Mwilu v Judicial Service Commission & 2 others; Director of Public Prosecutions & another (Interested Parties) (Petition E245 of 2020) [2021] KEHC 245 (KLR) (Constitutional and Human Rights) (12 November 2021) (Judgment)

Philomena Mbete Mwilu v Judicial Service Commission & 2 others; Director of Public Prosecutions & another (Interested Party) [2021] eKLR

Neutral citation: [2021] KEHC 245 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E245 OF 2020

SJ CHITEMBWE, WK KORIR & RE ABURILI, JJ

NOVEMBER 12, 2021

BETWEEN

HONOURABLE LADY JUSTICE PHILOMENA MBETE MWILU . PETITIONER

AND

JUDICIAL SERVICE COMMISSION .... 1ST RESPONDENT

HONOURABLE MR. JUSTICE PAUL KIHARA KARIUKI ... 2ND RESPONDENT

MACHARIA NJERU .... 3RD RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... INTERESTED PARTY

DIRECTOR OF CRIMINAL INVESTIGATIONS .... INTERESTED PARTY

The exclusive mandate of the Judicial Service Commission to initiate proceedings leading to the removal of a judge.

Reported by Ribia John

Jurisdiction *– jurisdiction of the Judicial Service Commission – jurisdiction to determine petitions that sought the removal of a judge from office – locus standi to institute such a petition - whether the act of JSC calling upon the petitioner to respond to the petition filed by the DPP and the DCI seeking her removal from office was ultra vires the jurisdiction of JSC – Constitution of Kenya, 2010, articles 168(2) and 260.*

Jurisdiction *– jurisdiction of the High Court – supervisory jurisdiction – jurisdiction of the Judicial Service Commission – quasi-judicial functions of the Judicial Service*

Commission (JSC) was subject to the supervisory jurisdiction of the High Court - whether the High Court was usurping the jurisdiction of the JSC under article168(2) of the Constitution to deal with complaints against judges by subjecting JSC proceedings to the supervisory jurisdiction of the High Court – Constitution of Kenya, 2010, articles 165(6) and (7) and 168(2).

Jurisdiction *–Judicial Service Commission (JSC) – where the set of facts leading to the petition to remove a judicial officer from office were subject to a pending criminal trial - whether the JSC could be barred from determining a petition for the removal of a judicial officer where the set of facts in the petition were subject to a pending criminal case – Constitution of Kenya, 2010, article 168(2).*

Constitutional Law *– fundamental rights and freedoms – right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or was threatened - right to fair administrative action – where the administrative action in question were JSC proceedings - whether judicial officers subject to JSC proceedings were required to await the outcome of the JSC proceedings before approaching the High Court on the alleged violation of her constitutional rights and fundamental freedoms – Constitution of Kenya, 2010 articles 22, 47, 165(6) and (7) and 168(2).*

Constitutional Law *– Judicial Service Commission – locus standi to initiate proceedings for the removal of a judge - Whether the use of the word "only" in article 168(2) of the Constitution limited the power to initiate the removal of a judge from office to the JSC or upon a petition by a natural or legal person – whether state organs could initiate proceedings for the removal of a judge at the JSC - Constitution of Kenya, 2010, article 168(2).*

Constitutional Law *– fundamental rights and freedoms – right to fair administrative action - Judicial Service Commission (JSC) – JSC proceedings – lack of rules and procedures governing JSC procedures - whether the lack of rules governing the proceedings before the JSC for the removal of a judge made the actions and decisions of the JSC to be without merit – Constitution of Kenya, 2010, articles 47 and 168(2).*

Statutes *– interpretation of statutes – meaning of the word "person" – meaning of the phrase, "any person" - what was the meaning of the phrase, "any person" as used in the Constitution of Kenya, 2010 - whether the definition of "person" as used in the Constitution extended to state organs.*

Judicial Officers *– recusal – grounds for recusal – language and tone used by a judicial officer - claim that language and tone of the judicial officer was impartial - whether a claim that the language and tone used by a judicial officer or a decision maker was impartial was evidence of bias or impartiality.*

Civil Procedure *– res judicata – sub judice – principles - whether based on the facts of the instant case, the instant petition was res judicata and/or sub judice – Civil Procedure Act, Cap 21 sections 6 and 7.*

Law of Evidence *– admissibility of evidence – admissibility of illegally obtained evidence–where a court had declared evidence to have been illegally obtained - whether evidence that was declared by a court to have been illegally obtained could be available for use in any court, tribunal or administrative body.*

Words and Phrases *– jurisdiction – definition of - the authority which a court had to decide matters that were litigated before it or to have taken cognizance of matters presented in a formal way for decision - Halsbury's Laws of England, 4th Edition, Vol. 9.*

Words and Phrases *– person – definition of - human being- also termed natural person or an entity (such as a corporation) that was recognized by law as having most of the rights and duties of a human being - Black's Law Dictionary, 10th edition at page 1324.*

Words and Phrases *– abuse – definition of - everything which was contrary to good order established by usage that was a complete departure from reasonable use - An abuse was done when one made an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use - Black's Law Dictionary.*

Brief facts

The petitioner was arrested on August 28, 2018. The following day, she was charged before the Chief Magistrate's Court at Nairobi in Anti-Corruption Criminal Case No. 38 of 2018, *Republic v Philomena Mbete*

Mwilu & Stanley Muluvi Kiima, with the offences of abuse of office, obtaining execution of a security by false pretences, unlawful failure to pay taxes and forgery. The charges arose from the petitioner's dealings with Imperial Bank Limited (IBL). Before the petitioner took plea in the above case, she instituted Nairobi High Court Petition No. 295 of 2018, *Honourable Philomena Mbete Mwilu versus The Director of Public Prosecutions & 4 Others* challenging her prosecution on various grounds and obtained conservatory orders staying her prosecution. The petitioner was aggrieved by part of the judgment and filed Civil Appeal No. 298 of 2019, *Honourable Philomena Mbete Mwilu v DPP & 6 Others* before the Court of Appeal on the 3rd July, 2019 (hereinafter Civil Appeal No. 298 of 2019). The DPP was dissatisfied with the entire decision and filed Civil Appeal No. 314 of 2019 *The Director of Public Prosecutions & the Director of Criminal Investigations v Honourable Philomena Mbete Mwilu* on July 11, 2019. At the time of the instant judgment, both appeals had not been determined.

Soon after Petition No. 295 of 2018 was determined on May 31, 2019, three petitions for the removal of the petitioner from office were filed before the Judicial Service Commission (JSC) as follows:

1. Petition dated June 7, 2019 by Mr. Alexander Mugane.
2. Petition dated June 11, 2019 by Mr. Peter Kirika.
3. Petition dated June 27, 2019 by the Director of Public Prosecutions (DPP) and the Directorate of Criminal Investigations (DCI).

Aggrieved the petitioner filed the instant appeal in which she challenged the jurisdiction of the Judicial Service Commission (JSC) to require her to respond to the petitions at the JSC when the set of facts that led to the filing of the petitions was being contested at the Court of Appeal and where one of the petitions was filed by state bodies (DPP and DCI) parties who the petitioner contended had no *locus standi* to file a petition for the removal of a judge before the JSC.

Issues

i. Whether the Judicial Service Commission (JSC) was subject to the supervisory jurisdiction of the High Court.
ii. Whether the High Court was usurping the jurisdiction of the JSC under article168(2) of the Constitution to deal with complaints against judges by subjecting JSC proceedings to the supervisory jurisdiction of the High Court.
iii. Whether judicial officers subject to JSC proceedings were required to await the outcome of the JSC proceedings before approaching the High Court on the alleged violation of her constitutional rights and fundamental freedoms.
iv. Whether, based on the facts of the instant case, the instant petition was *res judicata* or *sub judice*.
v. Whether evidence that was declared by a court to have been illegally obtained could be available for use in any court, tribunal or administrative body.
vi. Whether It was proper for the JSC to ask the petitioner to respond to petitions that were premised on evidence that had been quashed by the High Court for being illegally obtained.
vii. Whether the lack of rules governing the proceedings before the JSC for the removal of a judge made the actions and decisions of the JSC to be without merit.
viii. What was the meaning of the phrase, "any person" as used in the Constitution of Kenya, 2010?
ix. Whether the definition of person as used in the Constitution of Kenya, 2010 extended to state organs.
x. Whether the use of the word only in article 168(2) of the Constitution limited the power to initiate the removal of a judge from office to the JSC or upon a petition by a natural or legal person. (article 168(2) provided that the removal of a judge could be initiated only by the JSC acting on its own motion, or on the petition of any person to the Judicial Service Commission)
xi. Whether state organs could initiate proceedings for the removal of a judge.
xii. Whether the act of JSC calling upon the petitioner to respond to the petition filed by the DPP and the DCI seeking her removal from office was *ultra vires* and beyond the JSC's jurisdiction.

xiii. Whether a claim that the language and tone used by a judicial officer or a decision maker was impartial was evidence of bias or impartiality.

xiv. Whether the JSC could be barred from determining a petition for the removal of a judicial officer where the set of facts in the petition were subject to a pending criminal case.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 168 - Removal from office

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

Held

1. Jurisdiction was the authority which a court had to decide matters that were litigated before it or to take cognizance of matters presented in a formal way for decision. A court of law or tribunal acting without jurisdiction was proceeding in vain and whatever it did was a nullity. Before any court of law embarked on determining any substantive issue raised in judicial proceedings, it had to first determine whether it had the jurisdiction to entertain the proceedings before it. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings. jurisdiction was the power or authority vested in a court to hear and determine disputes presented before it. That p
2. The jurisdiction of the High Court was derived from article 165(3)(d) of the Constitution. Article 23 of the Constitution specifically granted the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threats to, a right or fundamental freedom in the Bill of Rights. The mandate of the High Court included the interpretation of the Constitution and the determination of any question as to whether anything purportedly done under the authority of the Constitution or statute was in compliance with the Constitution.
3. Article 165(6) of the Constitution vested the High Court with supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. The High Court in the exercise of its supervisory jurisdiction was empowered to call for the record of any proceedings before such a body, authority or tribunal and make any orders or give any directions it considered appropriate to ensure the proper administration of justice.
4. In exercising its authority under article 168(2) of the Constitution, the Judicial Service Commission (JSC) was carrying out an administrative function which was a quasi-judicial function and thus subject to the High Court's supervisory jurisdiction. In considering a petition for the removal of a judge from office, the JSC had a duty to ensure compliance with the Constitution and where it failed to do so, the High Court was mandated to step in and steady the ship.
5. Petition No. 295 of 2018 related to the criminal charges brought against the petitioner and the two appeals pending before the Court of Appeal were a continuation of that dispute. The instant petition was totally different as it raised issues relating to the jurisdiction of the JSC to adjudicate over the petitions pending before it seeking the removal of the petitioner from office. The petition also challenged the manner in which the petitions were being handled by the JSC. All those issues were novel and resided within the jurisdiction of the High Court. The High Court was not usurping the jurisdiction of the JSC under article168(2) of the Constitution to deal with complaints against judges by assuming jurisdiction to entertain the instant petition. The High Court was properly seized of the jurisdiction to hear and determine the petition.
6. The doctrine of exhaustion of remedies required that the constitutional and statutory avenues provided for resolution of disputes should first be resorted to before invoking court action. Besides the anchorage of the doctrine of exhaustion of remedies as espoused in article 159(2) of the Constitution, the doctrine was further given statutory recognition by section 9(1), (2), (3) & (4) of the Fair Administrative Action Act, 2015 which stipulated that before approaching the courts for judicial review of any administrative action, an applicant had to first exhaust the available internal dispute

resolution mechanisms. However, the court could, on application, in exceptional circumstances exempt a party from resorting to alternative internal dispute resolution mechanism.

7. The position held by the respondents and the interested parties was that the petitioner should await the conclusion of the process before the JSC before she could approach the High Court on the alleged violation of her constitutional rights and fundamental freedoms. That argument was not convincing for two reasons:
    1. there was no alternative dispute resolution mechanism provided for a judge who was facing a petition for removal and who was aggrieved by any of the processes of the JSC.
    2. Any person aggrieved by an administrative action deemed to be violating or threatening to violate their constitutional rights in ongoing proceedings was entitled to appeal against the decision or seek a remedy from the High Court and such a person could not be told to wait for the conclusion of the administrative process before approaching the court.
8. The petitioner was not expected to undergo the JSC process for her removal from office and thereafter approach the court after a decision had been made. It was within her constitutional right to seek the court's intervention before the conclusion of the process, where she felt that her rights were denied, violated or infringed or were threatened. The argument that the appellate process was time bound could not be an excuse for straddling two horses at the same time since initiating the process of removal of a judge by the JSC or by any member of the public was not time bound.
9. The principle of *res judicata* covered any issue which could or ought to have been raised or made a ground of attack or defence in the previous suit. If a litigant did not raise an issue which ought to have been raised in a decided matter involving the same parties and the same issues, then the principle of constructive *res judicata* would be invoked to stop the court from entertaining such a matter. Whenever the defence of *res judicata* was raised, the court was enjoined to examine the decision said to have settled the issues in question, the parties' pleadings, and the entire record of the previous case and compare it with the matter before it in order to ascertain whether the parties were the same or litigating under the same title, the issues under consideration were similar and the issues had been determined with finality by a court of competent jurisdiction.
10. The principle of *sub judice* was intended to cure the mischief of having more than one case in respect of the same dispute between the same parties being handled by different courts, notwithstanding that the courts could have jurisdiction over the matter. When two suits arising out of the same issues between the same parties were brought before the courts, there was bound to be a waste of resources through unnecessary litigation.
11. The concept of *sub judice* required that where an issue was pending in court between the same parties, any other court was barred from trying that issue so long as the first suit was ongoing. In such a situation, the subsequent suit ought to be stayed and that could be done at any stage of the proceedings.
12. The principle of *sub judice* was to prevent courts of competent jurisdiction from simultaneously adjudicating matters in respect of the same cause of action involving the same parties. That was to restrict the parties to one litigation so as to avoid the possibility of contradictory verdicts by different courts in respect of the same subject matter and was aimed at preventing a multiplicity of proceedings as well as the tendency by litigants to file claims at their preferred forum.
13. There was no convergence between the jurisdictions of the High Court and that of the JSC. The jurisdiction of the JSC was narrow and specifically carved out in the Constitution. The jurisdiction of the JSC was limited to considering whether any petition for the removal of a judge from office met the threshold set out in article 168(1) of the Constitution. On the other hand, and in the context of the instant case, the jurisdiction of the High Court was to ensure that the JSC carried out its mandate in compliance with the Constitution and the laws of the land. The High Court therefore only intervened in circumstances where the JSC had exercised its jurisdiction in a manner that was inconsistent with the constitutional edict.

14. The High Court had no competence to handle matters exclusively reserved for the JSC, and the JSC on its part could not deal with issues falling within the jurisdiction of the courts. It could not be said that the High Court in *Petition No. 295 of 2018* determined with finality the substance of the petitions for the removal of the petitioner as that role was reserved for the JSC. Accordingly, the petitions before the JSC could not be said to be *res judicata* as a result of the decision in *Petition No. 295 of 2018* because the jurisdiction and issues for determination by the High Court and the JSC were not the same. The principle of *res judicata* could not be invoked in the instant case.
15. The finding on *res judicata* applied to the *sub judice* principle which was essentially an extension of the doctrine of *res judicata* to live cases in that it sought to stop the pursuit of two similar cases between the same parties before different courts seized with the jurisdiction to handle the matters. The main difference between the two doctrines was that *res judicata* did not entertain the revival of disputes that were already settled through the institution of a fresh matter whereas the doctrine of *sub judice* did not allow the concurrent entertainment of two cases in circumstances where, if one of the two cases had been settled before the other one, the defence of *res judicata* could successfully be invoked in respect of the pending case. Considering that *Petition No. 295 of 2018* was fully determined, the doctrine of *sub judice* could not be invoked in respect of the petitions before the JSC as against *Petition No. 295 of 2018*.
16. The finding of the High Court that cases of misconduct with a criminal element committed in the course of official judicial functions, or which were so inextricably connected with the office or status of a judge, were to be referred to the JSC in the first instance was not a directive to the interested parties to file petitions to the JSC for the removal of the Petitioner from office and neither did it excuse the JSC from its constitutional obligation of satisfying itself that the Director of Public Prosecutions (DPP) and the Directorate of Criminal Investigations (DCI) had the *locus standi* to file petitions for the removal of a judge from office. The High Court did not give the interested parties the authority they did not have, of petitioning the JSC for the removal of the petitioner from office. To state otherwise would be tantamount to misinterpreting the judgment of the court. The assertion by the interested parties that the court in *Petition No. 295 of 2018* referred them to the JSC was not supported by the judgment.
17. The basic principles applicable to the construction of documents also applied to the construction of a court's judgment or order. The court's intention was to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the court's reasons for giving it had to be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order was clear and unambiguous, no extrinsic fact or evidence was admissible to contradict, vary, qualify, or supplement it. Once the court in *Petition No. 295 of 2018* held that the evidence intended to be used in her prosecution was illegally obtained, which decision the interested parties were aggrieved by and lodged an appeal, then the JSC was under an obligation to await the outcome of the appeals, before taking any further step in respect of the petitions grounded on the same evidence.
18. The material contents of the petitions filed before the JSC for the removal of the petitioner from office could also be traced to the transactions between the petitioner and her bank which was the basis for mounting her prosecution before the Anti-Corruption Court. The substratum of those petitions was the evidence that was declared to have been illegally obtained in Petition No. 295 of 2018 and revolved around the same transaction between the petitioner and her bank.
19. A perusal of the complaints forming the basis of the petitions against the petitioner showed that apart from the allegation of inappropriate communication with a prime suspect in a pending criminal case, there was an inseparable nexus between the allegations and the evidence that was found in Petition No. 295 of 2018 to have been illegally obtained. That evidence, having been declared by the High Court to have been illegally obtained and having been quashed, could no longer be available for use in any court, tribunal or administrative body, unless and until the Court of Appeal found and held otherwise.

