery performed on 10th December, 2015.
20. She on 15th March, 2016 performed the conjunctival flap surgery to stop the protrusion of the iris and contents of the right eye from coming out. She maintained that both she and the 3rd Interested Party followed the standard procedures. The 1st Interested Party was reviewed on 16th March 2016 and finally on 4th April 2016 by both the Petitioner and 3rd Interested Party.
21. In the last review, the 3rd Interested Party observed that the 1st Interested Party's right eye was filled with oil and inferior sub-retinal fluid prompting him to recommend that he returns to the hospital so that a further detailed examination can be conducted. Thereafter, the 1st Interested Party proceeded with various reviews with the 3rd Interested Party.
22. The Petitioner depones that to her surprise, the 1st Interested Party on 18th July 2017 lodged a complaint against her and the 2nd Interested Party before the Respondent. The 1st Interested Party claimed that the Petitioner had damaged his right eye causing him severe and permanent visual impairment owing to her failure to follow the 2nd Interested Party's standard preoperative and postoperative assessment.
23. In reaction to the complaint, the Respondent on 19th July 2017 directed both parties to respond to the charges and submit the relevant documents to the Preliminary Inquiry Committee (PIC) to carry out its investigations. The matter was filed under PIC Case No. 28 of 2017 pursuant to the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules.
24. The Petitioner states that the PIC its hearing of that matter on 15th February 2019 where three witnesses testified.



25. These witnesses were: herself, the 1st Interested Party and Peter Ndegwa who is from the 2nd Interested Party's Finance Department.
26. The PIC delivered its Ruling in August 2019 which was subsequently presented to the Respondent's Full Board at its 120th meeting. The Committee found as follows:
- i. The Petitioner failed to recognize and appreciate the signs of retinal detachment which is a well-known and serious complication following cataract surgery.
 - ii. There was delay in detecting the complication of retinal detachment.
 - iii. The Petitioner ought to have considered the various causes of reduced vision after cataract surgery and carried out necessary investigations to rule out likely complications.
 - iv. Due to retinal detachment, the 1st Interested Party became irreversibly blind in the right eye.
 - v. The failure of the 2nd interested party to give the patient Intravitreal Avastin injection after cataract surgery aggravated the damage to the 1st Interested Party's right eye.
27. The PIC's findings and recommendations were adopted and approved by the Respondent which ordered that:
- i. The Petitioner herein be and is hereby admonished for failing to timely detect a known complication of cataract surgery.
 - ii. The Petitioner be and is hereby directed to begin mediation with the First Interested Party in order to obtain compensation, and to report the progress to the Medical Practitioners and Dentists Council Chair within sixty (60) days of the date of the ruling.
 - iii. The Petitioner be directed to pay the Medical Practitioners and Dentists Council Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000.00/-) within fourteen (14) days of the ruling date as part of the Committee's sitting expenses.
 - iv. The Lions Sight First Eye Hospital is hereby reprimanded for neglecting to provide the Avastin Injection to the First Interested party because of a pending bill, regardless of the circumstances at the time.
28. The Petitioner states that the 1st Interested Party subsequently instituted a civil suit against her in Civil Case No. E181 of 2021 that is premised on the PIC's said Ruling.
29. The Petitioner depones that although she complied with the Respondent's order to pay the Ksh.150,000/-, she was dissatisfied with the PIC's Ruling and sought a review of the same by the Respondent's Chairman in a letter dated 29th May 2020. He avers that the Respondent's Chief Executive Officer responded in a letter dated 6th July 2020 informing that her application would be responded to within 14 days. She avers that this response never came.



30. This prompted her to write another letter dated 9th August 2021, and also highlighted the key areas of review being: she was at the time of the surgery an employee of the 2nd Interested Party thus the fees to the Board ought to have been borne by the 2nd Interested Party; that there was no independent retina opinion made during the hearing of this case taking into consideration the patient's state of Hypertension ; that no independent anterior segment surgeon's opinion was taken during this case as regards negligence or timely intervention and no independent cornea opinion was taken as regards to his corneal perforation.
31. The Petitioner avers that the Respondent's Legal Services Manager in a letter dated 13th August, 2021 (JT 47) wrote informing her that her application for review would be tabled before the Committee in September 2021 and would be advised on the way forward after deliberations. The Petitioner pointed out that no action was taken in the succeeding two years prompting her to write on 6th March 2023. In reply, the Respondent's Chairman stated that the Council did not have a sitting Board thus the delay.
32. Having regard to the foregoing, the Petitioner contends that the Respondent has violated her right under Article 47 of Constitution going by the manner in which its PIC conducted its proceedings and arrived at its final determination. The Petitioner's case against the Respondent is thus premised on the following grounds:
- a. inordinate delay in dealing with her application for review.
 - b. that the PIC contravened Rule 4(2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979 as it did not refer the complaint against her to the Professional Conduct Committee (PCC).
 - c. the PIC presented its findings and proposed final orders to the Full Board without first referring the same to the PCC, hence PIC acted in excess of its jurisdiction contrary to express provisions of Rule 4 (2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979, Section 7 (2) (a) (ii) of the *Fair Administrative Action Act*, contrary to Article 47 of *the Constitution*.
 - d. The Respondent acted unlawfully in adopting and approving the findings and the proposed final orders of the PIC at its 120th Meeting contrary to the express provisions of Rule 4 (2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979 and Section 7 (2) (a) (i) of the *Fair Administrative Action Act*, resulting in the Petitioner being subjected to unlawful administrative action, contrary to Article 47 of *the Constitution*.
 - e. That the PIC issued a ruling without recording whether its decision was unanimous or taken by majority of the members present contrary to the express provisions of Rule 10Y (2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) Rules 1979, resulting in the Petitioner being subjected to unlawful administrative action, contrary to Article 47 of *the Constitution*.
 - f) That PIC made orders in its undated ruling against the Petitioner in excess of its jurisdiction, contrary to Section 7 (2) (a) (ii) of the *Fair Administrative Action Act* and express provisions of Section 20 (1) & (2) of the *Medical Practitioners and Dentists Act* Revised Edition 2012, which expressly provide that the power to hold an inquiry in respect of complaint made against a medical practitioner or dentist resides in the Board, and not a committee of the Board. As the repository of the power to hold such inquiries, the Board cannot lawfully delegate to any other entity as the PIC or PCC hence the process the Petitioner was taken through violated right to