20. Although the consideration of the question of admissibility of evidence was ordinarily reserved for the trier of facts, that discretion was no longer available to the JSC in the circumstances of the instant case, since the exclusion of that evidence was by an order of a superior judicial organ and was therefore for use before any judicial or quasi-judicial body. Despite the fact that the matters before the Court of Appeal and JSC fell into separate and distinct jurisdictions, they were co-joined by the same set of facts. The legality of the evidence that the interested parties presented to the JSC in pursuit of the petitioner was so central to the decision of the Court of Appeal and therefore the appeals had to first be determined before the JSC could take any further step in regard to the petitions before it. It was not proper for the JSC to ask the petitioner to respond to petitions that were premised on evidence that was no longer in existence.
21. The importance of rules to govern administrative action that could result in adverse outcomes for the person who was being taken through such a process could not be gainsaid. The argument by the petitioner that the lack of rules governing the proceedings before the JSC for the removal of a judge made the actions and decisions of the JSC oppressive, capricious and whimsical was not without merit. There was sufficient illustration from the past proceedings conducted by the JSC that showed that a judge undergoing a process before it could be forgiven for perceiving that the procedures of the JSC were akin to a mirage which was seeable but unreachable and kept changing from case to case and depended on the judge appearing before the JSC.
22. An apt illustration could be deduced from the petitioner's complaint that previously, petitions for removal of judges had been placed before subcommittees of the JSC whose findings would later be subjected to the full Commission for adoption or rejection. According to the petitioner, no reason was given for subjecting her directly to the full Commission. The response by the JSC was that due to the importance of the offices of the Chief Justice and the Deputy Chief Justice, it was decided that any petition for the removal of a holder of any of the two offices would be considered by the whole Commission. That position was a departure from the earlier position adopted in the case of the first Deputy Chief Justice under the Constitution of Kenya, 2010 because the petition for her removal was first submitted to a subcommittee before the decision of the subcommittee was adopted by the full commission. The lack of rules therefore allowed the JSC to whimsically keep changing its procedures thereby resulting in unpredictable and inconsistent handling of complaints against judges. Although the court deprecated the effect of lack of regulations on the right to fair administrative action before the JSC, the law remained that lack of regulations was not sufficient to stop the JSC from executing its constitutional mandate so long as the JSC complied with the constitutional dictates.
23. The JSC had been involved in several litigations where lack of rules and regulations to govern its procedures for removal of judges under article 168 of the Constitution had been raised and pronouncements made on the importance of having those rules. The necessity of having rules was a statutory requirement as stipulated by section 47(2)(c) of the Judicial Service Act. The High Court was informed that the rules were pending before the National Assembly for approval. The court urged the JSC to take a proactive initiative and have the rules approved because they could not be pending before the legislature in perpetuity.
24. The High Court should not have been concerned about the way the JSC undertook its constitutional mandate. As a body carrying out administrative functions, the JSC should have been allowed the leeway to establish its own processes so long as it was shown that no judge, judicial officer or staff member appearing before it had been prejudiced by the path taken. There was no material placed before the court to show that by deciding to place the complaints against the petitioner before the full Commission and for want of regulations, the JSC violated any of her constitutional rights. Despite the petitioner being a member of the JSC and having participated in cases involving judges, judicial officers and staff members without the rules, that in itself did not give justification to the JSC to operate or to ignore the importance of the rules. The petitioner was only one of the Commissioners of JSC.

25. The absence of rules could not bar the JSC from executing its constitutional and statutory mandate. What the JSC only needed to do was to ensure compliance with the right to fair administrative action and all the other constitutional dictates. No case had been made by the petitioner for the issuance of any orders by dint of the lack of rules to govern the process before the JSC for the removal of a judge from office. Importantly, the JSC could not be stopped from executing its constitutional mandate due to the lack of rules to govern proceedings before it.
26. In exercising its judicial authority, courts were obligated to protect and promote the purposes and principles of the Constitution. The rules of constitutional interpretation did not favour a formalistic or positivistic approach (articles 20(4) and 259(1). The Constitution had incorporated non legal considerations which the court had to take into account in exercising its jurisdiction.
27. A person could be defined as a human being; also termed natural person or an entity (such as a corporation) that was recognized by law as having most of the rights and duties of a human being. The meaning of the phrase "any person" in article 168(2) of the Constitution could not exclude the DCI and JSC from being bound by the Bill of Rights, for that was the express requirement of article 20(1) of the Constitution.
28. The phrase "any person" as used in article 168(2) of the Constitution was similar in its use in all the other provisions in the Constitution where the word "person" was used. For instance, article 22(1) of the Constitution provided that every person had the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or was threatened. Under article 22 of the Constitution, only a natural or legal person and not a State organ who could petition for redress of violation of rights and fundamental freedoms.
29. The framers of the Constitution intended that any person as used in article 168(2) of the Constitution was meant to stand for any individual member of the society and not state organs or officers in their official capacity. Any contrary interpretation would go into breach of the doctrine of separation of powers.
30. The broad principle of separation of powers integrated a structure of checks and balances thereby ensuring the autonomy of State organs while at the same time safeguarding the ultimate goal of good governance through cooperation and collaboration between and among state organs.
31. The use of the word "only" in article 168(2) of the Constitution limited the power to initiate the removal of a judge from office to the JSC or upon a petition by a natural or legal person. The JSC was the only state organ allowed by the Constitution to initiate the removal of a judge from office. The initiation of the removal of a judge from office solely reposed with the JSC. If article 168(2) intended to include state organs among the bodies that could petition for the removal of a judge from office, it would have expressly stated so in the manner that article 20(1) expressly provided that the Bill of Rights applied to all law and bound all State organs and persons.
32. The use of the term "any person" envisioned by the framers of the Constitution in article 168(2) had to be a person or a determinate class of persons and not a state organ. If it were not so, article 260 would not have belaboured to define the phrases 'person,' 'state organ' and 'state officer' independently. It would simply have defined person to include state officer.
33. When it came to the removal of a member of a commission or the holder of an independent office, article 251(2) of the Constitution only allowed "a person" to petition for their removal from office. When that provision was read in comparison with article 168(2), state organs and state officers were excluded from petitioning for the removal of certain constitutional officeholders. The DPP and the DCI were holders of state offices and as occupants of those offices, were state officers. They were therefore not "person" as defined in article 260 and as used in articles 22, 168(2), 251(2) of the Constitution, among other provisions.
34. Under article 158(2) of the Constitution, a person desiring the removal of the DPP could present a petition to the Public Service Commission (PSC) in writing, setting out the alleged facts constituting

the grounds for the removal of the Director. A petition for the removal of the DPP could only be presented before the PSC by a person in their individual capacity and not by a state organ or a state officer.

35. Had the JSC bothered to interrogate the question whether state organs could petition it for the removal of a judge from office, it would have easily come to the conclusion that state organs could not petition for the removal of a judge from office. The JSC in calling upon the petitioner to respond to the petition filed by the DPP and the DCI seeking her removal from office was exercising jurisdiction that it did not have.

36. By entertaining a complaint from bodies not authorised by the Constitution to petition for the removal of a judge from office, the JSC's actions were *ultra vires* and were void *ab initio* as it was an outright violation of the Constitution. The JSC had no jurisdiction to entertain the petition of the DPP and the DCI for the removal of the petitioner from office because the interested parties were not 'any person' as defined in article 168(2) as read with article 260 of the Constitution and therefore they had no *locus standi* to file the aforesaid petition.

37. The functions of the DCI were directly linked to the mandate of the National Police Service under article 245(4) of the Constitution, to independently investigate any particular offence or offences and to enforce the law against any particular person or persons. These functions did not extend to presentation and prosecution of petitions before the JSC for the removal of judges from office. The powers and functions of the DPP and DCI were limited to the criminal justice arena. That was not to say that the DPP and the DCI could not share any relevant information in their possession with the JSC, upon which the JSC could initiate the process of removal of a judge if satisfied that the threshold in article 168 (1) had been met.

38. There was no bar for the occupants of the offices of the DPP and the DCI as private citizens to petition the JSC for the removal of a judge. In such a situation, they would have to demonstrate that they had a direct personal interest in the complaint to be presented before the JSC. The DPP and the DCI were state officers occupying state offices and they could not and did not meet the description of any person as provided in article 168(2) of the Constitution. The DPP and the DCI in their official capacities were distinct from members of the public. The DPP exercised state powers of prosecution whereas the DCI was mandated to carry out criminal investigations.

39. The Constitution under article 250(9) insulated the commissioners and holders of independent offices from personal liability for actions and decisions taken in good faith in the course of performing their duties. In addition, section 45 of the JSA insulated all the individuals working for the JSC from any civil action or suit for or in respect of any matter or thing done or omitted to be done in good faith. The same provision also protected a member of the Commission or the Chief Registrar from arrest under civil process while participating in any meeting of the Commission or of any Committee.

40. The 2nd and 3rd respondents were all along executing their responsibilities as members of the JSC. The alleged bias was said to have occurred in the course of the discharge of their mandates. It was for that reason that their individual rulings on the recusal applications were adopted as the decision of the Commission. The two commissioners were advancing their own interests which could make them personally liable to the petitioner. Just like judges and judicial officers who could not be named as parties in applications for recusal, the commissioners of the JSC when executing their mandates could not be named as parties. Even where an appeal arose from the decision of a judge or a judicial officer not to recuse themselves, they could not be named as respondents. That position was applicable to commissioners of the JSC. The 2nd and 3rd respondents were performing their functions as members of the JSC and as such they could not be sued in their individual capacities. Accordingly, their joinder to the instant petition was erroneous.

41. The court had an inherent jurisdiction to protect itself from abuse or to see that its process was not abused. The blacks law dictionary defined abuse as everything which was contrary to good order

established by usage that was a complete departure from reasonable use. Abuse was done when one made excessive or improper use of a thing or employed such thing in a manner contrary to the natural legal rules for its use.

42. The term abuse of court process had the same meaning as abuse of judicial process. The employment of judicial process was regarded as abuse when a party used the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. The petitioner's case was not an abuse of court process. On the other hand, JSC's decision to proceed with the petitions for the removal of the petitioner from office, despite the existence of the appeals before the Court of Appeal amounted to its own process.

43. In exercising its mandate under article 168(2) of the Constitution, the JSC acted as a quasi-judicial body. As a quasi-judicial body, its duty was to deal with the question referred to them without bias and they had to give to each of the parties the opportunity of adequately presenting the case made. The decision had to come in the spirit and with the sense of responsibility of a tribunal whose duty it was to mete out justice. A body exercising a quasi-judicial function had to accord parties a fair hearing.

44. The ingredients of a fair hearing as per article 50(1) of the Constitution included a public hearing before a court or, if appropriate, another independent and impartial tribunal or body. An allegation of bias against a judge had to be supported by cogent evidence and apprehension of bias alone was not sufficient to have a judge recuse themselves from a case. In exercising the quasi-judicial function of the JSC, each commissioner was expected to be impartial.

45. Besides being the principal legal advisor to the executive, the Attorney General (the AG) carried out other functions including sitting in cabinet meetings, a member of the National Council on Administration of Justice, member of the JSC, Chairperson of the Multi-Agency Taskforce Team, among others. Sections 5 and 6 of the Office of the Attorney General Act Cap 49 of Laws of Kenya showed that his functions and powers were expansive and gave the AG leeway to do anything that could be necessary for the effective discharge of the duties and the exercise of the powers of his office.

46. The participation of the Attorney General in the Multi-Agency Taskforce Team was part of his regular duties and he could not therefore be accused of bias for chairing the Taskforce. That applied to the litigations where he was made a party by virtue of his office. The Attorney General could not be accused of being biased yet it was the petitioner who named the AG, and correctly so, as one of the respondents in *Petition No. 295 of 2018* and her subsequent appeal.

47. There was nothing to show that the 2nd respondent had taken any position in respect of the petitions for the removal of the petitioner upon which the 3rd respondent could be said to have been aligned to. On the allegation that the language used by the 3rd respondent in his ruling declining to recuse himself betrayed his partiality, language and tone used by a judicial officer or a decision maker could at times have given the impression of bias. However, that in itself was not evidence of bias or impartiality. Each decision-maker had his own style of communicating a decision.

48. The enthusiasm of the 3rd respondent in disposing the petitions against the petitioner was explained in his ruling as an effort to improve the accountability of the Judiciary. That was part of the mandate of the JSC. That was also in line with the dictates of article 47(1) of the Constitution that every person had the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Each element of this right was important and those who exercise judicial or administrative functions were expected to expeditiously dispose of matters before them.

49. The apparent overzealousness of the 3rd respondent by itself could not amount to bias and neither could he be said to have taken a particular position on the petitions for the removal of the petitioner from office. Even the telephone call allegedly overheard by the petitioner being made by the 3rd respondent could be attributed to his anxiety to have the matters against the petitioner disposed of expeditiously.

50. In the age and times of the Covid-19 pandemic, virtual hearings of cases were encouraged and should have been embraced unless there was material to support the assertion that such a hearing would violate the rights of any party to proceedings. It was for that reason that all parties were in agreement that those proceedings be conducted virtually. Kenyan courts were at the moment dispensing justice virtually and it would actually be discriminatory to hold that a certain segment of our society was entitled to in-person arbitration of disputes. There was no merit in that particular assertion and complaint raised by the petitioner.
51. The petitioner was not facing any criminal trial at the moment. The JSC could not consider petitions for her removal while the two appeals were pending determination by the Court of Appeal. The question of the petitioner suffering double jeopardy if the JSC was allowed to proceed with the matters against her did not arise. It would also be speculative on the court's part if the court found otherwise because the outcome of the appeals could not be predicted.
52. So far the petitioner had not been tried and convicted. There were no criminal proceedings against her pending in any court. The mere fact that criminal charges could be preferred against any of the parties to the incident in question or both, barred the Commission from carrying out its Constitutional mandate as provided under article 168(2) of the Constitution. On the issue whether the Commission should have suspended its mandate and waited for a conviction before taking the steps taken, the court was not aware of any criminal proceedings that had been done and could not speculate that a criminal trial would be commenced against the petitioner. The DPP was on record as saying that he would await the conclusion of the process commenced by the JSC.
53. No person should be taken on a guilt trip for asserting and seeking the protection of their constitutional rights and fundamental freedoms by the courts. The Bill of Rights was put in the Constitution not as a page filler but to be enjoyed by all to whom the rights apply. The fact that the petitioner was a judge did not mean that she had a lesser entitlement to the rights available to every other person.

Petition partly allowed.

Orders

i. *A declaration was issued that the decision made by the Judicial Service Commission on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring her to respond to the four petitions lodged against her on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations; and all proceedings undertaken by the Judicial Service Commission subsequent thereto, were unconstitutional and in violation of articles 1(3), 27(1) and 50(1)of the Constitution.*

ii. *A declaration was issued that the decision made by the Judicial Service Commission on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring her to respond to the four petitions lodged against her on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations; and all proceedings undertaken by the Judicial Service Commission subsequent thereto, amounted to an abuse of process and administrative power of the Judicial Service Commission in view of the pendency of appeals before the Court of Appeal in Civil Appeal No. 298 of 2019, Honourable Philomena Mbete Mwilu v DPP & 6 others and Civil Appeal No. 314 of 2019, The Director of Public Prosecutions and the Director of Criminal Investigations v Honourable Philomena Mbete Mwilu, arising from the judgement of the High Court in Petition No. 295 of 2018, Honourable Philomena Mbete Mwilu v DPP & 4 others,*

iii. *An order of certiorari was issued calling into the instant court and quashing the decision of the Judicial Service Commission made on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring her to respond to the four petitions lodged against her on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations.;*

iv. *An order of certiorari was issued calling into the instant court and quashing all the proceedings undertaken by the Judicial Service Commission in respect of the four petitions lodged against the Petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations;*

v. *A declaration was issued that the Director of Public Prosecutions and the Director of Criminal Investigations as State officers, did not fall into the category of "any person" as envisaged under article 168(2) as read with article 260 of the Constitution and they could not petition the Judicial Service Commission for the removal of the petitioner or any judge from office as allowing them to petition for the removal of a judge from office violated the doctrine of separation of powers under article 1(3) of the Constitution.*

vi. *An order of certiorari was issued that quashed the petition lodged on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations that sought the removal of the Petitioner from office.*

vii. *A conservatory was issued suspending the Judicial Service Commission's consideration of the three petitions lodged against the petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; and on 11th June 2019 by Peter Kirika pending the final outcomes of the appeals pending before the Court of Appeal in Civil Appeal No. 298 of 2019, Honourable Philomena Mbete Mwilu v DPP & 6 others and Civil Appeal No. 314 of 2019, The Director of Public Prosecutions and the Director of Criminal Investigations v Honourable Philomena Mbete Mwilu, arising from the judgement of the High Court in Petition No. 295 of 2018, Honourable Philomena Mbete Mwilu v DPP & 4 others.*

viii. *Each party was to meet their own costs.*

Citations

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2. Apollo Mboya v Judicial Service Commission & another;Justice Kalpana Rawal & 4 (Interested Parties) ([2020] eKLR) — Explained
3. Apondi v Canuald Metal Packaging ([2005]1 EA 12) — Explained
4. Attorney General & 3 Others
5. Beekey Supplies Limited & another v Attorney General & another ([2017] eKLR)
6. Benson Kapoya Mosiro & another v Republic ([1992] eKLR) — Explained
7. Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another ([2006] eKLR) — Explained
8. Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others ([2015] eKLR) — Explained
9. George Joshua Okungu & Another v Chief Magistrate's Anti-Corruption Court at Nairobi & Another ([2014] eKLR.) — Explained
10. HOMEPARK CATERERS LIMITED v THE HON. THE ATTORNEY GENERAL & 3 OTHERS ([2007] eKLR) — Explained
11. International Centre for Policy and Conflict & 5 others v Attorney General & 5 others ([2013] eKLR) — Explained
12. in the Matter of the Kenya National Human Rights Commission, Supreme Court Advisory Opinion Reference No. 1 of 2012.
13. In the Matter of the Principle of Gender Representation in the National Assembly and the Senate
14. Isaac Aluoch Polo Aluochier v Independent Electoral & Boundaries Commission (IEBC) & 7 others ([2019] eKLR) — Explained
15. Jamal Salim v Yusuf Abdulahi Abdi & another ([2018] eKLR)
16. Jasbir Singh Rai & 3Others vs Tarlochan Singh Rai & 4 Others ([2013] eKLR) — Explained
17. Judicial Service Commission v Gladys Boss Shollei ([2014] eKLR) — Explained

18. Judicial Service Commission v Mbalu Mutava ([2015] eKLR) — Explained
19. Judicial Service Commission v Speaker of the National Assembly & 8 others
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25. Kenya Revenue Authority & 2 others v Darasa Investments Limited ([2018] eKLR) — Explained
26. Kyalo Peter Kyulu v Wavinya Ndeti & 3 others]2017] eKLR ([2017] eKLR) — Explained
27. Law Society of Kenya vs. Kenya Revenue Authority & another ([2017] eKLR) — Explained
28. Master Freighters Limited v Kenya Bureau of Standards & another [2019]eKLR (Constitutional Petition 306 of 2018) — Explained
29. Mini Bakeries (K) Ltd v George Ondieki Nyamanga ([2014] eKLR) — Explained
30. Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others ([2009] KLR 229,) — Explained
31. Nancy Makokha Baraza v Judicial Service Commission & 9 others ([2012] eKLR) — Explained
32. Nguruman Limited v Shompole Group Ranch & Another ([2014][eKLR) — Explained
33. Onyango Oloo v The Attorney General [1986 – 1989] EA 499
34. Owners of Motor Vessel 'Lillian S'v Caltex Oil (Kenya) Limited (Civil Appeal No 50 of 1989, [1989] KLR 1) — Explained
35. Peter Kamau Ikigu v Westlands Residential Resort Limited & another ([2018] eKLR) — Explained
36. Peter Kamau Ikigu v Westlands Residential Resort Limited & another ([2018] eKLR) — Explained
37. Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR (Civil Appeal 6 of 2016) — Explained
38. Republic v Chairman District Alcoholic Drinks Regulation Committee & 4 others & 2 others Ex-parte Detlef Heier & another [2013] eKLR ([2013] eKLR) — Explained
39. Republic v Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua ([2010] eKLR) — Explained
40. Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & another ([2002] eKLR) — Explained
41. Republic v Independent Electoral and Boundaries Commission & 3 others Exparte Wavinya Ndeti [2017] eKLR ([2017] eKLR) — Explained
42. Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR ([2017] eKLR) — Explained
43. Re the Matter of the Interim Independent Electoral Commission (Advisory Opinion No.2 of 2011 [2011] eKLR) — Explained
44. Re the Matter of the Interim Independent Electoral Commission ([2011] eKLR) — Explained
45. Robert Tom Martins Kibisu v Republic ([2018] eKLR) — Explained
46. Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others ([2012] eKLR) — Explained
47. Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR (Civil Appeal 202 of 2015) — Explained
48. Speaker of the Senate & another v Attorney-General & 4 others ([2013] eKLR) — Explained
49. Stanley Munga Githunguri v Republic ([1986] eKLR) — Explained
50. Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others (Nairobi (Milimani) HCCC No. 363 of 2009)
51. Tatu City Limited and another v Rosemary Wanja Mwangiru & 4 others

52. William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR ([2015] eKLR) — Explained
53. William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR ([2020] eKLR) — Explained
54. Republic of South Africa and others v South African Rugby Football Union and others ((CCT16/98) [1999] ZACC 11) — Explained
55. Locabail (UK) Ltd v Bayfield Properties Ltd ([2000]1 ALL ER 65) — Explained
56. Local Government Board v Arlidge (1915) AC 120
57. Maharaj v Attorney-General of Trinidad and Tobago (No 2) ((1978) 2 ALL ER 670) — Explained

Statutes

1. Civil Procedure Act (Cap. 21) — Interpreted
2. Civil Procedure Rules, 2010 (Cap 21 Sub-Leg) — Order 53 (2) — Interpreted
3. Constitution of Kenya, 2010 — article 171 (2) (e) (f), 172, 157, 245 (1), 25 (1)(c), 27, 47, 50, 1 (3), 168 (2) (3) (4), 1666 (2) — Interpreted
4. Criminal Procedure Codes (Cap. 75) — Interpreted
5. Evidence Act (Cap. 80) — Interpreted
6. Fair Administrative Action Act (No. 4 of 2015) — section 9 (1) (2) (3) (4) — Interpreted
7. Judicial Service Act — section 22 (5) — Interpreted
8. Law Reform Act (Cap. 26) — section 9 (3) — Interpreted
9. National Police Service Act (Cap. 84) — section 29 (1), 28 — Interpreted
10. Advocates Act — section 11 (1) — Interpreted
11. Statutory Instruments Act

Texts

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2. Bryan A. Garner, Black's Law Dictionary, 9th Ed
3. Hogg, QM., Lord Hailsham 1990, Halsbury's Laws of England (4th Edn Vol 24 para 948)
4. John Beecroft Saunders, Words and Phrases Legally Defined Vol. 3
5. Veronica Dougherty, Absurdity and the Limits of Literalism
6. Absurd Result Principle in Statutory Interpretation, 44 (American University Law Review 127 (1994) at page 101)
7. Bennion on Statutory Interpretation: A Code, 6th Edn (Oliver Jones at page 892)

International Instruments

1. African Charter on Peoples' and Human Rights (ACPHR) — article 7 (1)
2. International Covenant on Civil and Political Rights (ICCPR) — article 14 (1)
3. Universal Declaration of Human Rights (UNDHR), 1948 — article 10

Advocates

None mentioned

JUDGMENT

THE PARTIES

1. The petitioner, Honourable Lady Justice Philomena Mbete Mwilu, is the Deputy Chief Justice of the Republic of Kenya and Vice President of the Supreme Court. The petitioner took oath of office as the Deputy Chief Justice on October 28, 2016. She is also a member of the 1st respondent, the Judicial Service Commission (JSC), having been elected on May 3, 2017 by Judges of the Supreme Court.

2. The 1st respondent is a constitutional commission established under article 171 of the Constitution. Article 172 mandates it to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.

3. The 2nd respondent, the Honourable Mr. Justice Paul Kihara Kariuki, is the Attorney-General of the Republic of Kenya and a Commissioner of the 1st respondent by dint of article 171(2) (e) of the Constitution. Prior to his appointment as Attorney-General, he served as judge of the High Court and rose to become President of the Court of Appeal.

4. The 3rd respondent, Mr. Macharia Njeru, is an Advocate of the High Court and a Commissioner of the 1st respondent elected by members of the Law Society of Kenya under article 171(2) (f) of the *Constitution*.

5. The 1st interested party, the Director of Public Prosecutions (DPP) is a State office established under article 157 of the *Constitution*, with the mandate to exercise State powers of criminal prosecutions.

6. The 2nd interested party, the Director of Criminal Investigations (DCI) is a creature of section 29(1) of the *National Police Service Act*, Cap. 84 Laws of Kenya. The Director is in charge of the Directorate of Criminal Investigations which is a department established under section 28 of the *National Police Service Act* and is under the direction command and control of the Inspector-General of the National Police Service, an office established under article 245(1) of the *Constitution*.

BACKGROUND

7. The petitioner was arrested on August 28, 2018. The following day, she was charged before the Chief Magistrate's Court at Nairobi in Anti-Corruption Criminal Case No. 38 of 2018, Republic versus Philomena Mbete Mwilu & Stanley Muluvi Kiima, with the offences of abuse of office, obtaining execution of a security by false pretenses, unlawful failure to pay taxes and forgery. The charges arose from the Petitioner's dealings with Imperial Bank Limited (IBL).

8. Before the petitioner took plea in the above case, she instituted Nairobi High Court Petition No. 295 of 2018, Honourable Philomena Mbete Mwilu versus The Director of Public Prosecutions & 4 Others (hereinafter Petition No. 295 of 2018) challenging her prosecution on various grounds and obtained conservatory orders staying her prosecution. In a judgment delivered on May 31, 2019, the High Court made the following conclusions:

   (i) We have found no violation of articles 27, 28, 47, and 50(2) (a), (b,) (c), (j) and (k), as well as article 157(11) of the *Constitution* with respect to the decision to prosecute the petitioner;

   (ii) There was a factual and legal basis for the initiation of the charges in respect to counts I and II against the petitioner;

   (iii) charges were not defective for lack of a complainant as the Republic, through the National Police Service, is a proper complainant;

   (iv) There was no factual or legal basis for initiation of the prosecution of the petitioner on counts III, IV, V, VI, VII, VIII, X, XI and XII;

   (v) The media coverage of the investigations, arrest and intended prosecution did not affect the petitioner's right to a fair trial or infringe on her right to dignity;

   (vi) The decision of the DPP to prosecute the petitioner was not taken in contravention of article 157(11) and was not tainted by any irrationality or unreasonableness;

(vii) Judicial immunity does not shield a judicial officer from criminal prosecution;

(viii) Acts of a criminal nature committed outside the scope of official judicial function may be investigated and the judicial officer arrested and prosecuted directly without recourse to the disciplinary or removal process;

(ix) While the DCI is not precluded from investigating criminal misconduct of judges, there is a specific constitutional and legal framework for dealing with misconduct and/or removal of judges. Consequently, cases of misconduct with a criminal element committed in the course of official judicial functions, or which are so inextricably connected with the office or status of a judge, shall be referred to the JSC in the first instance;

(x) The offence of abuse of office in count I of the charges against the petitioner may amount to official misconduct as it relates to an alleged advantage obtained by virtue of her office as a Judge of the Court of Appeal and if proved, is in breach of the Judicial Code of Conduct, and ought, in the first instance, to have been referred to JSC;

(xi) Count II of the charges relates to obtaining of execution of security by false pretenses contrary to section 314 of the Penal Code. The circumstances were outside the scope of the petitioner's judicial duties and functions and it could therefore be tried directly without recourse to JSC.

9. The Court consequently granted the following reliefs:

a. A declaration be and is hereby issued that the evidence underpinning the intended prosecution of the petitioner in Nairobi Chief Magistrate's Court ACC Criminal Case No 38 of 2018 *Republic v Philomena Mbete Mwilu and Stanley Muluvi Kiima* was illegally obtained in a manner that was detrimental to the administration of justice;

b. An order of certiorari be and is hereby issued to quash the criminal proceedings in Nairobi Chief Magistrate's Court ACC Criminal Case No. 38 of 2018 Republic v Philomena Mbete Mwilu and Stanley Muluvi Kiima as against the petitioner.

10. The petitioner was aggrieved by part of the judgment and filed Civil Appeal No. 298 of 2019, *Honourable Philomena Mbete Mwilu v DPP & 6 Others* before the Court of Appeal on the July 3, 2019 (hereinafter Civil Appeal No. 298 of 2019). The DPP was dissatisfied with the entire decision and filed Civil Appeal No. 314 of 2019 The Director of Public Prosecutions & the Director of Criminal Investigations v Honourable Philomena Mbete Mwilu (hereinafter Civil Appeal No. 314 of 2019) on the July 11, 2019. At the time of writing this judgment, both appeals have not been determined.

11. Soon after Petition No. 295 of 2018 was determined on May 31, 2019, three petitions for the removal of the Petitioner from office were filed before the JSC as follows:

i) Petition dated June 7, 2019 by Mr. Alexander Mugane;

ii) Petition dated June 11, 2019 by Mr. Peter Kirika;

iii) Petition dated June 27, 2019 by the DPP and the DCI.

12. Prior to the filing of the above three petitions, Mr. Mogire Mogaka had on October 4, 2018 filed another petition for the removal of the petitioner before the JSC.

13. The petition by the DPP and the DCI was supported by the following materials:

i) Affidavit of Chief Inspector Walter Murunga sworn on 8th July, 2019 alleging that there was improper telephone communication between the petitioner and the accused person in

Milimani Criminal Case No. 1657 of 2018 in which the accused person had been charged with forgery.;

ii) Affidavit of PC Paul Mutethia sworn on 27th June, 2019 stating that the Petitioner was involved in improper conduct with the accused person in Milimani Criminal Case No. 1303 of 2018 and Criminal Case No. 1371 of 2018.

iii) Affidavit of Dr. Terra Saidimu Leseeto sworn on June 27, 2019 with several documents marked as TSL1-TSL6 being allegations of the claim that the Petitioner did not pay Capital Gains Tax on five properties enumerated in the Affidavit; and

iv) Affidavit of CP Abdallah K Mwatsefu sworn on June 27, 2019 with exhibits marked as AKM1-AKM46 being documents alleging that the petitioner had abused her office to obtain loans from IBL and unlawfully secured the discharge of a security given in respect of a lending from the said IBL.

14. The other three petitioners supported their respective petitions with their own affidavits.

15. On July 9, 2019, the JSC notified the Petitioner that the four petitions had been considered on July 8, 2019 and a decision had been made that she responds to them within 21 days. The Petitioner responded on 9th August, 2019 objecting to the consideration of the petitions by the JSC on the basis that the issues raised therein had been determined in Petition No. 295 of 2018 and two appeals arising from that judgment were pending before the Court of Appeal.

16. After considering the DPP's response to the Petitioner's objection, the JSC directed that the Petitioner's objection to the petition by the DPP be heard orally on December 16, 2019. The petitioner was required to file her supporting documents within 21 days.

17. On December 13, 2019, the petitioner applied for the recusal of the 2nd and 3rd respondents from hearing the petitions against her. As against the 2nd respondent, she alleged that he was biased and conflicted in view of the fact that he was actively involved in recommending her prosecution and that he was a party in Petition No. 295 of 2018. Regarding the 3rd respondent, the petitioner alleged that he was biased and conflicted on account of his demonstrated predetermined and biased mind against her. She also claimed that the 3rd Respondent was affiliated to the 2nd Respondent on the desired outcome of the petitions.

18. The recusal applications were heard and dismissed on August 13, 2020. Before considering the Petitioner's preliminary objection to the petitions, the JSC fixed the petitions for hearing on August 31, 2020. This action by the JSC is what brought the Petitioner to this Court.

The Petitioner's Case

19. By a petition dated August 13, 2020 and filed on the same day, supported by the petitioner's affidavit sworn on the even date, the petitioner seeks the following reliefs:

(a) A declaration be and is hereby issued that the decision made by the 1st respondent on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring the petitioner's response to the four petitions lodged against the petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions & the Director of Criminal Investigations; and all proceedings undertaken by the 1st respondent subsequent thereto, are unconstitutional and in violation of articles 1(3)(c), 25(1)(c), 27(1), 50(1), 159(1), 159(2)(a, b & e) and 165(3)(a, b & d(i) & (ii));

(b) A declaration be and is hereby issued that the decision made by the 1st respondent on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring the petitioner's response to the four petitions lodged against the petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions & the Director of Criminal Investigations; and all proceedings undertaken by the 1st respondent subsequent thereto, is unreasonable, unfair, unprocedural, unlawful and is *ultra vires* the power and authority of the 1st respondent in so far as the said petitions are a collateral challenge in the nature of an appeal against the judgement made by the High Court on 31st May 2019 in HC Petition No 295 of 2018, *Honourable Philomena Mbete Mwilu v DPP & 4 Others*;

(c) A declaration be and is hereby issued that the decision made by the 1st respondent on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring the Petitioner's response to the four petitions lodged against the Petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions & the Director of Criminal Investigations; and all proceedings undertaken by the 1st Respondent subsequent thereto, amounts to an abuse of process and administrative power of the 1st respondent in view of the pendency before the Court of Appeal of Civil Appeal No. 298 of 2019, Honourable Philomena Mbete Mwilu v DPP & 6 others and Civil Appeal No. 314 of 2019, The Director of Public Prosecutions & the Director of Criminal Investigations v Honourable Philomena Mbete Mwilu, arising from the judgement of the High Court in HC Petition No. 295 of 2018, Honourable Philomena Mbete Mwilu v DPP & 4 Others;

(d) A declaration be and is hereby issued that the lack of rules to govern the 1st respondent's procedures in accordance with its constitutional mandate renders its actions and decisions oppressive, capricious, whimsical and a violation of the petitioner's rights and fundamental freedoms including the rights guaranteed under articles 25(1)(c), 27, 47 and 50 of the *Constitution*;

(e) A declaration be and is hereby issued that the Petitioner will not have a fair consideration, evaluation, deliberation, process, review, hearing and/ or trial before the 1st Respondent; and that justice will not be done or seen to be done if the 1st respondent proceeds to consider, evaluate, deliberate upon, hear, review and/ or determine the petitions before it with the 2nd and 3rd respondents sitting in the deliberations; and in any event, without the petitioner being afforded all and the full guarantees of a fair process and/ or hearing as required by the rules of natural justice, The Constitution, Statute, and the general practice required of the 1st Respondent as a quasijudicial administrative body;

(f) An order of *certiorari* be and is hereby issued calling into this Court and quashing the decision of the 1st respondent made by on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring the petitioner's response to the four petitions lodged against the petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions & the Director of Criminal Investigations; and all proceedings undertaken by the 1st respondent subsequent thereto;

(g) An order of prohibition be and is hereby issued prohibiting the 2nd and 3rd respondents from sitting in any meeting of the 1st respondent to consider, evaluate, hear and/ or determine the four petitions lodged against the petitioner on October 18, 2018 by Mogire Mogaka; on June

7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions & the Director of Criminal Investigations;

(h) A declaration be and is hereby issued that the Director of Public Prosecutions and the Director of Criminal Investigations are not Any Person entitled to petition the 1st respondent to initiate the removal of the petitioner from office of Judge under article 168 of the *Constitution*;

(i) A declaration be and is hereby issued that an independent constitutional office holder and/or State agency and/or State officer cannot initiate the process for removal of a judge as doing [so] is inconsistent with and in violation of the tripartite framework and designation of sovereign power under article 1(3) of the *Constitution*; it impairs and undermines the performance and functioning of the three arms of government; and interferes with the independence of the Judiciary;

(j) A declaration be and is hereby issued that the 1st respondent has violated the petitioner's fundamental right to the unlimited right to a fair trial under article 25(c), right to equality before the law and equal benefit of the law under article 27(1), right to fair administrative action under article 47(1) and (2) and right to a fair hearing under article 50(1) of the *Constitution* in its consideration, deliberation and/ or evaluation of the four petitions lodged against the Petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions & the Director of Criminal Investigations; and all proceedings undertaken by the 1st respondent subsequent thereto;

(k) A conservatory order be and is hereby issued suspending the 1st respondent's consideration of the four petitions lodged against the petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on 11th June 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions & the Director of Criminal Investigations, pending the hearing and determination of this Petition;

(l) Any other relief and/ or order(s) the honourable court deems appropriate, just and/ or fit to grant; and

(m) The costs of this Petition be provided for.

20. It is the petitioner's case that under section 22(5) of the *Judicial Service Act* No. 1 of 2011, (hereinafter JSA), it has been a practice that the JSC sits in committees to consider and determine whether a complaint raises a *prima facie* case before submitting the same to the full Commission, a practice that is necessitated by the realization that certain commissioners may be conflicted in a matter, which conflict is avoided if they do not sit in the Committee.

21. The petitioner averred that all the petitions before the JSC relate to the same complaint by the DPP and the DCI which is a collateral challenge or appeal against the decision in Petition No. 295 of 2018 which are also pending before the Court of Appeal. It is her case that the practice of the JSC based on the principle of sub judice is not to consider any complaint in respect of which the subject matter is pending before a court of law.

22. The petitioner states that she is dissatisfied with the entire manner in which the JSC has handled the complaints against her, and is of the view that her rights to fair administrative action and fair hearing espoused in articles 47 and 50 of the *Constitution* had been violated or were threatened.

23. In support of her averment that she had been subjected to a process that is not in accord with the requirements of article 47, she cited the proceedings of July 24, 2020 where her application for review

of the JSC's decision to hear the matter virtually instead of physically as had earlier been directed was heard without affording her an opportunity to file authorities and prepare for the hearing. Further, the Petitioner complains that soon after her application for review was dismissed, she was directed to argue her two applications for recusal of the 2nd and 3rd Respondents the same afternoon and that it was only after she protested that the applications were postponed to the July 27, 2020. The Petitioner further asserts that when she applied for the transcript of proceedings of July 24, 2020, the same were not supplied to her until the July 27, 2020, two minutes to the hearing of her applications.

24. According to the Petitioner, she cannot get a fair hearing before the JSC unless and until the complaint of bias and conflict of interest against the 2nd and 3rd respondents is addressed by an independent and impartial arbiter, which the JSC is not. The Petitioner additionally points to the tone and the language used by the 3rd respondent in his ruling of August 13, 2020 dismissing her application for recusal as evidence of the demonstrable bias and conflict of interest she had complained of.