lawful administrative action under Article 47 by holding a hearing in respect of 1st Interested Party's complaint as PIC did not have the power to hold such hearing.

- g) That the Minister in establishing the PIC and PCC in the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979 and purporting to delegate to these two committees the power to hold hearings in respect of complaints against medical practitioners and dentists, the Minister acted ultra vires and beyond his powers, contrary to Section 7 (2) (a) (iii) of the [Fair Administrative Action Act](#), resulting in the Petitioner being subjected to unlawful administrative action, contrary to Article 47 of [the Constitution](#).
- h) That the PIC failed to consider the file of the patient (the 1st Interested Party) which was submitted to it in its entirety by the 2nd Interested Party and the Petitioner, thus PIC failed to take into account a relevant consideration that a reasonable tribunal would have taken into account, contrary to Section 7 (2) (f) of the [Fair Administrative Action Act](#), resulting in the Petitioner being subjected to unreasonable administrative action, contrary to Article 47 of [the Constitution](#).
 - i. That PIC failed to call and consider the testimony of nurses who checked the patient at Lions Sight First Eye Hospital (2nd Interested Party) at all material times, thus PIC failed to take into account relevant consideration that a reasonable tribunal would have taken into account, contrary to Section 7 (2) (f) of the [Fair Administrative Action Act](#), resulting in the Petitioner being subjected to unreasonable administrative action contrary to Article 47 of [the Constitution](#).
- j) That PIC failed to call and consider the testimony of the 3rd Interested Party despite having full knowledge that the 3rd Interested Party, a Posterior Segment Surgeon, also attended to the 1st Interested Party at all times, thus PIC acted unfairly contrary to Section 7 (2) (n) of the [Fair Administrative Action Act](#), resulting in the Petitioner being subjected to unreasonable administrative action contrary to Article 47 of [the Constitution](#)
- k) That PIC failed to call for and consider the Independent opinion of Posterior Segment Surgeon hence failed to take into account relevant considerations that a reasonable tribunal would have taken into account, contrary to Section 7 (2) (f) of the [Fair Administrative Action Act](#), resulting in the Petitioner being subjected to unreasonable administrative action, contrary to Article 47 of [the Constitution](#).
- l) That PIC failed to call for and consider the independent opinion of cornea surgeon on the 1st Interested Party cornea perforation hence failed to take into account relevant considerations that a reasonable tribunal would have taken into account contrary to Section 7 (2) (f) of the [Fair Administrative Action Act](#), resulting in the Petitioner being subjected to unreasonable administrative action contrary to Article 47 of [the Constitution](#).
- m) PIC failed to call and consider the opinion of an independent anterior segment surgeon on the timelines or otherwise of the interventions by the Petitioner while treating the 1st Interested Party, hence PIC failed to take into account relevant considerations that a reasonable tribunal would have taken into account contrary to section 7 (2) (f) of the [Fair Administrative Action Act](#), resulting in the Petitioner being subjected to unreasonable administrative Action, contrary to Article 47.
- n) that the finding by PIC that the 1st Interested Party had retinal detachment in the right eye without calling for and considering the testimony of the 3rd Interested Party and despite the testimony of the 1st Interested party and the Petitioner at the PIC hearing indicating the 3rd



Interested Party also attended to the 1st Interested Party at all material times, PIC failed to take into account relevant considerations that a reasonable tribunal would have taken into account contrary to Section 7 (2) (f) of the *Fair Administrative Action Act*, resulting in the Petitioner being subjected to unreasonable action, contrary to Article 47 of *the Constitution*.