25. The petitioner avers that the lack of rules for the conduct of business by the JSC in accordance with its constitutional mandate renders its actions and decisions oppressive, capricious, whimsical and a violation of her rights and fundamental freedoms including the rights guaranteed under articles 25(1)(c), 27, 47 and 50 and that section 47 of the JSA obliges the JSC to make regulations for the better carrying out of the purposes of the Act.

26. The petitioner further avers that the pronouncements by the then Chairperson of the JSC that the matter be handled virtually, that the JSC is not a court of law and is not bound by rules of procedure and that it will determine how to conduct its proceedings further exacerbates her plight.

27. According to the petitioner, the rulings of the 2nd and 3rd respondents of August 13, 2020 reiterated the position taken by the Chairperson and she is therefore genuinely apprehensive that the JSC is intent on conducting its proceedings in blatant disregard of its obligations under articles 47 and 50 of the Constitution.

28. The petitioner avers that the rights and safeguards to fair administrative action, due process, fair hearing and fair trial are not intended to be exercised or enjoyed in death and/or after harm has been occasioned and suffered but are meant to be invoked and exercised proactively before the harm complained of is done.

29. The petitioner further asserts that there has never been any incident before, where a complaint for the removal of a Judge has been initiated by a state agency as is the case herein and that as such, the JSC in accepting to consider the petition by the DPP and the DCI, has violated the national values and principles of governance in particular, the requirement to follow the rule of law as read together with articles 157(4) and (6) and article 168(2) of the Constitution.

30. According to the petitioner, the DPP and the DCI are not the "any person" entitled to lodge a petition for her removal as contemplated by article 168(2) of the Constitution. In her view, the term "any person" as used in the Article is not an ordinary English word but a technical legal term and as such ought to be interpreted as excluding a "State office" and "State officer" of which the DPP and the DCI are. It is the Petitioner's case that any other interpretation would not accord with the desire to have a judiciary that is independent but accountable to the people only and for that reason, "any person" must be sourced from the people: natural or juristic; not from the holders of delegated legislative power or appointees of holders of delegated executive power.

31. The petitioner further states that the jurisdiction to determine a question of whether a right or fundamental freedom has been denied, violated, infringed or threatened is vested exclusively in the High Court by virtue of articles 23 and 165 of the Constitution. On the other hand, the power to

consider a petition for the removal of a Judge from office resides only with the JSC under article 168 of the Constitution.

32. The petitioner claims that the process for her removal from office commenced on flawed enterprise as the JSC did not ascertain whether the Interested Parties had *locus standi* to initiate her removal, that it did not determine whether there was a prima facie case warranting a merit response in light of the decision in Petition No. 295 of 2018 and the pending appeals before the Court of Appeal and that the JSC was mainly concerned with her expedited conveyance to a tribunal for her removal as opposed to affording her a fair hearing in the four petitions.

33. The petitioner further states that in the decision of August 13, 2020, the JSC treated recusal as an issue that is personal to the 2nd and 3rd respondents and not a collective responsibility. She avers that it cannot therefore be explained why when they were sued in their personal capacities, the 2nd and 3rd respondents resorted to the collective comfort of the Commission by having the Chief Registrar of the Judiciary swear replying affidavits on their behalf. The Petitioner avers that she does not question the impartiality of the JSC as an institution but is apprehensive of the partiality of the 2nd and 3rd respondents.

DIVISION - **THE 1ST RESPONDENT'S CASE**

34. The JSC opposed the petition through a replying affidavit sworn on September 7, 2020 by Mrs. Anne Amadi, the Chief Registrar of the Judiciary and the Secretary of the JSC.

35. The 1st respondent averred that the role of the JSC in the removal of Judges under article 168(2), (3) & (4) of the Constitution is merely limited to processing of the petitions against Judges on the basis of fair administrative action under article 47 and ensuring that only petitions that meet the *prima facie* standard proceed to a tribunal appointed under article 168(5) of the Constitution.

36. According to the JSC, in a meeting held on August 26, 2019, it was decided that given the stature of the offices of the Chief Justice and Deputy Chief Justice, any petition filed against them would be considered wholly by the full Commission and that it would be important to fast-track complaints touching on high level officers in order to avoid the perception that the officers were being shielded.

37. It was further asserted that when the appeals came up for case management conference before the Deputy Registrar of the Court of Appeal on November 12, 2019, the Petitioner applied for adjournment of the appeals on the basis that they were related to the petitions for her removal which were scheduled to be heard on December 16, 2019 before the JSC. According to the JSC, the issues before the Court of Appeal and those before it were unrelated in the sense that the proceedings before it concerned the removal of the Petitioner from office whereas the appeals related to her arrest by the DCI and her prosecution by the DPP.

38. It was the JSC's contention that the petitioner had not utilized the opportunity to be heard since she did not file any response to the petitions for her removal from office.

39. The JSC averred that during the hearing of the applications for recusal, it was resolved that the 2nd and 3rd respondents would consider the respective applications and make their individual decisions which would be adopted by the JSC. It was deposed that the 2nd and 3rd respondents determined that there was no conflict of interest and that the petitioner's allegations were unsubstantiated and based on her subjective apprehension of bias rather than perceptions of a reasonable and fair minded person.

40. According to the JSC, the 2nd respondent concluded that the petitioner had failed to demonstrate how in his official capacity as the principal legal advisor of the government, he had advised the Interested Parties in a manner exhibiting bias in relation to the petitions before the JSC. Further, that the 2nd respondent had determined that the performance of simultaneous constitutional roles cannot be

sufficient ground for recusal. It was also contended by the JSC that the 3rd respondent on his part concluded that as an independent member of the JSC, he was aware that the members determine disputes either by consensus or by majority.

41. It was asserted that the 2nd and 3rd respondents' findings were adopted as the decision of the JSC and a ruling in respect of the applications for recusal delivered on the 13th August 2020. Further, that the applications for recusal were made to the JSC and not the 2nd and 3rd respondents and therefore the decision declining recusal was by the JSC and not by the two commissioners in their personal capacities. The JSC compared the positions of the 2nd and 3rd Respondents to that of judges under article 160(5), who cannot be made parties to proceedings for decisions made in good faith.

42. The JSC similarly averred that on August 13, 2020, it was resolved that the pending preliminary objections would be heard virtually on August 31, 2020. It was also noted that the hearing did not proceed as conservatory orders were obtained in the present petition filed on August 13, 2020. The JSC therefore contended that the petitioner's claim of violation of her constitutional right to fair administrative action was premature as no decision had been made that a prima facie case had been established to warrant a recommendation to the President for her removal from office in accordance with article 168(4) of the Constitution.

43. The JSC averred that it complied with article 47 of the Constitution and the *Fair Administrative Action Act*, 2015 by supplying all the information and documents, including the Hansard Reports that the petitioner requested for, issued notices to all the parties for mention, hearing and ruling dates, notified all the parties of any and/or all its deliberations and resolutions and accorded the parties and their respective representatives opportunity to make submissions in their respective cases.

44. The JSC dismissed the Petitioner's averment that the phrase "any person" in article 168(2) of the *Constitution* does not include the Interested Parties and averred that according to article 260 of the *Constitution*, the definition of "person" includes both natural and legal persons and this includes the Interested Parties.

45. The JSC in a nutshell contended that the present Petition is an attempt to unduly delay proceedings before an independent constitutional commission by seeking to challenge its administrative decision reached on July 8, 2019 to proceed with the petitions for the removal of the Petitioner without any reasonable justification for the delay. It urges this Court to dismiss the petition with costs, asserting that the petitioner is guilty of laches.

THE 2ND & 3RD RESPONDENTS' CASE

46. The 2nd and 3rd respondents opposed the petition and relied on the replying affidavit sworn on their behalf on 7th september 2020 by the Chief Registrar of the Judiciary, Mrs. Anne Amadi. They also relied on the JSC's replying affidavit sworn by the same deponent.

47. The 2nd and 3rd respondents contended that it is peculiar that the petitioner in her prayers in the petition does not seek any relief and/or order against them. They asserted that she instead alleges, without providing cogent evidence, that the 2nd and 3rd respondents were openly biased against her. According to them, by virtue of article 171(2) (e) & (f) of the *Constitution*, as members of the JSC they are mandated to carry out the functions under article 172 of the Constitution and thus are presumed to be competent, impartial and faithful to their constitutional and statutory obligation as well as their oaths of office. They asserted that their independence as Commissioners is set out under articles 249 and 250 of the Constitution.

48. The 2nd and 3rd respondents consequently urged this Court to find that they competently, impartially and faithfully performed their functions as members of the JSC. Further, that they were wrongly joined to this petition in their personal capacities and should thus be struck off from the proceedings.

THE 1ST INTERESTED PARTY'S CASE

49. The DPP opposed the petition through grounds of opposition dated October 28, 2020. The grounds are as follows:

    (a) That the High Court has no jurisdiction to entertain a matter pending in the Court of Appeal;

    (b) That the matters sought to be canvassed in the petition are *res judicata*;

    (c) That the petition is a legal misadventure intended only to delay the hearing of the petition for the removal of the petitioner as the Deputy Chief Justice and the Vice President of the Supreme Court;

    (d) That the interim orders obtained were calculated to ensure that the Petition before the 1st respondent, the Judicial Service Commission (JSC), is not determined before reconstitution of the JSC once the Chief Justice retires;

    (e) That the petition introduces a new cause of action purely to convolute and cloud the matter;

    (f) That the petition is vexatious, frivolous and therefore an abuse of the legal process; and

    (g) That it is in the interest of justice and public interest that the orders sought in the instant petition be declined.

THE 2nd INTERESTED PARTY'S CASE

50. The DCI opposed the petition and filed a 130 paragraph replying affidavit sworn on the October 8, 2020 by Mr. Abdallah Komesha Mwatsefu, a Commissioner of Police. According to the DCI, the the Petitioner is guilty of non disclosure, is dishonest and misrepresented material facts in that she intentionally created a false and non-existent sense of urgency in order to obtain exparte conservatory orders by failing to disclose to the court the fact that the hearing that was scheduled before the JSC on August 31, 2020 at 10.00 am was not of the substantive petitions for her removal but her own preliminary objections to the petitions.

51. Further, that the petitioner spurned the opportunity to be heard on her preliminary objections by filing spurious and multiple applications and suits that undermined the hearing and determination of the JSC petitions; that she had to date failed, refused and or neglected to lodge her substantive response to the JSC petitions and is therefore the cause rather than the victim of any breaches of the law and procedure.

52. It was further contended that the petitioner had stalled the hearing of the appeals on account that there were petitions for her removal from office pending before the JSC while on the other hand, she stalled the JSC petitions on the ground that there were appeals before the Court of Appeal; that she failed to disclose to the Court of Appeal, to the JSC or to this Court that she had in Petition No. 295 of 2018 argued passionately that the first port of call for anyone aggrieved by her conduct and the correct forum to lodge any charges against her was the JSC; that she failed to disclose to this Court that in Petition No. 295 of 2018, the Court had sanctioned referral of the complaints against her to the JSC.

53. The DCI lamented that the joinder of the 2nd and 3rd respondents to this Petition was only intended to embarrass or intimidate them from carrying out their statutory and constitutional mandates as

no orders were sought against them; that her failure to enjoin the Interested Parties to this petition was a calculated act of sharp practice against them as she was seeking orders against them; that she failed to exhaust the alternative and primary dispute resolution mechanism provided under article 172 of the Constitution and the JSA; that the petitioner as commissioner of the JSC had participated in proceedings against judges and judicial officers where the rules and procedures which she now challenges had been applied; and that the petitioner is using this Petition to stop three other petitions for her removal that were not filed by the Interested Parties.

54. The DCI disclosed at length and in finer detail the evidence against the petitioner as contained in the petition for her removal before the JSC which, according to the DCI, renders the petitioner unfit to hold the office of a judge. We shall refer to that evidence later in this judgment.

55. The DCI averred that the investigations into the allegations against the petitioner were impartially conducted based on the evidence gathered and therefore her prosecution had nothing to do with her work as a judge.

56. The DCI asserted that since the JSC is yet to hear and determine the substantive petition filed by the Interested Parties or the petitioner's preliminary objection, the allegation that the Petitioner's constitutional rights have been breached is misplaced. The DCI maintained that the applications for recusal of the 2nd and 3rd respondents were heard and determined following due process.

57. It was deposed on behalf of the DCI that there was a serious breach of the law by the petitioner and that this petition does not raise any constitutional issues concerning the violation of the petitioner's rights and fundamental freedoms and that the JSC should therefore be allowed to determine the merits of the allegations against her without any further delay.

58. On the issue of whether the Interested Parties qualify as 'persons' under the Constitution, the DCI maintained that the Constitution under article 260 recognizes the DPP and the DCI as 'persons' entitled to petition the JSC to initiate the removal of the Petitioner from the office of a judge as stipulated under article 168 of the Constitution. Reference was made to article 259(3)(b) of the *Constitution* which provides that any reference in the Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time.

59. According to the DCI, the doctrine of sub judice only applies to court proceedings and not to petitions before the JSC. He averred that the JSC is not a court to determine criminal liability of the Petitioner and was only carrying out its constitutional mandate to consider allegations of serious misconduct by a senior judicial officer for removal from office.

60. The DCI asserted that the Court in Petition No. 295 of 2018 concluded that the decision of the DPP to prosecute and to direct the arrest and prosecution of the Petitioner was not in contravention of article 157(11) of the Constitution.

61. According to the DCI, the finding in Petition No. 295 of 2018 that the evidence against the Petitioner was "illegally obtained" does not bar the JSC from considering whether the same evidence gave rise to a ground for the removal of the Petitioner as a judge under article 168(1) of the Constitution and that in any case, the said finding is the subject of the DPP's appeal to the Court of Appeal. Further, that the JSC is not bound by the Evidence Act, the Civil Procedure Act and its rules and the *Criminal Procedure Code*.

THE PETITIONER'S SUBMISSIONS

62. The petitioner filed written submissions dated November 9, 2020 and rebuttal submissions dated November 27, 2020. She also filed a list and bundle of authorities dated September 7, 2020 and a supplementary list dated September 22, 2020. Counsel for the petitioner also made oral highlights to her submissions.

63. On the question of whether the JSC had jurisdiction to entertain claims against the petitioner, it was submitted that there would be no propriety in the JSC entertaining the four petitions seeking her removal or requiring a merit response to the same from her since the JSC had no jurisdiction to entertain the four petitions in the first place. It was argued that the JSC cannot usurp the appellate jurisdiction of the Court of Appeal in respect of issues arising from Petition No. 295 of 2018. Reliance was placed on the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 on the importance of jurisdiction.

64. The petitioner submitted that the matters raised in the petitions seeking her removal from office are *res judicata* in view of the Judgement in Petition No. 295 of 2018 and are equally sub-judice on account of Civil Appeal No. 298 of 2019 and Civil Appeal No. 314 of 2019 currently pending before the Court of Appeal. The petitioner relied on the cases of *William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others* [2015]eKLR; *Republic v Chairman District Alcoholic Drinks Regulation Committee & 4 others Ex-Parte Detlef Heier & another* [2013]e KLR; *Tom Mboya Odege v Edick Peter Omondi Anyanga & 2 others [2018]eKLR; Republic v Independent Electoral and Boundaries Commission & 3 others Ex parte Wavinya Ndeti* [2017]e KLR; *Kyalo Peter Kyulu v Wavinya Ndeti & 3 others*]2017] eKLR, *Kenya Bankers Association v Kenya Revenue Authority* [2019] eKLR and *Peter Kamau Ikigu v Westlands Residential Resort Limited & another* [2018] eKLR for the proposition that a matter that is *res judicata* or sub-judice deprives the court or tribunal of jurisdiction.

65. It was further submitted that the interested parties cannot pursue the prosecution of Civil Appeal No. 314 of 2019, with the ultimate goal of being permitted to prosecute the petitioner in ACC Criminal Case No. 38 of 2018 and at the same time seek the Petitioner's removal from office on the same facts before the JSC as this would amount to double jeopardy.

66. The petitioner submitted that the failure by the JSC to ascertain its jurisdiction to entertain claims brought by the Interested Parties against her is sufficient reason for this Court to intervene and quash the entire process as a trial commenced on a wrong footing is bad and cannot be made good thereafter as was held in the case of *Stanley Munga Githunguri v Republic* [1986] eKLR.

67. The petitioner further relied on the case of *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another* [2006] eKLR where the Court of Appeal underscored the right to a fair process notwithstanding any claim of public interest and expedience in combating crime, corruption or misconduct. Reliance was also placed on the case of *Republic v Chief Justice & 6 others Ex-parte Moijo Mataiya Ole Keiwua* [2010] eKLR where the High Court emphasised the need to adhere to the rules of natural justice.

68. The petitioner submitted that Article 50 of the Constitution entitles a judge a fair hearing before the JSC since the process may lead to the formation of a tribunal by the President for the removal of a judge from office under article 168(5). This argument was buttressed by the decision in *Nancy Makokha Baraza v Judicial Service Commission & 9 others* [2012] e KLR where it was held that the High Court has jurisdiction and supervisory powers over the JSC. The petitioner argued that thus far, the process before the JSC had been unconstitutional, unfair, wrong, unprocedural and illegal, and that this Court has the jurisdiction to address her grievances.

69. On the issue of lack of regulations or rules for the conduct of proceedings before the JSC, the Petitioner relied on the decision of the Tribunal Investigating the Conduct of Honourable Mr. Justice Prof. J.B. Ojwang' (hereinafter Justice Prof. J.B Ojwang Tribunal) for the submission that the failure by the JSC to make rules and subjecting a judge to a process without rules violates articles 47 and 50 of the Constitution. Further reliance was placed on the case of *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 (Interested Parties)* [2020] eKLR where the High Court found that the lack of rules impairs fair administrative action on the part of the JSC while considering petitions for removal of judges.

70. On the issue of the refusal by the 2nd and 3rd respondents to recuse themselves from deliberating on the petitions against the petitioner, it was submitted that Article 75 of the Constitution as read with section 44 of the JSA required the 2nd and 3rd respondents to avoid conflict of interest and conduct likely to demean their office and to declare any such conflict and automatically recuse themselves without any solicitation or prompting.

71. Additionally, the petitioner submitted that article 250(9) of the Constitution did not immunize members of commissions and independent offices from being sued but only shielded them from personal liability if the action upon which they are sued was done in good faith. The petitioner argued that the 2nd and 3rd respondents had not alleged or proved that they were acting in good faith in refusing to recuse themselves. Reliance was placed on the case of *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* (1978) 2 All ER 670 where it was held that a judge or a member of a quasi-judicial tribunal could be sued in the vindication of rights and fundamental freedoms. The Petitioner further relied on the case of *Homepark Caterers Limited v The Hon. The Attorney General & 3 Others* [2007] eKLR where a suit against a judge was entertained and a declaration made that the party could not get a fair hearing before that judge on account of conflict of interest.