- o) That the finding by PIC that the Petitioner “failed to recognize and appreciate the signs of retinal detachment” despite the evidence that cataract surgeries on the 1st Interested Party’s left eye and right eye were performed according to stipulated professional standards and were successful, and at all material times the 1st Interested Party’s retina of the right eye was attached, the PIC arrived at a finding that was unfair, unreasonable, without foundation and not rationally connected to the information before it contrary to Sections 7 (2) (i) (iii) and (n) of the *Fair Administrative Action Act* resulting in the Petitioner being subjected to unfair and unreasonable administrative action, contrary to Article 47 of *the Constitution*.
- p) The finding by PIC that “ there was delay in detecting the complication of retinal detachment” despite the evidence demonstrating that at all material times the 1st interested Party retina of the right eye was attached, PIC arrived at a finding that was wrong, unfair, unreasonable, without foundation and was not rationally connected to the information before it, contrary to Sections 7 (2) (i) (iii) & (n) of the *Fair Administrative Action Act*, resulting in the Petitioner being subjected to unfair and unreasonable administrative action contrary to Article 47 of *the Constitution*.
- q) The finding by PIC that the ‘Petitioner failed to recognize and appreciate the signs of retinal detachment’ despite evidence demonstrating that there was no delay in the diagnosis or management of the 1st Interested Party left eye, the PIC arrived at a decision that was unfair, unreasonable, without foundation and was not rationally connected to the information before it contrary to Sections 7 (2) (i) (iii) and (n) of the *Fair Administrative Action Act*, resulting in the Petitioner being subjected to unfair and unreasonable administrative action, contrary to Article 47 of *the Constitution*.
- r) The finding by PIC that the Petitioner “ought to have considered other causes of reduced vision after cataract surgery and carried out necessary investigations to rule out likely complications” despite the evidence demonstrating that after cataract surgery the Petitioner diagnosed Posterior Capsule Opacity (PCO) in timely manner, performed YAG laser, referred him immediately after loss of vision in the right eye to retina surgeon, secured his cornea, and placed bandage contact lens in the right eye-PIC arrived at a finding that was unfair, unreasonable, without foundation and was not rationally connected to the information before it, contrary to Sections 7 (2) (i) (iii) and (n) of the *Fair Administrative Action Act*, resulting in the Petitioner being subjected to unfair and unreasonable administrative action, contrary to Article 47 of *the Constitution*.
- s) The order by PIC that the Petitioner “be and is hereby admonished for failing to detect a known complication of cataract surgery” PIC arrived at a decision that was unfair, unreasonable, without foundation and was not rationally connected to the information before it, contrary to sections 7 (2) (i) (iii) and (n) of the *Fair Administrative Action Act*, resulting in the Petitioner being subjected to unfair and unreasonable administrative action, contrary to Article 47.
- t) The order by PIC directing that the Petitioner pays ‘Medical Practitioners and Dentists Council the sum of Kshs. 150,000/- within a period of 14 months from the date of the [Ruling] as part of costs for Committee Sitting’ the PIC arrived at a decision that was unfair,



unreasonable, without foundation and was not rationally connected to the information before it, contrary to Sections 7 (2) (i) (iii) and (n) of the *Fair Administrative Action Act*, resulting in the Petitioner being subjected to unfair and unreasonable administrative action, contrary to Article 47 of *the Constitution*.

33. The Petitioner complains that the PIC's erroneous decision has tainted her professional reputation and livelihood besides the verdict has caused her mental pain and financial burden which necessitates compensation under Article 23(3) of *the Constitution*.

Respondent's Case

34. The Respondent's response and submissions are not in the Court file or Court Online Platform (CTS).

1st Interested Party's Case

35. The 1st Interested Party filed his Replying Affidavit sworn on 18th November 2024.
36. Recapping the facts of this case, the 1st Interested Party claims that the Petitioner during the cataract surgery of his right eye, blatantly neglected to test his intra-ocular pressure before commencing the surgery which was a breach of the routine preoperative assessment.
37. In addition, he contends that when he requested the Petitioner to conduct an ultra sound of the right eye to assess the status of his retina, the Petitioner dismissed his request and went ahead to prescribe Predforte eye drops, Ciprofloxacin eye drops and Timolol eye drops for 3 days. He stated that despite consistently informing the Petitioner that his vision in the eye was deteriorating, she maintained that his lens was sitting in its normal place and that his vision would go back to normal.
38. That he complained of gradual diminishing vision and excruciating pain in the right eye but the Petitioner assured him his lens were sitting well and his vision would return to normal and proceeded to subject him to laser treatment to deceptively clean up the surface of the lens in his right eye.
39. That to his dismay, when he visited the 2nd Interested Party on 14th December, his vision was found to be worse than it was before the surgery.
40. He states that even the treatment notes by the Petitioner attached to her affidavit confirm that from 14th December, 2015 to 21st January, 2016; there was steady decline of his vision despite the fact that he was regularly visiting the Petitioner for further reviews and check ups considering he had a high risk of retinal detachment.
41. He avers that it due to negligent acts and omissions by the Petitioner despite him consistently complaining about his fading eyesight, he eventually lost the vision in the right eye hence the decision to lodge a complaint with the Respondent on 18th July, 2017 against both the Petitioner and the 2nd Interested Party.
42. The 1st Interested Party depones that on 15th February, 2019, himself, the Petitioner and a Mr. Peter Ndwiga appeared before the PIC to present their respective testimonies. He avers that in the end the PIC ruled in his favour and its recommendations adopted by the Respondent in its 120th meeting. He also clarified that in arriving at its decision about Petitioner's negligence and the state of the 1st Interested Party's retina, PIC considered the independent opinion of Dr. Kihaki, a surgeon at Eagle Eye Laser Centre.
43. It is asserted the Preliminary Inquiry Committee (PIC) is by virtue of Rule 4 (a) & 4 (3) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules is authorized to inquire into complaints of professional disgraceful conduct of any medical practitioner of dentist.



44. He states that the Petitioner failed to adhere to the Respondent's Ruling, in particular Order No. 2; hence his decision to file Milimani HCC Misc. Application No. E370 of 2020 Dr. Joseph Chege Mwangi vs. Dr. Jyotee Trivedy & Lions Sight -First Eye Hospital and Milimani HCCC No. E181 of 2021 Dr. Joseph Chege Mwangi Vs. Dr. Jyotee Trivedy & Lions Sight -First Eye Hospital.
45. The 1st Interested Party questioned the motive of filing this Petition yet the Petitioner did not bother to appeal the directive of the Respondent Board as provided for under Section 20 (9) of the *Medical Practitioners and Dentists Act*, Cap 253 which option was available within 30 days of the decision. He contended that the present proceedings, two years after the decision, is an attempted 'appeal' of the Committees decision. That even the purported application for review was not made until 20th May, 2020 well past the time limit provided in Section 20 (9) of the Medical Practitioners and Dentist Act, Cap 253 Laws of Kenya.
46. The 1st Interested Party additionally states that the Petition does not meet the threshold for grant of judicial review orders and therefore should be dismissed.

2nd and 3rd Interested Parties Case

47. The 2nd and 3rd Interested Parties responses and submissions are not in the Court file or Court Online Platform (CTS).

Petitioner's Submission

48. Prof. Migai Akech and Associates Advocates for the Petitioner filed submissions dated 19th March 2024 and underscored the issues for determination as: whether the Respondent and its PIC acted lawfully; whether the Respondent acted within its powers, whether the Respondent acted reasonably; whether the PIC arrived at reasonable findings and determinations and whether Petitioner is entitled to the reliefs sought.
49. Counsel on a preliminary stated that the Respondent's authority to address professional misconduct complaints is anchored in the Medical Practitioner and Dentists Act through the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules. In this regard, the PIC was established under Rule 3 and its functions set out under Rule 4(1).
50. Counsel submitted that the PIC in issuing its impugned Ruling violated the directive outlined under Rule 4(2). That is where the Committee establishes that the complaint is warranted it is to refer the matter to the Professional Conduct Committee (PCC) together with its findings and recommendations under Rule 4A (2). Counsel accordingly submitted that the PIC in making its findings and issuing its recommendations to the Respondent who then adopted the same as its orders, both acted unlawfully. Additionally, Counsel submitted that the Respondent had failed to consider her appeal for review of the PIC's Ruling and its own Orders flowing therefrom.
51. Correspondingly Counsel submitted that the PIC had breached Rule 10Y(2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules by failing to indicate whether its impugned Ruling had been taken by a majority of the members present. Counsel submitted that the Respondent's cumulative actions were in breach or Rules 4(2), 4A (2) and 10Y(2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules and violated the Petitioner's right under Article 47 of *the Constitution*.



52. Reliance was placed in *Gathigia v Kenyatta University* [2008]KLR 587 where the Court echoed that:
- “If a statute prescribes or statutory rules and regulations binding on the tribunal prescribe, the procedure to be followed, that procedure must be observed.”
53. On the second issue, Counsel submitted that Respondent had failed to act within its power by delegating its mandate to the PIC. Counsel contended that the *Medical Practitioners and Dentists Act* provides that the Respondent’s Board under Section 20 is the one vested with the power to inquire into complaints of any infamous or disgraceful conduct in a professional respect made against a medical practitioner of dentist.
54. Counsel emphasized that this power cannot therefore be delegated to another body such as the PIC which was established under the cited Rules. Counsel asserted therefore that the Respondent’s Board by permitting the PIC to hear the complaint against the Petitioner and failing to hear the compliant as mandated, acted beyond its power and thus the findings of the PIC which it approved are void ab initio.
55. Counsel relied in *Republic V Chief Executive Officer, Independent Policing Oversight Authority & 2 others ex parte Harish Kanji Patel*[2019] eKLR where the Court found that IPOA in purporting to delegate its power to the police Internal Affairs Unit(IAU) had failed to exercise its statutory duty and powers to investigate the complaint.
56. Similar reliance was placed in *Martin Wanderi & 106 others v Engineers Registration Board & 10 others* [2018]eKLR.
57. In like manner, Counsel in the third issue submitted that the Respondent in the circumstances of this case had acted unreasonably in the manner in which the Petitioner’s case was handled before the PIC. Particularly, failure to consider vital evidence. Reliance was placed in *Republic v Public Procurement Administrative Review Board & 2 others ex parte Rongo University* [2018] eKLR where it was held that:
- “A decision which fails to give proper weight to a relevant factor may also be challenged as being unreasonable. It is a well-established principle that if an administrative or quasi-judicial body take into account any reason for its decision which is bad, or irrelevant then the whole decision even if there are other good reasons for it, is vitiated.”
58. Like dependence was placed in *Associated Provincial Picture Houses Ltd V Wednesbury Corporation* [1948]1 K.B. 233 and *Republic v National Cohesion and Integration Commission* [2022] KEHC 10206 (KLR).
59. In view of the foregoing and circumstances of this case as highlighted in the Petitioner’s evidence, Counsel submitted in the next issue that the PIC’s findings were arbitrary. Counsel stressed that the finding was devoid of any reasonable justification.
60. To this end, Counsel submitted that it was apparent that the Petitioner was entitled to compensation for the unlawful and unreasonable administrative action taken by the Respondent.
61. Reliance was placed in *De Jong and Others v The Trustees of the Simcha Trust and Another* 2014 (4) SA 73 (WCC) where it was held that:
- “It seems to me that the remedy for compensation must have been intended by the lawmaker as a remedy for the benefit of the aggrieved party in the review proceedings, granted because such a party will enjoy neither a reconsideration of his administrative application by the



original administrator nor obtain the benefit of a substituted administrative decision by the court”.