72. It was submitted that on the crucial element of predisposition or even apparent predisposition of a judge notable from conduct, as in the case of the 3rd respondent, the Court in *Homepark Caterers Limited* (*supra*) reiterated that justice must be manifestly and undoubtedly be seen to be done. Further, the Petitioner submitted that the mere fact that the 3rd Respondent acted in a manner that appeared to promote the interests of one of the parties in the petitions before the JSC was sufficient indictment and justification for his recusal.

73. With regard to the interpretation of the phrase "any person" as used in article 168 (2) of the Constitution, the petitioner submitted that the phrase is not an ordinary English word but a technical legal term and as such ought to be interpreted as excluding a "State office" and "State officer" of which the DPP and the DCI are. Reliance was placed on *Bennion on Statutory Interpretation: A Code, 6th Edn Oliver Jones at page 892* for the statement that the interpreter's duty is to arrive at the legal meaning of the enactment, which is not necessarily the same as its grammatical meaning. It was therefore urged on behalf of the Petitioner that the term "any person" cannot be interpreted literally to include the offices of the DPP and the DCI.

74. In the petitioner's view, the term "any person" has a legal meaning interpreted as a natural or juristic person, incorporated or unincorporated, in which case, the offices of the Interested Parties are not. It was submitted that the two offices are State offices with the DPP being established under the Constitution and that of DCI under an Act of Parliament.

75. The petitioner submitted that the purpose of article 168 (2) was to limit who can initiate the removal of a judge as is manifest from the use of the word "only" in the Article.

76. It was the petitioner's submission that a purposive construction of article 168(2) and applying the purpose-and-constrained construction leads to the conclusion that the Constitution intended to exclude the Legislature and the Executive and State officers in those organs or independent office holders from initiating the removal of a judge from office. In her view, any other interpretation would not accord with the desire to have a judiciary that is independent but accountable to the people only. For that reason, she argued that "any person" must be sourced from the people: natural or juristic; not from the holders of delegated legislative power or appointees of holders of delegated executive power.

77. The petitioner further submitted that the "Absurd Result Principle" as discussed by Veronica Dougherty, *Absurdity and the Limits of Literalism: Defining theAbsurd Result Principle in Statutory Interpretation*, 44 American University Law Review 127 (1994) at page 1018 and in the case of *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR is applicable in the interpretation of the phrase "any person" as used in article 168(2) as the independence of the Judiciary from the Legislature and Executive precludes the inclusion therein of the Interested Parties.

78. The petitioner submitted that at no given time has the Interested Parties initiated the removal of a judge from office under article 168(2) of the Constitution. She buttressed this argument by referring to the cases involving Justices Nancy Baraza and Philip Tunoi which were investigated by the DCI but the removal proceedings were initiated by the JSC on its own motion.

79. During the oral hearing on the 9th and August 10, 2021, the petitioner adopted and reiterated her written submissions. Her advocates highlighted her written submissions and additionally argued that the JSC had no jurisdiction to entertain the Interested Parties' petition, the High Court having found in Petition No. 295 of 2018 that the evidence they intended to use in the criminal trial was illegally obtained in violation of the petitioner's right to privacy and the same evidence could not therefore be used against her before the JSC. She reiterated that the issue of the illegally obtained evidence was still pending before the Court of Appeal.

80. It was also submitted that actions by the Interested Parties amounted to an abuse of the legal process and further that the action by the DPP in bringing proceedings against the petitioner was contrary to the DPP's mandate as set out in article 157 of the Constitution.

81. Counsel for the petitioner stressed that the JSC must protect independence of courts and the tenure of the judges as stipulated in article 161(2) of the Constitution and must not be seen as an agent of the State. It was submitted that the JSC must stand firmly in defence of the Judiciary otherwise the entire constitutional order would collapse. Further, that the JSC and the Interested Parties were opening an avenue for the State to interfere with the independence of the Judiciary. Counsel submitted that no one in the Judiciary was above the law but the persistent attacks on the Judiciary were of great concern and were leading to the abuse of the court's and legal process.

82. Counsel submitted that in entertaining the petitions for removal of the Petitioner from office, the JSC contravened the twin doctrines of sub judice and res judicata, which amounted to abuse of the court process.

83. It was further submitted that the Interested Parties armed with the same evidence that was rejected in Petition No. 295 of 2018 proceeded to the JSC and filed a petition for her removal while at the same time lodged an appeal before the Court of Appeal.

84. It was submitted that it was ironical for the DPP to oppose the jurisdiction of this Court on the ground that the matter was pending before the Court of Appeal yet they filed a petition for the removal of the petitioner from office before the JSC despite the pendency of their own appeal. Reliance was placed on the cases of *Peter Kamau Ikigu v Westlands Residential Resort Limited & another* [2018] eKLR and

Tom Mboya Odege v Edick Peter Omondi Anyanga & 2 others [2018] eKLR on the applicability of the principle of sub judice. Further reliance was placed on the case of *Kenya Bankers Association v Kenya Revenue Authority* [2019] eKLR. It was submitted that the JSC had already made up its mind on the question of *sub judice* and *res judicata* and therefore the Petitioner could not get a fair hearing before it.

85. The petitioner's counsel submitted that her preliminary objection should have been treated as a substantive response to the claims brought against her before the JSC as the matter was sub judice the appeals before the Court of Appeal and *res judicata* Petition 295 of 2018. It was submitted that the Petitioner was not challenging the mandate of the JSC but that as was held in the case of Tom Mboya (supra), the JSC being an inferior tribunal, could not purport to entertain issues that were pending before the Court of Appeal.

86. Counsel for the petitioner further submitted that the JSC's own practice was not to entertain matters pending before courts until the court processes are concluded. It was however the petitioner's argument that in regard to the petitions against her, the JSC had contravened its own practice and procedure thereby denying her equal protection before the law as contemplated in article 27 of the Constitution.

87. On the constitutionality of the JSC's decision of July 8, 2020 directing the Petitioner to respond to the petitions for her removal, it was submitted that it was the responsibility of the JSC to determine the threshold of matters before it and to determine whether the Interested Parties had *locus standi* to present their petition before calling upon her to respond.

88. Counsel for the petitioner further submitted that the manner in which the JSC handled the petitions for her removal undermined her fundamental rights and freedoms to equality before the law as enshrined in article 27(1), fair administrative action guaranteed under article 47(1)(2) and fair hearing by an independent and impartial tribunal as enshrined in article 50(1) of the Constitution.

89. It was further submitted that the JSC was not a conveyor belt but a sieve and that the process of evaluating the complaint was important but that the JSC failed to sieve the complaint against her. This point was emphasised by reference to the case of *Nancy Makokha Baraza* (supra).

90. On the issue of lack of rules for the conduct of the business of the JSC, it was submitted that without clear and predictable rules, the right to fair administrative action and the right to fair hearing cannot be achieved. It was further argued that the right to fair administrative action and the right to fair hearing were super rights which could not be derogated from and that the JSC's decision to conduct proceedings virtually was tantamount to the JSC stating that it was not bound by articles 47 and 50(1) of the Constitution.

91. It was also submitted for the petitioner that the averments of the JSC that she had sat in several hearings without rules and was therefore estopped from challenging the process was flippant as the petitioner was appearing before the JSC as a party and not as a commissioner. Reliance was placed on the cases of *Christopher Murungaru* (*supra*) and Prof. Justice J.B. Ojwang Tribunal (*supra*). Further submission was that the lack of rules and lack of commitment by the JSC to make rules was unconstitutional and contrary to articles 25, 27, 47 and 50.

92. As to whether the Interested Parties qualify as juridical persons to initiate a petition before JSC for the removal of a judge from office, it was submitted that they were not persons within the meaning of article 168(2) of the Constitution. It was argued that the DPP was an independent office established under article 157(1) of the Constitution with the mandate to conduct criminal proceedings whereas the DCI is appointed under section 30 of the *National Police Service Act* and mandated to among others, detect, investigate and prevent crimes.

93. Counsel for the petitioner reiterated that Petition No. 295 of 2018 permanently restrained the DPP and the DCI from pursuing the petitioner using illegally obtained evidence yet they still wanted to pursue the same quashed charges before the JSC.

94. This Court was urged to quash the decision of the JSC to ask the petitioner to respond to the Interested Parties' petition as their roles and functions are clear cut in the criminal justice system.

95. It was further submitted that the DCI is *functus officio* having investigated and handed its report to the DPP and that since the prosecution as intended was quashed, only the Court of Appeal can deal further. The Court was urged to apply the ejusdem generis rule to interpret 'any person.' Counsel referred to the case of *African Spirits Ltd v ODPP* [2019] eKLR where an attempt by the DPP and DCI to prosecute a tax evasion case was quashed on the ground that they exceeded their mandates.

96. Regarding the issue of bias and conflict of interest on the part of 2nd and 3rd respondents, Counsel for the petitioner submitted that the right to a fair hearing is one of the most sacred and fundamental rights guaranteed under articles 47 and 50 of the Constitution and that the petitioner was treated differently because she is the Deputy Chief Justice of the Republic of Kenya. Further, it was submitted that the rights in the Bill of Rights were inherent and could only be limited as provided for in the Constitution under articles 24 and 25. Reference was made to article 14(1) of the *International Covenant on Civil and Political Rights (ICCPR)*, Article 7(1) of *African Charter on Peoples' and Human Rights (ACPHR)* and Article 10 of the *Universal Declaration of Human Rights (UDHR)* as codifying the common law rules of natural justice.

97. It was submitted that the conduct of the 2nd and 3rd Respondents raise reasonable apprehension and suspicion from the petitioner that there is a likelihood of a risk of miscarriage of justice. As against the 2nd respondent, it was argued that he was biased and conflicted against the petitioner because as the Chairperson of the Multi-Agency Taskforce Team comprising the Office of the DPP, the DCI and the Ethics and Anti-Corruption Commission, had deliberated upon, reviewed and recommended prosecution of the Petitioner. Further, that the 2nd respondent had also hired a foreign counsel of the rank of Queens' Counsel to prosecute her in ACC No. 38/2018 and oppose her case in Petition No. 295 of 2018.

98. Concerning the 3rd respondent, it was submitted that there is a conflict of interest demonstrated by his active interference with the prosecution of the appeals filed by the petitioner and the Interested Parties in the Court of Appeal challenging the decision in Petition No. 295 of 2018 in a bid to influence the speed with which the appeals should be determined. It was additionally contended that the petitioner's averment that she overheard the 3rd respondent as they waited for the full Commission to converge online on June 29, 2020 discussing how he had influenced the prosecution of the petitions for her removal had not been rebutted by the respondents.

99. It was therefore argued that there cannot be any other conclusion in the mind of a right thinking member of the society that the 3rd respondent's obsession with the expedition of the petitions before the JSC against the petitioner had nothing to do with expedition or efficiency but a well calculated move or motive to achieve a specific outcome not connected to the merits of the petitions.

100. It was contended that by stating in his recusal ruling that he would continue to be enthusiastic in cleaning up the mess in the Judiciary, the 3rd respondent had rendered the petitioner guilty without affording her an opportunity to prove her innocence. Reliance was placed on the case of Justice Prof. J.B. Ojwang Tribunal (*supra*) and *Homepark Caterers* (*supra*).

THE RESPONDENTS' SUBMISSIONS

101. The three respondents filed joint written submissions dated November 18, 2020. They framed the issues for determination as follows:

a) Whether the decision of the Judicial Service Commission (JSC) given on 8th July 2019 should be quashed

102. On this issue, the respondents submitted that the criminal process is separate and distinct from the administrative process of the JSC as was held in Petition No. 295 of 2018 and that therefore the petitioner's allegation that the JSC was sitting on appeal in regard to the decision in Petition No. 295 of 2018 is unmerited. It was submitted that the JSC was well within its powers to consider the petitions for the removal of the petitioner from office and conduct proceedings related thereto in accordance with article 168(2), (3) & (4) as read with article 172 of the Constitution.

b) Whether the 2nd & 3rd Respondents should recuse themselves from the proceedings before the JSC.

103. The respondents contended that the petitioner's allegation of bias against the 2nd and 3rd respondents was not backed by any cogent evidence. They further argued that the applications for recusal were made to the JSC and not to the individual Commissioners and therefore the decision declining recusal was by the JSC and not by the individual Commissioners who are cushioned from individual liability by article 250(9) of the *Constitution*.

c) Whether the JSC denied the Petitioner her right to fair administrative action

104. The respondents acknowledged that the JSC is bound by the requirements of fair administrative action under Article 47 of the Constitution when considering a petition for the removal of a judge from office, as was held in the cases of *Judicial Service Commission v Mbalu Mutava* [2015] eKLR and *Judicial Service Commission v Gladys Boss Shollei* [2014] eKLR, among others.

105. The respondents nevertheless cited the case of *Apollo Mboya* (*supra*) and submitted that Courts have variously held that the role of according fair hearing to judges with complaints of gross misconduct against them is vested in the tribunal to be appointed by the President in the event that the JSC is satisfied that such petition against a judge discloses a ground for removal.

106. In the respondent's view, the JSC had not had the opportunity to determine whether there are grounds for the removal of the petitioner and that it is therefore premature for the petitioner to claim that there was a violation of her constitutional right to fair administrative action. It was nevertheless the respondents' firm assertion that the JSC had, as averred in its replying affidavit, adhered to the constitutional and statutory principles of fair administrative action throughout the proceedings despite the petitioner's failure, neglect and/or refusal to comply with its directions given on July 8, 2019 that she responds to the petitions.

d) Whether the JSC's lack of rules to govern its process renders its actions and decisions oppressive

107. The respondents pointed out that the JSC had previously considered complaints against judges in compliance with the rules of natural justice and principles of fair administrative action notwithstanding the lack of procedural rules which are yet to be approved by the National Assembly and that the Petitioner had participated in those proceedings. It was consequently submitted that there is no impediment to disciplinary proceedings and that a constitutional process cannot be fettered by the delay of the legislature in enacting elaborate rules and procedures to govern the process.

(e) Whether the DPP and DCI can initiate the process of removal of a judge

108. It was submitted that answering this question requires a purposive interpretation of the Constitution in a manner that advances its purposes, gives effect to its intents, and illuminates its contents as has been held in the following cases: *Speaker of the Senate & another v. Attorney General & 4 Others*, Supreme Court Advisory Opinion No. 2 of 2013; *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012]e KLR; Centre for Human Rights and Awareness v. John Harun Mwau & 6 others [2012] eKLR and *in the Matter of the Kenya National Human Rights Commission*, Supreme Court Advisory Opinion Reference No. 1 of 2012.

109. The respondents further submitted that the issue before the Court is the correct interpretation to be accorded to article 168(2) of the Constitution. They argued that by dint of the definition of the term "person" in article 260, the phrase "any person" in article 168(2) should include a company, association or other body of persons whether incorporated or unincorporated. The Respondents submitted that the Court in Petition No. 295 of 2018 found that the Interested Parties have the locus to file a petition for the removal of a judge from office before the JSC. The respondents therefore stressed that once the criminal proceedings against the petitioner were quashed, the Interested Parties were free to initiate her removal from office in accordance with article 168(2) of the *Constitution*.

f) Whether the Petitioner has invoked the appropriate forum for the consideration and resolution of the dispute herein.

110. The respondents urged this court to strike out the petition for offending the concept of independence of the JSC and the doctrine of exhaustion. On the independence of the JSC, it was submitted that the JSC is, under Article 172 of the Constitution, mandated to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. The Supreme Court decision in *Re the Matter of Interim Independent Electoral Commission* [2011] eKLR was cited as explaining the importance of the independence clause under article 249(2) of the Constitution in respect of commissions and independent offices.

111. It was the respondents' assertion that the JSC being an independent commission should not be subjected to direction by this court or by any person on how to handle the petitions for removal of the petitioner from office.

112. Regarding the doctrine of exhaustion, it was submitted that as was held by the Court of Appeal in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR, it is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Further reliance was placed on *Beekey Supplies Limited & another v Attorney General & another* [2017] eKLR for the holding that courts must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed as constitutional petitions. These principles are also espoused in *Master Freighters Limited v Kenya Bureau of Standards & another* [2019] eKLR and *International Centre for Policy and Conflict & 5 others vs the Hon. Attorney General & 4 others* [2013] eKLR. Relying on the cited decisions, the respondents submitted that the petitioner has not exhausted the dispute resolution mechanism provided under articles 168(2) & (3) and 172 of the *Constitution* which mandates the JSC to receive and investigate complaints against judges.

113. The respondents further argued that the issues in contest before this court are similar to those raised by the petitioner in her objection to the petitions for her removal pending before the JSC.

114. The respondents accused the petitioner of using procedural devices to stall the appeal process before the Court of Appeal by claiming that it would interfere with or compromise the process before the JSC and later moving to this Court to stall the JSC process by obtaining *ex-parte* conservatory orders.

g) Whether this petition is a belated attempt to delay and quash the decision of 8th July 2019

115. The respondents submitted that this petition simply seeks to challenge an administrative decision reached before a constitutional commission without providing any reasonable justification for the delay and the Petitioner is therefore guilty of laches.

h) Whether the 2nd & 3rd Respondents are proper parties to this petition

116. The respondents submitted that the 2nd & 3rd respondents have been wrongly enjoined in their personal capacities and are not proper parties to these proceedings for the reason that they were performing their functions as members of the JSC and can therefore not be held liable for anything done in good faith in the performance of a function of their office as stipulated under article 250(9) of the *Constitution*. Reliance was placed on the decision in *Isaac Aluoch Polo Aluochier v Independent Electoral & Boundaries Commission (IEBC) & 7 others* [2019] eKLR for the proposition that members of constitutional commissions and holders of independent offices ought not to be sued in their individual capacity for performing their official functions.

117. The respondents urged this Court to dismiss the Petition with costs and allow the JSC to proceed and consider the petitions for removal of the Petitioner from office.

118. The respondents' counsel also made oral submissions adopting their written submissions. It was submitted that the petition ought to be struck out because its net effect was to ask this Court to interfere with the constitutional function and administrative process of the JSC to receive and consider petitions against judges as provided under article 168 of the Constitution. According to the respondents, the judgment in Petition No. 295 of 2018 only quashed the decision of the Interested Parties to bring criminal proceedings against the petitioner but did not stop them from petitioning the JSC for her removal from office.

119. It was submitted that the JSC was only acting within its constitutional mandate which had been curtailed by the petitioner's actions and that the petitioner had not utilized the avenue for resolving the dispute as she did not file her response to the petitions.

120. On the issue of laches, it was submitted that the petition was a belated attempt by the petitioner to delay and quash the petitions for her removal. Reference was made to section 9(3) of the *Law Reform Act* and Order 53(2) of *Civil Procedure Rules* which prescribe a six months' period within which an action to quash an administrative decision can be brought. It was argued that there was no justification for the delay of 12 months before instituting this petition which action would gravely compromise the efficiency of the administrative process in light of a party having unrestricted time to challenge administrative processes. It was argued that if this Court would entertain this, it would bring the processes of the rule of law and administration of justice to a halt.