62. Additional dependence was placed in *De Jong and Others v The Trustees of the Simcha Trust and Another* 2014 (4) SA 73 (WCC) and *Gulleid v Registrar of Persons & another* [2021] KEHC 110 (KLR).

1st Interested Party’s Submissions

63. On 26th November 2024, Robson Harris Advocates LLP filed submissions for the 1st Interested Party where they highlighted the issues for discussion as: whether the Petitioner has demonstrated any grounds to warrant grant of judicial review orders and whether the Petitioner’s Petition is procedurally mature.

64. On the first issue, Counsel submitted that the Petitioner had not met the test for grant of judicial review orders since she had failed to demonstrate that the impugned decision was illegal, irrational and unfair as set out under Section 7(2) of the *Fair Administrative Action Act*.

65. Reliance was placed in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University* [2018] eKLR where it was held that:

“Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.”

66. Comparable dependence was placed in *Republic v Inspector General of Police and another ex parte Patrick Macharia Nderitu*[2015] eKLR and *Republic v Disciplinary and Ethics Committee and another; Donald Oyatsi (Ex parte) AGK (Interested Party)* [2020] eKLR.

67. According to Counsel, the PIC by dint of Rules 4(1) & (3) of the *Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules* had acted within the powers donated to it by conducting inquiries and making recommendations to the Respondent’s Board, as such acted lawfully.

68. In addition, Counsel submitted that the Petitioner had not demonstrated that the Respondent acted unfairly, failed to observe the set Rules or failed to observe the rules of natural justice. Similar sentiments were registered in relation to whether the Respondent had acted with biasness, irrationality and unreasonably.

69. On the last issue, Counsel submitted that the Petition was premature by virtue of failing to comply with Section 9 of the *Fair Administrative Action Act*. Counsel submitted that the Petitioner was at liberty to appeal if she felt aggrieved by imposition of the fine as set out under Section 20(9) of the *Medical Practitioners and Dentists Act* however failed to do so.

Analysis and Determination

70. In view of the foregoing, it is my considered view that the issues that arise for determination in this matter are as follows:



- i. Whether the Respondent and its Preliminary Inquiry Committee (PIC) acted unlawfully in conducting the disciplinary proceedings against the Petitioner and in so doing violated the provisions of Section 7 of the *Fair Administrative Action Act* and Article 47 of *the Constitution*.
- ii. Whether the petitioner is entitled to the reliefs sought.

Whether the Respondent and its Preliminary Inquiry Committee (PIC) acted unlawfully in conducting the disciplinary proceedings against the Petitioner and in so doing violated the provisions of Section 7 of the *Fair Administrative Action Act* and Article 47 of *the Constitution*.

71. The Petitioner pointed out that the Respondent's authority to handle complaints of professional misconduct by medical practitioners and dentists is founded on the Medical Practitioner and Dentists Act specifically, under the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules. It was further pointed out that Preliminary Inquiry Committee (PIC) is established under Rule 3 and its functions are set out under Rule 4(1). It was argued that the PIC in issuing its impugned Ruling contravened Rule 4(2) thereof for failing to refer its findings and recommendations to the Professional Conduct Committee (PCC) in line with Rule 4A (2). It was thus the Petitioner's case that for the findings and recommendations of PIC to be made to the Respondent which then adopted the same, both PIC and the Respondent acted unlawfully.
72. Additionally, Counsel submitted that the Respondent had failed to consider her appeal for review of the PIC's Ruling and its own Orders flowing therefrom.
73. Moreover, it was also submitted on behalf of the Petitioner that PIC had breached Rule 10 Y (2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules by failing to indicate whether its impugned Ruling had been taken by a majority of the members present. It was thus the Petitioner's case that the totality of the Respondent's in breaching Rules 4(2), 4A (2) and 10Y (2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules was a violation of the Petitioner's right under Article 47 of *the Constitution*.
74. The 1st Interested Party refuted these assertions and contended that the Preliminary Inquiry Committee (PIC) is by virtue of Rule 4 (a) & 4 (3) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules authorized to inquire into complaints of professional disgraceful conduct of any medical practitioner or dentist and make recommendations to the Respondent. Concerning the argument by the Petitioner that the Respondent delayed in processing the request for the review of the impugned ruling, the 1st Interested Party countered this by stating that despite the said ruling having been issued in August, 2019; it was not until 29/5/2020 that the Petitioner was writing seeking review which was even well past the 30-day period that is provided for in Section 20 (9) of the *Medical Practitioners and Dentists Act* to lodge an Appeal.
75. To be able to ascertain the legality or otherwise of the Respondent's action against the Petitioner; it is necessary to examine the legal provisions under which the complaint against the Petitioner was processed to be able to determine if the laid down procedure was adhered to as well as the effect thereof in regard to Section 7 of the *Fair Administrative Action Act* and Article 47 of *the Constitution*.
76. To begin with, the *Medical Practitioners and Dentists Act*, Cap 253 is the legislation that regulates the practice of medicine and dentists professionals. The preamble to the Act provides that it is "An Act of Parliament to consolidate and amend the law for registration of medical practitioners and dentists and for purposes connected therewith and incidental thereto."