121. The respondents argued that it was erroneous to sue the 2nd and 3rd respondents in their personal capacities since the JSC is an independent commission with a separate legal personality. It was stressed that the JSC is an autonomous legal person existing independent of its members as stipulated in articles 249 and 250 of the Constitution. It was further submitted that the refusal by the 2nd and 3rd respondents to recuse themselves from disciplinary proceedings before the JSC was justified as there was no merit in the application as per the reasons given in their individual rulings.

122. According to the respondents, Petition No. 295 of 2018 which terminated the criminal proceedings referred the Interested Parties to the JSC as the proper forum for filing complaints in respect of misconduct by judges including criminal conduct linked to judicial office.

123. It was submitted that in considering matters involving the conduct of judges, the standard of integrity that the JSC is required to secure is as provided in article 166(2)(c) of the *Constitution* which is that of high moral character. It was argued that this Court should be alive to the standard of Caesar'

124. According to the respondents, the JSC was not the forum in which the right to a fair hearing is domiciled but is only a forum where the right to fair administrative action takes place. The decisions in *Judicial Service Commissions v Mbalu Mutava* [2015] eKLR; *Judicial Service Commission v Gladys Boss Shollei* [2014] eKLR and *Apollo Mboya* (*supra*) were cited as affirming this position.

125. It was further submitted that this Court in determining this matter should be alive to the principle of equality and fairness before the law as envisaged under articles 10, 27 & 47 of the Constitution which provide that all state officers, and this includes the respondents, are enjoined to treat all persons equally without discrimination and that the petitioner should not get any preferential treatment.

126. The respondents maintained that the decision in Petition No. 295 of 2018 did not stop JSC but facilitated it to make an inquiry into Counts 1, 2, and 13 and any other additional grounds. It was further argued that the JSC was not sitting on appeal as alleged by the petitioner.

127. As regards the issue of illegally obtained evidence, it was submitted that the legal and statutory frameworks protecting accused persons in the manner evidence is obtained does not apply to the administrative processes of JSC but would apply to the tribunals formed on the recommendation of JSC. It was submitted additionally that even if the rules of evidence were to apply to JSC proceedings, they would only apply to exclude the specific evidence that was illegally obtained.

128. On the issue of lack of rules, it was submitted that constitutional processes cannot be hampered by absence of rules as that would defeat the purpose of the Constitution. The Respondents provided as an example, the absence of rules of procedure in cases involving articles 258 and 259 of the *Constitution* and submitted that this has not hampered the courts from interpreting the Constitution in line with those Articles. Further, that requiring an administrative process to be guided by legislative rules would subject the rules to Parliament and legislative acts thereby impeding the independence of the Judiciary.

129. On the issue of *sub judice*, it was submitted that the proceedings before the Anti-Corruption Court were terminated by the High Court and that the proceedings before the Court of Appeal are a continuation of the inquiry that was begun by the High Court on the validity of those criminal proceedings. Further, it was argued that the proceedings before the JSC are disciplinary proceedings in nature. It was therefore argued that section 193A of the *Criminal Procedure Code* which allows for concurrent criminal and civil proceedings over the same subject matter is applicable in the circumstances. Consequently, it was submitted that since there are no civil proceedings, the sub judice doctrine does not apply.

130. According to the Respondents, the ratio decidendi in Petition No. 295 of 2018 was the balancing of public interest and that no offence should go unpunished. Further, that the independence of the Judiciary should be protected. It was argued that the decision did not stop the DPP and the DCI from referring the complaints against the Petitioner to the JSC. It was argued that the High Court decision was judge made law and that the Interested Parties acted in accordance with the letter and spirit of the said judgment.

131. Counsel for the respondents urged this Court not to accept the submission that the Interested Parties cannot initiate complaints before the JSC as this would have the dire consequences of immunizing judges from criminal liability because in some circumstances, it is only the Interested Parties who could be in possession of adverse material against a judge.

132. It was further submitted that as there were serious allegations made against the petitioner, the JSC should not be stopped from making a finding whether or not the complaints against her met the threshold for her removal from office.

133. It was also submitted that the fact that the petitioner overheard the 3rd respondent talking about expediting the hearing of the petitions against her is not sufficient evidence of bias. It was further submitted that the minutes of the Multi-Agency Taskforce Team chaired by the 2nd respondent had not been produced as evidence hence the allegation that the 2nd respondent was biased was speculative.

THE 1ST INTERESTED PARTY'S SUBMISSIONS

134. The DPP framed the following issues for determination:

Whether the JSC had jurisdiction to entertain the petitions for the removal of the Petitioner from office

135. It was submitted that the jurisdiction to receive, hear and consider petitions for removal from office of a judge is vested in the JSC under articles 168(2) and 172(1)(c) of the Constitution and therefore the petitioner's allegation that the JSC acted *ultra vires* is unsustainable. According to the DPP, this position was affirmed in Petition No. 295 of 2018.

136. The DPP submitted that the petitioner acknowledged the jurisdiction of the JSC to handle petitions for removal of judges and that it was in this spirit and in compliance with the orders in Petition No. 295 of 2018 that the DPP instituted JSC Petition No. 86 of 2019. Consequently, the DPP submitted that the JSC was within its constitutional powers to direct the Petitioner to respond to the four petitions and therefore it cannot be accused of acting *ultra vires*.

Whether the Interested Parties could petition the JSC for the removal of the Petitioner from office

137. It was submitted that the process of removal of a judge from office may be initiated only by the JSC acting on its own motion or on the petition of "any person" to the JSC and that the Constitution defines a "person" to include a company, association or other body of persons whether incorporated or unincorporated. Further, that each of the Interested Parties qualify as "any person" within the meaning of article 168(2) as read with article 260 of the *Constitution*.

138. The DPP further submitted that the filing of Civil Appeal No. 314 of 2019 simultaneous with JSC Petition No. 86 of 2019 was meant to ensure that the DPP was not locked out of the appellate process which is time bound.

Whether the 2nd and 3rd Respondents were right not to recuse themselves

139. The DPP denied the allegation that the Attorney General was actively involved in the recommendation of the petitioner's prosecution in ACC No. 38 of 2018 stating that article 157 (10) of the Constitution insulates the DPP from being directed by any person in the execution of his prosecutorial powers.

140. It was further submitted that the petitioner's allegation of bias against the 2nd and 3rd respondents was unreasonable and grounded on apprehension and conjecture as it was devoid of any cogent evidence.

Reliance was placed on the case *Robert Tom Martins Kibisu v Republic* [2018] eKLR, where the Supreme Court held that in a case alleging bias, "cogent evidence" was required, and that allegations based on apprehension and conjecture were insufficient.

141. On the test of bias, the DPP referred to the case of *Philip K. Tunoi & Another v Judicial Service Commission & another* [2016] eKLR, where the Court of Appeal held inter alia that in determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

142. On the standard of bias, reliance was placed on the Supreme Court decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2013] eKLR and *Benson Kapoya Mosiro & Another v Republic* [1992] eKLR.

143. The DPP further submitted that the petitioner's allegation of bias is an afterthought and calculated to convolute the matter before the JSC in an effort to have the petitions for her removal abandoned. According to the DPP, the petitioner's preferred forum was the JSC and that as was held in *Apondi v Canuald Metal Packaging* [2005]1 EA 12, a party is at liberty to choose a forum which has jurisdiction to adjudicate its claim or choose to forego part of its claim and that such a party cannot be heard to complain about that choice after the event and it would be otherwise offensive and prejudicial to other parties and an abuse of the court process to allow litigation by instalments.

144. Counsel for the DPP submited that the failure by the petitioner to raise the allegation of bias at the beginning against the 2nd & 3rd respondents amounts to indolence because the 2nd respondent was an active participant in the proceedings before the High Court and the Court of Appeal at her invitation while the 3rd respondent had been a party in the proceedings for over a year. He urged this court not to assist the petitioner.

Whether the JSC Petition No. 86 of 2019 is Res Judicata and or Sub judice in view of the decision in Petition No. 295 of 2018

145. The DPP submitted that the proceedings giving rise to the High Court decision in Petition No. 295 of 2018 and the proceedings before the JSC are distinct and different in nature in terms of the jurisdictions and the reliefs sought. Counsel for the DPP asserted that what is before the JSC is the removal of the petitioner from office as a judge for alleged misconduct as provided for under articles 168(2) and 172(1) (c) of the *Constitution* while what was before the High Court were allegations of violations, infringement and or threat to violation and or infringement of Constitutional rights and or fundamental freedoms under articles 23 and 165. Further, that court proceedings and proceedings before the JSC have very different standards of proof.

146. According to the DPP, the proceedings before the JSC cannot amount to an appeal against the decision in Petition No. 295 of 2018 for the reason that the role of the JSC is purely administrative limited to determining whether the complaints meet the threshold for removal of a judge.

147. The DPP also submitted that the decision of the JSC can only be challenged by way of Judicial Review. Additionally, it was contended that the Petitioner failed to appeal against the finding in Petition No. 295 of 2018 that she could be subject of a petition for her removal from office before the JSC. According to the DPP, the Petitioner was therefore satisfied with the jurisdiction of JSC to handle any removal proceedings against her hence the instant proceedings are only meant to delay the matters before the JSC.

148. On whether the petitions before the JSC are *sub judice* Civil Appeal No. 298 of 2019 and Civil Appeal No. 314 of 2019, the DPP submitted that the petitions do not meet the parameters of sub judice as set out in the case of *Kenya Bankers Association v Kenya Revenue Authority* [2019]eKLR being the existence of two or more suits filed consecutively, the issue in the suits or proceedings being directly and substantially the same, the parties in the suits or proceedings being the same or litigating under the same title, and the suits pending before courts of competent jurisdiction.

Whether the Petitioner's right to fair hearing was guaranteed before the JSC

149. The DPP submitted that the JSC did not violate any constitutional or statutory requirements on fair hearing. According to the DPP, the Petitioner's allegations that the JSC delayed in supplying her with the Hansard Report and that the conduct of proceedings virtually violated her right to fair hearing is unmerited as the decisions of the JSC were always promptly communicated to her. Further, that it is now settled practice in line with Covid-19 protocols that courts hear matters virtually.

Whether the petition is an abuse of the court process

150. The DPP submitted that the petition is an abuse of the court process and that the Petitioner can only be described as a "galloping litigant" as described in the case of Vincent Kibiego Saina v Attorney General, High Court Miscellaneous Civil Application No. 839 of 1999 cited in *Tatu City Limited and another v Rosemary Wanja Mwangiru & 4 others* (2019) eKLR). The DPP further relied on the cases of *Mini Bakeries (K) Ltd v George Ondieki Nyamanga* [2014] eKLR and *Nguruman Limited v Shompole Group Ranch & Another* [2014] eKLR for the proposition that a matter should not be reopened before the High Court when there is a pending appeal before the Court of Appeal.

151. It was the DPP's submission that the petitions before the JSC raise serious triable issues touching on the integrity of the petitioner hence they should be disposed off with speed to ensure proper administration of justice in general and for the protection of the image of the Judiciary.

152. At the oral hearing, the DPP identified the following issues for this Court's determination:

    i) Jurisdiction of JSC to entertain the petitions for removal of Petitioner as a judge

    ii) Whether the DPP and the DCI can petition the JSC for removal of a judge from office

    iii) Whether the petition before JSC is *res judicata* and or sub judice.

    iv) Whether the right of the petitioner to fair hearing was or is guaranteed and whether the petition is an abuse of court process.

153. On the issue of whether the JSC can entertain the four petitions for removal of the petitioner as a judge, counsel for the DPP adopted and joined issues with the submissions of the respondents and reiterated the constitutional mandate of the JSC which includes receipt of complaints on the removal of a judge and the investigation of those complaints.

154. On the issue of recusal of the 2nd and 3rd respondents on grounds of bias and conflict of interest, it was submitted that the circumstances set out do not fit the test of bias or conflict of interest. It was further submitted that the two commissioners adequately addressed the issue of recusal in their rulings and therefore this Court cannot substitute those decisions with its own.

155. It was the DPP's further submission that the allegation of bias before the JSC was brought after inordinate delay and that the petitioner is litigating in instalments while taking everyone in circles.

156. As to whether the petition before JSC is *res judicata*, it was submitted that Petition No. 295 of 2018 is distinct from the JSC petitions since the High Court's jurisdiction is derived from article 23, while the JSC petitions were brought under articles 168 and 172 (1)(c) of the *Constitution*. Counsel further submitted that there are also different issues before the two fora in that what was before the High Court was a judicial process whereas what is before the JSC is an administrative and quasi-judicial process with different standards of proof.

157. The DPP also submitted that the Interested Parties occupy State offices as State Officers and therefore they can bring petitions as State officers and also in their capacities as private citizens.

158. Counsel for the DPP submitted that there is no dispute that is ripe for determination and intervention by this Court since the JSC is seized of the matter. It was submitted that the Court has already pronounced itself in Petition 295 of 2018 on the issues raised in this petition and therefore this petition offends the doctrine of mootness.

159. It was further submitted that the mere fact that two commissioners declined to recuse themselves does not mean that the JSC has made up its mind on the petitions for removal of the Petitioner from office. Further that, in previous proceedings involving judges, JSC remitted the complaints to its committees but that due to the gravity of the petitioner's case, the entire Commission chose to hear it.

160. Counsel for the DPP submitted that the issue of illegally obtained evidence is a matter before the Court of Appeal and that in any event, the evidence that was quashed by the High Court is not the only evidence that they intend to present before the JSC against the Petitioner.

161. It was submitted that the DPP does not participate in decision making process of the JSC in any way and that he only presented the petition against the Petitioner just like any other person. Additionally, counsel argued that the Multi-Agency Taskfore Team is a purely administrative body and not a legal body hence it has no role in advising the DPP in the exercise of his prosecutorial powers granted by article 157 of the Constitution.

THE 2ND INTERESTED PARTY'S SUBMISSIONS

162. The DCI filed submissions dated November 23, 2020. He also adopted those of the respondents and the DPP.

163. According to the DCI, the Petitioner had failed to understand that the JSC is not a court of law and therefore not bound by the evidential and procedural rules for civil and criminal matters. Reliance was placed on the case of *Nancy Makokha Baraza* (*supra*).

164. Concerning the constitutional and statutory mandate of the JSC, it was submitted that the jurisdiction of the JSC and that of a tribunal appointed by the President upon the recommendation of the JSC for the removal of a judge from office are separate and distinct. According to the DCI, the JSC can only consider a petition filed before it and the response thereto on a prima facie level, which test is neither based on a balance of probabilities nor beyond any reasonable doubt. The DCI urged this Court not to expand the jurisdiction of the JSC beyond that which is given to it by the Constitution.

165. It was the DCI's submission that the JSC is not barred from initiating separate and or parallel diciplinary or removal proceedings against a judge who has been charged with a criminal offence. The DCI relied on the holding in Petition No. 295 of 2018 that the fact that a judge or judicial officer may, in criminal offenses committed outside the scope of the judicial function, be arrested and charged directly, does not bar the JSC from initiating disciplinary or removal proceedings.

166. The DCI submitted that the petitioner is using all the available technicalities in law to delay the hearing and determination of the allegations against her so as to cling to the office of Deputy Chief Justice. The case of *Philip K. Tunoi & another v Judicial Service Commission & another* (*supra*) was cited for the holding that there is no proprietary right to hold the office of a judge under the Constitution and that a judge can be removed from office as provided by law.

167. Submitting on the admissibility of evidence before the JSC, the DCI reiterated the contention that the JSC proceedings are not governed by the Evidence Act, the Criminal Procedure Code or the constitutional safeguards in respect of the right to a fair hearing and that article 50(2) of the Constitution does not apply to proceedings before the JSC.

168. Refuting the petitioner's claim that the absence of rules to govern its proceedings makes the JSC proceedings unconstitutional, the DCI submitted that the JSC is a master of its own procedure and has a duty to act fairly. Reliance was placed on *Judicial Service Commission v Gladys Boss Shollei & another* (*supra*) where it was held that although an investigative body is under a duty to act fairly, it is a master of its own procedure and it need not hold a hearing akin to a criminal trial.

169. On the issue of the recusal of the 2nd and 3rd respondents, the DCI submitted that due to the constitutionally pre-determined composition of the members of the JSC and the need for them to provide checks and balances to each other, recusal of any member who is neither accused in a petition nor a disciplinary proceeding is not acceptable as this would interefere with the functions of the Commission. It was submitted that the membership of JSC is unlike a court situation where a judge who is asked to recuse oneself can easily be replaced by another judge.

170. Submitting on the issue of the right to fair administrative action and the right to a fair hearing under articles 47 and 50 of the Constitution, counsel for the DCI conceded that article 50 rights cannot be limited but argued that the Article is not applicable to a petition before the JSC. He however submitted that article 50 would apply to the proceedings before a tribunal appointed by the President upon the recommendation by the JSC. It was further submitted that the right to fair administrative action which is applicable to the JSC proceedings can be limited as it concerns the exercise of administrative powers by State organs and statutory bodies.

171. On the question of whether the Petitioner was accorded fair administrative action, the DCI submitted that the JSC has powers under section 47 (1) (c) of the JSA to make regulations to provide for preliminary procedures for making recommendations to the President. The DCI submitted that in the absence of such statutory procedures, the JSC has administrative discretion to adopt any fair procedure appropriate to its task.

172. Highlighting the written submissions at the oral hearing, it was submitted on behalf of the DCI that this petition is intended to scuttle the hearing of the petitions pending before the JSC for the removal of the Petitioner and that if the Petitioner had any issue with the jurisdiction of the JSC, she should have raised it in the first instance. In the view of the DCI, this petition is made on impulse and without legal basis and that the intention of the Petitioner is to ensure that no determination is made because the nature of accusations and evidence gathered against her is insurmountable if considered by an impartial tribunal.

173. According to the DCI, the Petitioner never appealed against any of the decisions made by the JSC but has instead filed this petition seeking a declaration that the decision by the JSC seeking her to respond to the petitions for her removal amounts to violation of her constitutional rights.

174. It was further contended that pursuant to Article 168(4) of the Constitution, the use of the term 'shall' makes it mandatory for JSC to consider a petition once it is received. The DCI argued that there is

no time limit for lodging a complaint before JSC and that even courts cannot establish timelines for lodging complaints before the JSC.

175. On the petitioner's claim that the petitions before the JSC are res judicata and sub judice, it was submitted that the issue of *res judicata* and sub judice is not ripe for determination before this Court for the reason that it ought to have been raised and exhausted before the JSC in the first instance.

176. On the petitioner's claim that the lack of rules of procedure before the JSC violated her right to fair administrative action, it was submitted that there is no evidence that the lack of rules by JSC renders the decisions or procedures of JSC oppressive. Further, that the JSC had previously handled petitions before it without the rules and that the petitioner who is a member of the JSC had never found it necessary to require those rules in other cases.

177. On the petitioner's allegation of bias and conflict of interest against the 2nd and 3rd respondents, it was contended that the architecture of JSC was to cater for different interests and therefore the JSA did not factor in a provision for recusal or stepping aside of a member as the members must act as one through a majority.

178. On the definition of the word 'person' within the meaning of the Constitution, it was submitted that the phrase "any person" is a loaded term and it would be a monstrosity to hold that the phrase "any person" excludes or does not include DPP and DCI and further, that this Court will have to perform semantic acrobatics to redefine the words which are clearly defined by the Constitution. It was further submitted that article 259 (3)(b) of the Constitution removed all the barriers thereby allowing anyone to approach the court. He urged this Court to advance the rule of law by opening doors for JSC to receive petitions from any person as this will contribute to good governance and ensure those who act with impunity are brought to account.

179. It was further contended that if this Court holds that the DPP and the DCI are not "persons" as envisaged in article 168(2) of the Constitution, then article 20(1) which provides that the Bill of Rights applied to all law and binds all State organs and all persons is not applicable to them.

180. The DCI further submitted that the rights to fair hearing and fair trial as guaranteed by article 50(2) do not apply to proceedings before the JSC and that these rights only apply to a hearing or proceeding before a court of law which is tasked with making a finding of fact which is distinguishable from the proceedings before the JSC which does not conduct criminal proceedings or make decisions on a finding of fact.

181. It was submitted that the JSC is not bound by the procedure set out under the Civil Procedure Act or the Criminal Procedure Code or the Evidence Act hence the doctrines of *res judicata* and *sub judice* are not applicable to its proceedings.

182. On the use of illegally obtained evidence, counsel submitted that two of the petitions before the JSC were not filed by the DPP and the DCI. Further, that the proceedings before the Anti Corruption Court and the JSC have not reached full disclosure stage hence the legality or otherwise of evidence to be relied on is not before this Court. It was argued that this matter will be decided by a tribunal and assuming the evidence was illegally obtained, that alone cannot stop the trial in view of the provisions of article 50(4) of the Constitution.

183. Counsel submitted that the *Tom Mboya* case is inapplicable and distinguishable from the circumstances of the Petitioner for the reason that there were two dispute resolution mechanisms applied in that case. According to the DCI, the Court of Appeal is a judicial body while JSC is a body exercising a different mandate. Further, that the proceedings before the JSC are not prohibited by law as it is the JSC's mandate to determine if a *prima facie* case has been established against a judge. Counsel

further ssubmitted that the petitions before the JSC are not an attack on the Judiciary but are aimed at defending and strenghtening the institution.

THE PETITIONER'S REBUTTAL SUBMISSIONS

184. In response to the respondents' and Interested Parties' submissions, the petitioner's counsel submitted and maintained that the respondents and the Interested Parties proceeded on the erroneous premise, either deliberately or out of ignorance, that the Court in Petition No. 295 of 2018 directed the DPP to lodge its complaint before the JSC. The Petitioner submitted that the High Court ruled that the DPP ought to have lodged a complaint against the petitioner before the JSC in the first instance instead of instituting criminal proceedings against her, which was not the same as telling the DPP to file his complaint before the JSC.

185. The petitioner submitted that the DPP, having opted for criminal proceedings, is precluded from pursuing the same issues based on the same facts before the JSC, before exhausting the remedies provided for the course of action originally chosen. To this end, the petitioner argued that as there is an ongoing appeal process, that process must be allowed to continue to its logical conclusion and therefore the petitions for her removal lodged before the JSC are a collateral attack on the judgement in Petition No. 295 of 2018. According to the petitioner, the actions of the DPP and the DCI offend the doctrine of exhaustion.

186. It was the petitioner's further submission that contrary to the respondents' and Interested Parties' assertions that the Deputy Registrar stayed the appeals before the Court of Appeal, the appeals were put in abeyance with the acquiescence of the advocates for the petitioner and the interested parties in light of the proceedings pending the JSC. Further, the petitioner submitted that she had already raised a preliminary objection before the JSC, which she expected would clear the way for the hearing of the appeals.

187. The petitioner rejected the argument by the DPP that she was asking this Court to determine the preliminary objection to the petitions before the JSC and submitted that where it is manifestly clear that she is not being given and will not receive a square deal before the JSC, this Court has jurisdiction to intervene and halt the proceedings before the JSC. Reliance was placed on the case of *Jared Benson Kangwana v Attorney General*, Nairobi High Court Misc. Application No. 446 of 1995 (Unreported) (hereinafter "*Kangwana* case") where the Court held that abuse of process is not limited to criminal prosecutions only but can also occur in quasi-judicial proceedings.

188. The petitioner submitted that the DPP and the DCI are the authors and victims of their own schemes and folly as their attempt to straddle and ride two horses simultaneously has undoubtedly precipitated the instant petition which the petitioner is entitled to file under article 22 of the *Constitution*.

189. In her rejoinder to the respondents' and Interested Parties' claim that this Court lacks jurisdiction to determine the petition, the petitioner submitted that pursuant to Article 165(3)(b), (d)(ii), (6) & (7) of the *Constitution* this Court has jurisdiction to determine all the issues before it. Reliance was placed on the case of *George Joshua Okungu & another v Chief Magistrate's Anti-Corruption Court at Nairobi & another* [2014] eKLR in support of the argument that this Court has jurisdiction to interfere with proceedings pending before a subordinate court or tribunal where abuse of process is established.

190. The petitioner submitted that the conduct of the DPP and the DCI in insisting that they can pursue proceedings before the JSC while they have a pending appeal arising out of the same facts betrays their ulterior motive against the petitioner and as such the Court must intervene in favour of the petitioner. She cited the case of *Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & another*

[2002]eKLR where the court held *inter alia* that when the predominant purpose is to achieve an ulterior motive, regardless of the proceedings, the Court must step in and halt the action.

191. The petitioner rejected the tag that she was a galloping litigant and emphasized that she is a victim being dragged through different scenes by the galloping Interested Parties and can only react to the galloping horses in a bid to stop them. Further, that every step taken by the petitioner is and has been a valid reaction to the interested parties' and the respondents' actions.

192. The petitioner submitted that an order of prohibition is available to her and relied on the Court of Appeal decision in *Joram Mwenda Guantai v The Chief Magistrate*, Nairobi [2007] eKLR where it was held that an order of prohibition is appropriate to stop the abuse of the court process. She further argued and relied on the case of *Republic v Judicial Commission of Inquiry Into the Goldenberg Affair & 3 others Ex Parte Mwalulu & 8 others* [2004] eKLR that where a process is improper, the High Court has power to interfere with the decision making process of the Commission in order to uphold the rule of law.

193. The petitioner rejected the respondents' submission that she was running away from the JSC proceedings and argued that she had submitted herself to the jurisdiction of the JSC but that at every turn, it had become increasingly clear that the process was a sham and that the JSC did not intend to give her a fair hearing as manifested by the conduct of the 2nd and 3rd respondents; the lack of locus of the Interested Parties to lodge petitions before JSC for her removal from office and their conduct; the continuation of a multiplicity of causes; and the Interested Parties' failure to exhaust the appeal process.

194. It was submitted by the petitioner that the respondents' claim that the Report of the Justice Prof J. B. Ojwang Tribunal is irrelevant to this case, was erroneous and disingenuous since the Tribunal assailed the conduct of the JSC for the manner in which it arrived at the decision that led to the constitution of the Tribunal by the President. Further, that the Tribunal found that the JSC was bound by the provisions of article 50 of the Constitution in its deliberations.

ANALYSIS AND DETERMINATION

195. We have carefully considered the petition, the replies thereto and the rival submissions by the parties' counsel. We find that the main issues for our determination are whether this Court has jurisdiction to hear and determine the instant petition and whether the JSC had jurisdiction to entertain the petitions for the removal of the petitioner from office. In our view, any other issue and ancillary question stem from the identified issues and we shall resolve them as we discuss those two main issues.

196. The petitioner instituted the instant petition upon being aggrieved by the entire manner in which the JSC had handled the petitions filed against her seeking her removal from office of judge. She in particular alleges wanton disregard of her rights to equal treatment before the law, fair administrative action and fair hearing enshrined in articles 27, 47 and 50 of the Constitution.

197. The petitioner questions the impartiality of the 2nd and 3rd respondents. She asserts that the JSC lacks jurisdiction to consider the petitions against her in view of the pending appeals before the Court of Appeal over the same subject matter. In addition, she claims that the petitions before the JSC are *res judicata* Petition No. 295 of 2018, *sub judice* the two appeals pending before the Court of Appeal and violate the doctrine of exhaustion. The petitioner contends that the decision of the JSC to conduct virtual proceedings to the petitions for her removal from office violated her right to fair hearing. She further contends that the Interested Parties herein had no locus standi to petition the JSC for her removal from office.

198. According to the petitioner, the use of evidence already declared in Petition No. 295 of 2018 to have been illegally obtained and the lack of rules of procedure for proceedings before the JSC violates her constitutional rights. She therefore urged this Court to grant her the prayers sought in the petition.

199. On their part, the respondents contended that this Court lacks jurisdiction to entertain the Petitioner's case for the reasons that the petition is *sub judice* since the High Court has no jurisdiction to entertain matters pending before the Court of Appeal; the petition is res judicata Petition No. 295 of 2018; the JSC is the only constitutionally mandated body that can entertain a petition for the removal of a judge from office; this Court is *functus officio* because the issues raised in this petition were heard and determined in Petition No. 295 of 2018; and the petition violates the doctrines of exhaustion of remedies, ripeness and mootness.

200. The respondents urged that the petition should be struck out in limine for offending the concept of independence of the JSC. They further argued that the contested issues before this Court are similar to those raised by the petitioner in her preliminary objection to the petitions for her removal pending before the JSC and that this petition is therefore premature. Further, that the 2nd and 3rd respondents were wrongly enjoined in this petition because they were exercising their constitutional mandate as commissioners of the JSC. They accuse the petitioner of laches claiming that this petition was filed on impulse and that the allegations of bias were brought late.

201. In their vehement opposition to the petition, the DPP and the DCI contended that this Court has no jurisdiction to entertain a matter pending before the Court of Appeal; that the present petition is neither a constitutional case nor does it involve determination of a constitutional issue as the issues raised will only require the Court to examine the factual basis of the law on alleged bias, sub-judice and *res-judicata*; that they have locus standi to petition the JSC for the removal of a judge from office; that the Petitioner deliberately failed to join them in the petition yet she sought and obtained adverse exparte orders against them; that the evidence which was found to have been illegally obtained can still be used against the petitioner in proceedings before the JSC which are administrative in nature; that not all the evidence they intend to rely on against the petitioner before the JSC has been unveiled; that apart from their petition, there are other petitions against the petitioner seeking her removal from office; and that the 2nd respondent does not control or direct the DPP in the execution of his prosecutorial powers.

202. It is consequently the respondents' and the interested parties' case that the petitioner is a galloping litigant who is desirous of not having the petitions for her removal before the JSC heard and that this petition is therefore without merit. They urged the court to dismiss it with costs.

Jurisdiction of this Court

203. In response to the submissions by the respondents and the Interested Parties that this Court has no jurisdiction to entertain her petition, the petitioner submitted that this Court derives its jurisdiction from articles 165(3)(b) & (d)(ii), (6) & (7) of the *Constitution* and that all the issues she has raised in this petition fall squarely within this Court's jurisdiction. She supported her argument by referring to the case of *George Joshua Okungu & Another v Chief Magistrate's Anti-Corruption Court at Nairobi & Another* [2014] eKLR.

204. The petitioner further argued that in line with the holding in *Jared Benson Kangwana* (*supra*), this Court has jurisdiction to stop abuse of the court process and must intervene and halt the proceedings which are pending before the JSC.

205. Jurisdiction is defined in *Halsbury's Laws of England* *(4th Ed.) Vol. 9* as:

> "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

206. The *Black's Law Dictionary, 9th Edition,* defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.

207. In *Words and Phrases Legally Defined* *Vol. 3*, John Beecroft Saunders defines jurisdiction as follows:

> "By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

208. Jurisdiction is so fundamental to all judicial and administrative or quasi-judicial proceedings that a court of law or tribunal acting without jurisdiction is proceeding in vain and whatever it does is a nullity. Therefore, before any court of law embarks on determining any substantive issue raised in judicial proceedings, it must first determine whether it has the jurisdiction to entertain the proceedings before it. In *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 Nyarangi JA expressed himself on the issue of jurisdiction as follows:

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings..."

209. Jurisdiction can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdullahi Abdi & another* [2018] eKLR stated as follows:

> "Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows:
>
> 1) ...
>
> 2) The jurisdiction either exists or does not ab initio ...
>
> 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
>
> 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal."

210. Therefore, jurisdiction is the power or authority vested in a court to hear and determine disputes presented before it. That power may be conferred by the Constitution, statute or both. It may be

limited in like manner. This position was affirmed by the Supreme Court in *Re the Matter of Interim Independent Electoral Commission* [2011] eKLR as follows:

> "Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent…Jurisdiction flows from the law, and the recipient Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours…"

211. Similarly, in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court stated that:

> "A Court's jurisdiction flows from either the Constitution, or legislation or both. Thus a court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…where the constitution exhaustively provides for the jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation…"

212. The importance of jurisdiction was considered by the Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR where it was stated that:

> "So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in *barren cul de sac*. Courts, like nature, must not act and must not sit in vain."

213. The jurisdiction of this Court is derived from article 165(3)(d) of the Constitution which empowers this Court to hear any question respecting the interpretation of the Constitution, including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. In addition, article 23 specifically grants this Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threats to, a right or fundamental freedom in the Bill of Rights. It is therefore clear from the stated provisions that the mandate of this Court includes the interpretation of the Constitution and the determination of any question as to whether anything purportedly done under the authority of the Constitution or statute is in compliance with the Constitution.

214. Article 165(6) vests the High Court with supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. Additionally, under article 165(7), the High Court in the exercise of its supervisory jurisdiction is empowered to call for the record of any proceedings before such a body, authority or tribunal and make any orders or give any directions it considers appropriate to ensure the proper administration of justice.

215. There is sufficient case law which confirms that in exercising its authority under article 168(2), the JSC is carrying out an administrative function which is a quasi-judicial function and thus subject to this court's supervisory jurisdiction. We are fortified on this point by the decision of the Court of Appeal

(per E. M. Githinji JA) in *[Judicial Service Commission v Mbalu Mutava & another]* [2015] eKLR where it was held that:

> "(28) The act by JSC of initiating the process of removal of a judge, either on its own motion through information or through investigation; the act of receiving the petition from a member of the public, the consideration of the petition, the process by which it satisfies itself whether or not the petition discloses a ground for removal, the determination of that question; the act of formulating a petition and the recommendation, and the act of sending the petition to the President are indistinguishably a series of administrative actions which adversely affects a judge forming a single whole – an administrative action within the meaning of article 47(1).
>
> It is true that it was performing a constitutional mandate but in performing that mandate JSC was subject to the Constitution and, in this case, subject to 1st respondent's constitutional right to fair administrative action. I have no doubt that on this aspect the High Court made a correct finding."

216. Earlier, in *[Nancy Makokha Baraza]* (*supra*) it was affirmed that in considering a petition for the removal of a judge from office, the JSC has a duty to ensure compliance with the Constitution and where it fails to do so, this Court is mandated to step in and steady the ship. This is what the Court stated:

> "71. ... If JSC, a State organ does something or omits to do something under the Constitution, and which contravenes that Constitution, that act or omission, if proved before the High Court, shall be invalid. If the process of removal of a judge as instigated or commenced by the JSC is unconstitutional, wrong, unprocedural or illegal, then this Court has the jurisdiction to address the grievances of the affected party. This court has jurisdiction to give a generous and sustainable full measure of the fundamental rights and freedoms. The question before us is whether JSC has interpreted its Constitutional mandate in a patently wrong and unreasonable fashion to require the intervention and proper guidance of this court..."

217. A perusal of the petitioner's pleadings clearly show that she complains about the exercise of the JSC's constitutional mandate in regard to the petitions for her removal from office. She poses the questions whether the JSC has the mandate to entertain the complaints against her in light of the determinations in Petition No. 295 of 2018 and whether the DPP and the DCI have the legal capacity to petition the JSC for the removal of a judge from office. These issues, in our view, raise valid and live constitutional questions which squarely fall within the jurisdiction of this Court.

218. There is the argument by the respondents and the Interested Parties that this Court should not entertain the matter as doing so would amount to handling a matter pending before the Court of Appeal and that therefore this petition is sub judice the two appeals. A brief disposal of this issue is that Petition No. 295 of 2018 related to the criminal charges brought against the Petitioner and the two appeals pending before the Court of Appeal are a continuation of that dispute. This petition in our view, is totally different as it raises issues relating to the jurisdiction of the JSC to adjudicate over the petitions pending before it seeking the removal of the Petitioner from office. This petition also challenges the manner in which the said petitions are being handled by the JSC. All these issues are novel and reside within the jurisdiction of this Court. By this Court assuming jurisdiction to entertain the petition, it is not usurping the jurisdiction of the JSC under article168(2) to deal with complaints

against judges. We therefore find and hold that we are properly seized of the jurisdiction to hear and determine this petition and find no merit in the objection raised to this Court's jurisdiction by the respondents and Interested Parties.

219. The above finding leads us to dismiss the arguments by the respondents and interested parties that the issues raised in the petition are not ripe for determination by this court; that the issues raised in the petition are moot; and that there is no proper petition before this court. In short, we find and hold that we have the requisite jurisdiction to delve into the substance and merits of the petitioner's case.

The Doctrine of Exhaustion of Remedies

220. Still on the issue of jurisdiction, the respondents and Interested Parties also questioned the authority of this Court to entertain the petition on the ground that it offends the exhaustion of remedies doctrine. They contended that the Petitioner has not utilized the opportunity to be heard by the JSC over her preliminary objection to its jurisdiction to entertain the petitions for her removal from office. In their view, the petitioner has consequently deprived the JSC of its constitutional mandate as espoused in articles 168(2) and 172 of the Constitution. They argued that this Court is precluded by law from hearing the petition as the JSC is the body that is constitutionally mandated to hear and determine all such matters relating to the disciplining of judges.

221. In rebuttal, the petitioner submitted that since the DPP opted to charge her with a criminal offence, which action was faulted by the High Court in Petition No. 295 of 2018, this precluded him from pursuing a simultaneous or concurrent cause of action based on the same facts before the JSC as he ought to have exhausted the remedy (appeal) provided by the cause of action that he had chosen. In the petitioner's view, therefore, it is the DPP and the DCI who should first and foremost exhaust the remedy of appeal before seeking her removal from office before the JSC.

222. From the rival positions of the parties on this point, it is apparent that the respondents and the Interested Parties fault the petitioner for failing to exhaust the alternative procedure provided under the Constitution dealing with the process of removal of a judge from office, which procedure is the proceedings before the JSC. The petitioner, on the other hand, is accusing the respondents and the Interested Parties of failing to exhaust the appellate process challenging the decision in Petition No. 295 of 2018, which is pending before the Court of Appeal.