77. Section 3 (1) of the Act establishes the Medical Council (formerly the ‘Board’; it was amended by [Act No. 12 of 2012](#) on 12 July 2012). Following the amendment which was the only one done in 2012, it became known as the Kenya Medical Practitioners and Dentist Council, and not the Board. The composition is stipulated in Section 3A while the functions are set out in Section 4 (1) (a-p).
78. The Act in Section 4A allows the Council to have Committees. The Committees include the Training, Assessment, Registration and Resources committee; the Disciplinary, Ethics Committee; Inspection, Licensing, Finance and General-purpose committee; Audit & Risk Committee. The Ethics & Disciplinary Committee’s mandate is outlined in Section 4 (b) (i) -v; and includes: conducting inquiries into complaints submitted; regulating professional conduct; ensuring fitness to practice and operate; promoting mediation and arbitration between the parties, at its own liberty, recording and adopting mediation agreements or compromise between parties, on terms agreed.
79. The Council, under Section 4 (2) is given powers from time to time to appoint such other ad hoc committees as it may be necessary for effective carrying out of the functions under the Act and the composition of the committees under the Act shall be such number of persons as the Council may deem necessary.
80. On disciplinary proceedings, Section 20 of the Act is relevant. Section 20 (1) allows any person who is dissatisfied with any professional service offered or alleges any breach of the standards by registered or licensed person under the Act to make a complaint in the prescribed manner to the Council (formerly Board). Section 20 (2) provides that “The Council may, or through a committee appointed for that purpose, inquire into any complaint of professional misconduct, malpractice or any breach of standards.”
81. It means therefore that for purposes of Section 20; the Council itself (formerly Board) , or if it pleases, may delegate to a ‘Committee appointed for that purpose’ thus the argument by the Petitioner that the Council acted unlawfully in delegating that function falls flat on the face.
82. The right to be heard is guaranteed under Section 20 (3) which provides as follows:
“...the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or through a representative”
83. Most importantly, Section 20 (5) empowers the Council (formerly Board) to ‘regulate its own procedure in disciplinary proceedings’ which implies that the Council possesses ‘procedural autonomy and/or flexibility to fashion its procedures to specific needs that would allow it operate effectively where possible on case by case basis as long as it does not depart from the tenets of natural justice and fairness, the Council (formerly Board) was is not therefore beholden to very strict procedural technicalities for the sake of it.
84. Consequently, to argue that ruling adopted by the Council (formerly Board) should be discarded only because it does not indicate if it the decision of the Council (formerly Board) made by the majority or not as is required by Rule 10 Y (2) is a trifling technicality since there is no evidence to the contrary that decision was not the Council. It would only have made a difference had the Petitioner provided evidence that the decision was not made by the Council (read Board) or that it was made without having the requisite quorum. This is not the case here as none of those allegations was pleaded, let alone being proved.
85. The Petitioner further argued that the Preliminary Inquiry Committee (PIC) in issuing its impugned Ruling contravened Rule 4(2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules for not referring its findings and recommendations to the Professional Conduct



- Committee (PCC) in line with Rule 4A (2). The Petitioner thus contended that for the findings and recommendations of PIC to be made to the Respondent which adopted them, both PIC and the Respondent acted unlawfully.
86. Part II of the Medical Practitioner & Dentists (Disciplinary Proceedings) Rules deals with ‘Proceedings Relating to Conviction and Infamous Conduct in a Professional Respect.’
87. Rule 3 establishes the Preliminary Inquiry Committee made up of seven members elected from among the members of the Board.
88. The functions of the Preliminary Inquiry Committee as stipulated in Rule 4 are as follows:
- 4(1) The functions of the Preliminary Inquiry Committee shall be to—
- (a) conduct inquiries into the complaints submitted to it under these Rules and make appropriate recommendations to the Board;
 - (b) ensure that the necessary administrative and evidential arrangements have been met so as to facilitate the Board to effectively undertake an inquiry under rule 6;
 - (c) promote mediation and arbitration between the parties and refer matters to such mediator or arbitrator as the parties may in writing agree; and
 - (d) at its own liberty, record and adopt mediation agreements or compromise between the parties, on the terms agreed and thereafter inform the chairperson.
- (2) Subject to paragraph (1), the Preliminary Inquiry Committee after considering the complaint and making such inquiries with respect thereto as it may think fit, shall—
- (a) if of the opinion that the complaint does not warrant reference to the Board for inquiry, reject the complaint and so inform the Chairperson;
 - (b) if of the opinion that the complaint does warrant reference to the Board, cause the same to be referred to the Board together with its findings and recommendations.
- (3) The Preliminary Inquiry Committee shall, in consultation with the Board, have the power to—
- (a) levy reasonable costs of the proceedings from parties;
 - (b) make an order compelling a medical practitioner or dentist to undergo continuous professional development of not more than fifty points;
 - (c) suspend the licence of a medical institution for a period of not more than six months;
 - (d) make an order for the closure of an institution pending the compliance by that institution, of a condition or requirement under the licence issued to it under the Act; and
 - (e) make such further recommendations as the committee deems fit.
89. On the other hand, there is under Rule 4A what is known as Professional Conduct Committee. It necessary to point out one distinctive feature between Professional Conduct Committee and the Preliminary Inquiry Committee. While the Preliminary Inquiry Committee is a Standing Committee formed by seven members elected from the Board (Council), the Professional Conduct Committee is an ad hoc committee which can only come into existence upon a recommendation of the Preliminary Inquiry Committee to the Board to create it. Further, the rules do not make it mandatory for the Board



to act on the recommendation for its establishment, the applicable rule uses the word ‘the Board may’ meaning the Board has discretion to act on such a recommendation or not. Rule 4A provides:

“4A. Professional Conduct Committee

1. The Board may, upon the recommendation of the Preliminary Inquiry Committee, establish on an ad hoc basis, a professional Conduct Committee...’

90. Contrary to the Petitioner’s assertions, there is no requirement whatsoever that the PIC must refer its recommendations and findings to the Professional Conduct Committee. That itself would be a misnomer seeing that this Committee is in fact ad hoc and its birth can only arise upon a recommendation for its establishment made by PIC to the Board, and in fact, the Board may choose to act on such recommendation or not.

91. It would thus be inconceivable that the findings and recommendations of PIC can be subject to a temporary creation that can only come into existence only upon PIC’s recommendation and which is further subject to the whims of the Board. The Petitioner’s argument is thus not practical and is also not borne out by the applicable provisions; Professional Conduct Committee is recommended and created on a need basis, not for each and every case and PIC can only recommend its creation by the Board when it considers it necessary. Further, once established, it is not PIC that would forward its recommendations to the PCC Committee, it is the Board. Where no recommendation is made by PIC to the Board to establish the PCC as happened in this case, the Board can act on the recommendation of PIC as it happened in the instant case for the rules allow the Board to act on the recommendations of PIC.

92. To that extent, I find neither a failure to abide by the provisions of the Act or procedure stipulated in the Medical Practitioners & Dentists (Disciplinary Proceedings) (Procedure) Rules in regard to the manner the Respondent investigated the complaint against the Petitioner.

93. The other cluster of the grievances by the Petitioner related to the failure to take into account relevant considerations which the according to the Petitioner comprised critical evidential material or witnesses testimony that was not considered by the PIC and to that extent, the Board arrived at an unfair decision.

94. This Court has to be cautious as to the extent it may go in evaluating the merits of the decision considering that it is not exercising the appellate jurisdiction and may thus not substitute its own decision for that of the Board or the PIC.

95. Traditionally, Courts have resisted the attempt to entertain merit review in judicial review matters except in the very limited cases where unreasonableness or irrationality is established. Nevertheless, with the right to fair administrative action now recognised as a fundamental human right under *the Constitution* and legislation that strictness has been relaxed to a certain extent as was explained by the Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) as follows:

26. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or



grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See *Reid v Secretary of State for Scotland* [1999] 2 AC 512. ...

... Analysis of article 47 of *the Constitution* as read with the *Fair Administrative Action Act* reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7(2)(f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7(2)(j) identifies abuse of discretion as a ground for review while Section 7(2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7(2) (k) subsumes the dicta and principles in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7(2)(i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7(2)(i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7(2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the *Fair Administrative Action Act*.

96. The Petitioner pin-pointed a numbers of factual errors that she claimed were relevant but were ignored in the process of decision making, this included: PIC's failure to call and consider the testimony of nurses who checked the patient at Lions Sight First Eye Hospital (2nd Interested Party) at all material times considering that the 1st Interested Party alleged there was breach of standards especially that that there was the failure to take intra-ocular pressure on the date the right eye surgery was done, the PIC failure to call and consider the testimony of the 3rd Interested Party despite having full knowledge that the 3rd Interested Party, a Posterior Segment Surgeon, had also attended to the 1st Interested Party at all times especially in reaching the finding that the 1st Interested Party had retinal detachment in the right eye without calling for and considering the testimony of the 3rd Interested Party whose preoperative and intra-operation notes were critical and which the Petitioner insisted showed marked disparity between what he had anticipated before surgery and what he actually found out, making the finding by PIC that the Petitioner "failed to recognize and appreciate the signs of retinal detachment" despite the evidence suggesting especially at the time of surgery that the 1st Interested Party's retina of the right eye was attached according to the 3rd Interested party operation notes; the finding by PIC that the Petitioner "ought to have considered other causes of reduced vision after cataract surgery and carried out necessary investigations to rule out likely complications" despite the evidence demonstrating that after cataract surgery the Petitioner diagnosed Posterior Capsule Opacity (PCO) in timely manner, performed YAG laser, referred him immediately after loss of vision in the right eye to retina surgeon, secured his cornea, and placed bandage contact lens in the right eye.



97. The 1st Interested Party questioned why the Petitioner the never sought to appeal the ruling yet under Section 20 (9) of Medical Practitioners and Dentist Act the Petitioner she had the right to appeal the decision of the Board to the High Court within 30 days.
98. I have read the ruling which is the subject matter of this Petition, that is the ‘Preliminary Inquiry Committee Case No. 28 of 2017- Dr. Joseph C. Mwangi v Dr. Jyotee Trivedy & Lions SightFirst Eye Hospital.
99. A portion of paragraph 1, 2 and 3 of the ruling details what the PIC did on receipt of the Petitioner’s complaint.

“Para 1...” The complainant submitted the Council’s application for lodging a complaint dated 20th May, 2017, a statement dated 24th July, 2017 which gave chronology of events leading to the complaint herein together with the letter from 2nd Respondent dated 20th March, 2017, a report from Dr. Kibata Githeka dated 15th March, 2017 and a medical report from the 2nd Respondent dated 9th September, 2015.”

Para 2: “The Council forwarded to the Respondent herein and also requested that they submit a response addressing allegations raised therein and also submit a certified copy of the patient file and any other documents that may assist the Council in its investigations.”

Para 3: “In response thereto, the Respondents submitted to the Council the medical report by the Respondent dated 3rd September 2017 and a copy of the patient’s file. Thereafter, the Council forwarded the said medical report to the complainant for comments or rebuttal”

100. The Petitioner, who was one of the Respondents in the Inquiry, was not only granted the opportunity to submit her comments on the complaint but also submit ‘any other documents that may assist the Council in its investigation.’ She does not tell this Court that she sought to submit statements of the nurses or the opinions of experts on the subject and this was rejected or not considered. It is now that she wants Court through this Petition to fault PIC for not calling experts on the subject yet she neither raised the issue then or even bothered to file a report by any such expert in support of her case. How she turns and blames the Respondent for not considering relevant factors in respect of some evidence that was not there is baffling.
101. On the failure by PIC to consider the medical notes, PIC’s ruling has summarized the review of the medical notes at paragraph 5-9 of the Ruling at paragraph 8 in despite the Petitioner claiming that there was no retinal detachment, the Ruling affirms:

“8. Thereafter the patient was referred to a vitreo-retinal surgeon who found total retinal detachment with proliferative vitreoretinopathy. He underwent vitreo-retinal surgery of the right eye on 7th March, 2016 during which he was found to have peripheral retinal breaks...”

102. In the finding, the Committee stated on this issue in finding (iii).

“The Committee further finds that there was delay in detecting the complication of retinal detachment, which should have been suspected based on the signs that the patient presented during post-operative follow ups. The Committee finds that retinal detachment should have been suspected when the patient reported a drop in vision. The Committee notes from the reviews carried out on 21st January, 2016 the vision was 6/24 on the right eye and 6/9 on the



left eye and by 4th of March, 2016 the vision in the right eye had dropped to hand movement by which time there was already proliferative vitreoretinalpathy (PVR)”

103. The Petitioner is challenging these findings on account that the evidence presented could not plausibly lead to these findings. Such a contention is a matter that should be made on appeal as the appellate Court has the opportunity to reevaluate the evidence and reach different conclusions. The Petitioner has to take the option prescribed in the Statute first. Section 9(2) of the *Fair Administrative Action Act* provides:

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”

104. The right to appeal the ruling was available to the Petitioner but she chose not to exercise it. She does not offer any reasons why she abandoned this remedy which gave her the opportunity to challenge the matter on evidential flaws she has identified and instead chose to file a Constitutional Petition.

105. Given the facts of this case; it is my considered view that the failure to take into account the relevant matters purely pivot around evidential issues that allegedly PIC ought to have considered which in my view are matters consideration through an appeal and, not by way of a Constitutional Petition.

106. Moreover, even though Section 7(2) of the *Fair Administrative Action Act* gives some latitude to the Court to review the merits of the decision, this is not tenable in the circumstances of this case given that the Statute under which the decision was made provided an appellate mechanism which was available to the Petitioner in the first instance who instead invoking it chose to approach this Court by way of Constitutional Petition seeking discretionary remedies. Although the existence of an alternative remedy may not divest the High Court its jurisdiction to entertain a constitutional petition; It is a now settled that when a right or liability is created by a statute which creates a remedy or procedure for enforcing the right that ought to be pursued first before invoking the constitutional jurisdiction of this court. In this case, the statute had prescribed the right of appeal to the High Court. The Indian Supreme Court in the case of Seth Ratan Chand v Pandit Durga Prasad AIR 2003 SC 2736: [2003]5 SCC 399 faced with a similar situation held thus:

“... When a party has had statutory remedy of assailing the order passed by the District Court by filing an appeal to the High Court itself, he could not bypass the said remedy and take recourse to proceedings under Article 226 and 227 of *the Constitution*. Such a course may enable a litigant to defeat the provision of the statute which may provide certain conditions for filing the appeal, like limitation or.... other conditions for entertaining the appeal. For the reasons stated, the High Court committed manifest error of law in entertaining and allowing the writ petition....”

107. The appropriate remedy under the circumstances of this case was to lodge an appeal which is provided for under Section 20 (9) of the *Medical Practitioners and Dentists Act*.

108. The Petitioner ought to have exhausted the mechanism laid down for redressing her grievances against the decision of the Board under the *Medical Practitioners and Dentists Act* instead of rushing to file a Constitutional Petition citing evidential shortcomings in the findings of the Board/Council. As was



held in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR;

“... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

109. In view of the foregoing findings, I find no merit in this Petition which I hereby dismiss with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF JULY, 2025.

.....

L N MUGAMBI

JUDGE