223. Since this issue is cross-cutting and applies to both the jurisdiction of this Court as well the jurisdiction of the JSC, we propose to deal with the issue in its entirety at this stage.

224. The doctrine of exhaustion of remedies has been considered by Kenyan courts and found to be a sound legal principle. The doctrine requires that the constitutional and statutory avenues provided for resolution of disputes should first be resorted to before invoking court action. In *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR it was held that:

> " This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
>
> > "Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.""

225. That the principle has its foundation in the Constitution was aptly stated by the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR as follows:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with Article 159 of the constitution which commands courts to encourage alternative means of dispute resolution."

226. Besides the constitutional anchorage of the doctrine of exhaustion of remedies as espoused in article 159(2), the doctrine is further given statutory recognition by section 9(1), (2), (3) & (4) of the *Fair Administrative Action Act*, 2015 which stipulates that before approaching the courts for judicial review of any administrative action, an applicant must first exhaust the available internal dispute resolution mechanisms. However, the Court may, on application, in exceptional circumstances exempt a party from resorting to alternative internal dispute resolution mechanism.

227. In *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR the Court of Appeal stated that:

> "Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime." [emphasis added]

228. Again, the Court of Appeal in *Kenya Revenue Authority & 2 others v Darasa Investments Ltd* [2018] eKLR stated as follows when it posed the following question:

> "What then, is the consequence, if any, of the respondent's failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial Review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017]eKLR and Kenya Revenue Authority & 5 others v Keroche Industries Limited CA No. 2 of 2008. Perhaps that is why the legislature at section 9(4) of the *Fair Administrative Action Act* stipulates that:
>
> > "Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.""

229. In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, the Court, citing several other decisions observed that:

> "52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion

doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the Constitution and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

> " 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
>
> > "Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."
> >
> > "While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthiga Kabiru & 2 others –vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:
> >
> > > "It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte applicants argue that this accords with article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

230. We have carefully considered the arguments by the respondents and the Interested Parties that by filing this petition, the petitioner has violated the doctrine of exhaustion of alternative remedies. In our understanding, fortified by the above cited cases and the provisions of article 159 (2) (d) of the Constitution and section 9(4) of the *Fair Administrative Action Act*, the doctrine is applicable where the Constitution or statute provides an effective, sufficient and adequate alternative dispute resolution mechanism to a person who is aggrieved by the decision of an administrator or an administrative body.

231. In the case before us, the respondents and the Interested Parties contend that the Petitioner should await the conclusion of the process before the JSC before she can approach this Court on the alleged violation of her constitutional rights and fundamental freedoms. We find this argument not convincing for two reasons: first, there is no alternative dispute resolution mechanism provided for a judge who is facing a petition for removal and who is aggrieved by any of the processes of the JSC. Secondly, any person aggrieved by an administrative action deemed to be violating or threatening to violate their constitutional rights in ongoing proceedings is entitled to appeal against the decision or seek a remedy from this Court and such a person cannot be told to wait for the conclusion of the administrative process before approaching the Court. This position is fortified by the statement of the Court in *Stanley Munga Githunguri v Republic* [1986] eKLR that:

> "Mr Chunga argued that Prohibition ought not to be granted where alternative remedies are available to an applicant. He said the applicant would be entitled to defend himself. He referred to appeal after conviction, bail pending appeal, review by the High Court. Mr Chunga must have been speaking lightly for the impracticability of his proposition is brightly apparent. What kind of a mad man who has an opportunity to apply for Prohibition would opt for a trial, the risk of conviction and imprisonment."

232. We are guided by the above authority that the petitioner was not expected to undergo the JSC process for her removal from office and thereafter approach the Court after a decision had been made. In our view, it was within her constitutional right to seek the Court's intervention before the conclusion of the process, where she felt that her rights were denied, violated or infringed or were threatened.

233. Indeed, as shall be demonstrated elsewhere in this judgement, there is merit in the submission by the Petitioner that it is actually the Interested Parties who ought to have exhausted the already pending appellate process challenging the decision in Petition No. 295 of 2018, instead of approaching the JSC, the way they did. In our view, the argument that the appellate process is time bound cannot be an excuse for straddling two horses at the same time since initiating the process of removal of a judge by the JSC or by any member of the public is not time bound.

Jurisdiction of the JSC

234. The petitioner's case is that there would be no propriety in the JSC entertaining the petitions for her removal or requiring a merit response to the same from her as the JSC has no jurisdiction to entertain them in the first instance. It is the petitioner's submission that the matters raised in the petitions seeking her removal are *res judicata* as they were heard and determined in the Petition No. 295 of 2018 which quashed the charges brought against her, on account that the evidence had been illegally obtained. Further, that the petitions before the JSC are equally *sub-judice* Civil Appeals Nos. 298 of 2019 and 314 of 2019 which are pending hearing and determination before the Court of Appeal. The Petitioner further asserts that by entertaining the petitions for her removal from office, the JSC was sitting on

appeal over the decision in Petition No 295 of 2018. She relied on the *locus classicus* case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (supra) where the Court held authoritatively that:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

235. The petitioner further submitted that the JSC abdicated its mandate by failing to ascertain whether the DPP and the DCI had the *locus standi* to file petitions for the removal of a judge from office. It is her case that the two do not qualify to be the "any person" envisaged by article 168(2) of the Constitution and therefore they cannot file a petition for the removal of a judge from office. It is the petitioner's case that owing to the lack of jurisdiction by the JSC, this Court has constitutional authority to intervene, halt and quash the entire process commenced before the JSC.

236. In response, the respondents submitted that the proceedings before the JSC are disciplinary and not civil, therefore, the doctrine of sub judice does not apply in the circumstances. Further, that section 193A of the Criminal Procedure Code allows concurrent criminal and civil proceedings over the same subject matter. They argued that in any case, it is the High Court in Petition No. 295 of 2018 that referred the Interested Parties to the JSC and therefore the JSC cannot be accused of sitting on appeal against that decision as alleged by the petitioner.

237. On his part, the DPP submitted that the petitioner's claim that the petitions before the JSC are sub judice Civil Appeals Nos. 298 of 2019 and 314 of 2019 is unfounded as the proceedings before the JSC are disciplinary, whereas those before the Court of Appeal are civil in nature.

238. The DCI's response is that the proceedings giving rise to the decision in Petition No. 295 of 2018 and the proceedings before the JSC are distinct and different in nature in terms of the jurisdictions and the reliefs sought and that the principle of *sub judice* does not therefore apply. According to the DCI, the doctrine of *sub judice* only applies to court proceedings and not to petitions before the JSC and that the JSC is not sitting as a court to determine criminal liability of the petitioner but is carrying out its constitutional mandate to consider allegations of serious misconduct by a senior judicial officer. According to the DPP and the DCI, the JSC is the only body clothed with the constitutional mandate to receive and process complaints for the removal of a judge from office.

239. From the rival averments and submissions, we discern that a question of the jurisdiction of the JSC to entertain the petitions filed against the petitioner has arisen. In our view, the issues arising from this question are: whether the petitions before the JSC are res judicata as well as sub judice and whether by entertaining the petitions, the JSC would be sitting on appeal over the judgment of the High Court in Petition No. 295 of 2018. Also arising is the question whether the DPP and the DCI have the locus standi to lodge petitions for removal of a judge from office.

Res Judicata

240. The principle of *res judicata* is provided for in section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya) as follows:

> "7. Res judicata No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former

suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

241. By virtue of the 4th explanation, the principle of res judicata covers any issue which could or ought to have been raised or made a ground of attack or defence in the previous suit. In essence therefore, if a litigant does not raise an issue which ought to have been raised in a decided matter involving the same parties and the same issues, then the principle of constructive res judicata would be invoked to stop the court from entertaining such a matter.

242. The Court of Appeal in *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR affirmed the applicability of constructive *res judicata* in Kenya as follows:

> " Therefore, there are instances where the public interest is given prominence over parties' interests in a suit. Such an instance, in our view, would be like in the instant suit where great burden of litigation has been placed upon a party necessitating such a party to seek protection from Court. The Supreme Court of India in the case of State of UP v Nawab Hussain, AIR 1977 SC 1680, considered the doctrine of constructive res judicata and delivered itself thus:
>
> > "This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon.
>
> But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and

to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could; have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them. This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata, by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle.""

243. The Court of Appeal concluded that:

> "To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive *res judicata* is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer's accounts, has been or could have been raised before the High Court in the previous suits."

244. The matter before us is a constitutional petition and the question whether the doctrine of *res judicata* is applicable to such matters was addressed by the Supreme Court in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR (Muiri Coffee case) as follows:

> "(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of *res judicata* is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of *res judicata*, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment."

245. The Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR reaffirmed its decision in the Muiri Coffee case that the doctrine of *res judicata* was indeed available as a defence in constitutional litigation by stating that:

> "(81) We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively…
>
> (82) If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the Constitution in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further article 50 on right to fair hearing and article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of *res judicata*, they only need to invoke some constitutional provision or other."

246. The Supreme Court in the above case however cautioned that although the doctrine of res judicata lends itself to the promotion of the orderly administration of justice, it should not be invoked where there is potential for substantial injustice arising from the failure of the court to hear a constitutional matter or issue on its merits. The Court added that before a court can arrive at a conclusion that a matter is res judicata, it must examine the entirety of the circumstances as well as address the factors for and against exercise of such discretionary power.

247. Earlier on, in *Accredo AG & 3 others v Steffano Ucceli & another* [2019] eKLR, the Court of Appeal had acknowledged the need to apply the doctrine of *res judicata* in constitutional litigation in the rarest and clearest of cases.

248. In our considered opinion, whenever the defence of res judicata is raised, the Court is enjoined to examine the decision said to have settled the issues in question, the parties' pleadings, and the entire record of the previous case and compare it with the matter before it in order to ascertain whether the parties are the same or litigating under the same title, the issues under consideration are similar and the issues have been determined with finality by a court of competent jurisdiction. This in essence meets the test laid by the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR as follows:

> "Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
>
> (a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

249. The respondents and the Interested Parties contend that the doctrine of *res judicata* is not applicable in the circumstances of this case for the reason that the proceedings before the JSC are disciplinary in nature whereas the Petition No. 295 of 2018 was a civil dispute. The answer to this issue will be provided after the principle of sub judice is discussed below.

Sub Judice

250. Akin to the doctrine of *res judicata*, the petitioner further asserted that the petitions before the JSC are equally *sub judice* on account of the pending appeals arising from the judgment in Petition No. 295 of 2018. It was submitted for the petitioner that the violation of the doctrine of *sub judice* by the respondents and the Interested Parties amounted to abuse of the court process. It was argued that this Court is required to determine whether the Court of Appeal might deal with the same issues as those pending before the JSC, and if the answer is in the affirmative, then it must tell the JSC to down its tools and do no more. The Petitioner cited the case of *Kenya Bankers Association v Kenya Revenue Authority* [2019] eKLR which restated the purpose of the sub judice principle and submitted that the JSC had already assumed jurisdiction and as such she was not guaranteed a fair hearing.

251. Section 5 of the Civil Procedure Act provides that any court shall, subject to the provisions of the Act, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. This provision therefore recognizes that not all claims are available for trial by a particular court as a court may be "expressly" or "impliedly barred" from hearing certain claims.

252. The doctrine of sub judice is legislated in section 6 of the Civil Procedure Act in prohibitory mandatory terms as follows:

> " No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
>
> Explanation. —The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court."

253. This principle of *sub judice* is intended to cure the mischief of having more than one case in respect of the same dispute between the same parties being handled by different courts, notwithstanding that the courts may have jurisdiction over the matter. When two suits arising out of the same issues between the same parties are brought before the courts, there is bound to be wastage of resources through unnecessary litigation.

254. The concept of *sub judice* requires that where an issue is pending in court between the same parties, any other court is barred from trying that issue so long as the first suit is ongoing. In such a situation, the subsequent suit should be stayed and this can be done at any stage of the proceedings.

255. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR reiterated the elements and the purpose of *sub judice* by stating that:

> " (67) ...The purpose of the *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res *sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

256. It is thus appropriate to conclude that the principle of sub judice is to prevent courts of competent jurisdiction from simultaneously adjudicating matters in respect of the same cause of action involving the same parties. This is to restrict the parties to one litigation so as to avoid the possibility of contradictory verdicts by different courts in respect of the same subject matter and is aimed at preventing a multiplicity of proceedings as well as the tendency by litigants to file claims at their preferred forum.

257. In the case of *Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga* [2013] eKLR it was stated that it is not the form in which the suit is framed that determines whether it is *sub judice*, rather it is the substance of the suit as gleaned from the pleadings of the parties, and that, there can be no justification in having two cases being heard parallel to each other.

258. Having stated the law, we now proceed to examine the evidence placed before us in order to determine whether the principles of *res judicata* and sub judice are applicable in the circumstances of this case.

The decision of the Court in Petition No. 295 of 2018

259. According to petitioner, there is a high and probable risk that if the JSC is allowed to proceed and consider the complaints against her, it may end up arriving at a decision that could conflict with the outcome of the two appeals pending before the Court of Appeal, arising from Petition No. 295 of 2018.

260. The respondents are however of the view that the petitioner has not satisfied the requirements for the invocation of the defence of *res judicata* and sub judice in the circumstances of this case. They also argue that the matters before the JSC are not an appeal against the decision in Petition No. 295 of 2018 and that neither can those matters interfere with the appeals before the Court of Appeal. According to the respondents, Petition No 295 of 2018 was geared at stopping the prosecution of the petitioner in the Anti-Corruption Court while the appeals before the Court of Appeal are a continuation of the inquiry as to the validity of the criminal proceedings. They submitted that the proceedings before the JSC are disciplinary proceedings. Further, that the doctrine of *res judicata* does not apply and that neither can the principle of *sub judice* be invoked since the proceedings before the JSC and the Court of Appeal are not similar. Additionally, it was submitted that section 193A of the *Criminal Procedure Code* allows parallel civil and criminal proceedings.

261. On his part, the DPP argued that the proceedings giving rise to the High Court decision in Petition No. 295 of 2018 and the proceedings before the JSC are distinct and different in nature in terms of the jurisdictions and the reliefs sought. It was submitted that what is before the JSC is the removal of the Petitioner from office as a judge in accordance with Articles 168(2) and 172(1)(c) of the Constitution, for alleged misconduct while Petition No. 295 of 2018 concerned alleged violation of constitutional rights and fundamental freedoms.

262. The DPP rebuffed the petitioner's assertion that the petitions before the JSC are appeals against the decision in Petition No. 295 of 2018 and submitted that the role of the JSC is purely administrative and is limited to determining whether the complaints before it meet the threshold for removal of a judge. The DPP stressed that the petitioner has not established the ingredients of the principle of the doctrines of res judicata and *sub judice* in order to successfully invoke them.

263. The DCI on the other hand contended that the issue of sub judice is not ripe for determination by this Court for the reason that the petitioner had not raised it before the JSC in the first instance.

264. As correctly pointed out by the respondents and the Interested Parties, there is no convergence between the jurisdictions of this Court and that of the JSC. The jurisdiction of the JSC is narrow and specifically carved out in the Constitution. Material to this case is that the jurisdiction of the JSC is limited to considering whether any petition for the removal of a judge from office meets the threshold set out in Article 168(1). On the other hand, and in the context of this case, the jurisdiction of the High Court is to ensure that the JSC carries out its mandate in compliance with the Constitution and the laws of the land. The High Court therefore only intervenes in circumstances where the JSC has exercised its jurisdiction in a manner that is inconsistent with the constitutional edict.

265. It follows therefore that the High Court has no competence to handle matters exclusively reserved for the JSC, and the JSC on its part cannot deal with issues falling within the jurisdiction of the courts. It cannot therefore be said that the High Court in Petition No. 295 of 2018 determined with finality the substance of the petitions for the removal of the petitioner as that role is reserved for the JSC. Accordingly, the petitions before the JSC cannot be said to be *res judicata* as a result of the decision in Petition No. 295 of 2018 because the jurisdiction and issues for determination by the High Court and the JSC are not the same.

266. We find merit in the argument by the respondents and the Interested Parties that the principle of *res judicata* cannot be invoked in the circumstances of this case.

267. The above finding on *res judicata* applies to the *sub judice* principle which is essentially an extension of the doctrine of *res judicata* to live cases in that it seeks to stop the pursuit of two similar cases between the same parties before different courts seized with the jurisdiction to handle the matters. The main difference between the two doctrines is that *res judicata* does not entertain the revival of disputes that are already settled through the institution of a fresh matter whereas the doctrine of *sub judice* does not allow the concurrent entertainment of two cases in circumstances where, if one of the two cases had been settled before the other one, the defence of *res judicata* could successfully be invoked in respect of the pending case.

268. In any event, considering that Petition No. 295 of 2018 was fully determined, we do find that the doctrine of sub judice cannot be invoked in respect of the petitions before the JSC as against Petition No. 295 of 2018.

The appeals before the Court of Appeal

269. Counsel for the petitioner also submitted that the Court having found in Petition No. 295 of 2018 that the use of illegally obtained evidence was too serious so as to undermine the administration of justice and further that the petitioner's right to privacy as enshrined in article 31of the Constitution had been violated, the matters pending against the petitioner before the JSC, a quasi-judicial body, cannot proceed before the determination of the appeals.

270. In response, the respondents and the Interested Parties contended that the JSC was not sitting on appeal in respect of the decision in Petition No. 295 of 2018 and that it was therefore well within its powers to consider the petitions for the removal of the Petitioner from office and conduct proceedings related thereto in accordance with articles 168(2), (3) & (4) and 172 of the *Constitution*. They further argued that the criminal court process was separate and distinct from the administrative process of the JSC and that if anything, the JSC was acting in accordance with the finding of the High Court that the JSC was the appropriate forum for considering whether the petitions for the removal of the petitioner had met the constitutional threshold. Further, the Interested Parties stressed that the High Court in Petition No. 295 of 2018 referred them to the JSC and that they had simply complied with that directive by filing their petition for the removal of the petitioner.

271. We have read the judgment in Petition No. 295 of 2018 and we observe that the Court found that "cases of misconduct with a criminal element committed in the course of official judicial functions, or which are so inextricably connected with the office or status of a judge, shall be referred to the JSC in the first instance." That finding in our view was not a directive to the Interested Parties to file petitions to the JSC for the removal of the Petitioner from office and neither did it excuse the JSC from its constitutional obligation of satisfying itself that the DPP and the DCI had the locus standi to file petitions for the removal of a judge from office.

272. In other words, we do find that the High Court did not give the Interested Parties the authority that they did not have, of petitioning the JSC for the removal of the petitioner from office. To state otherwise would be tantamount to misinterpreting the judgment of the Court.

273. We therefore find that the assertion by the interested parties that the Court in Petition No. 295 of 2018 referred them to the JSC is not supported by the said judgment.

274. In *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) the Court observed as follows regarding the rules for interpreting judgments:

> "...the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it...
>
> It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not

elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

275. Guided by the above decision on interpretation of court judgments, we find no ambiguity in the words used in the finding and holding by the Court in Petition No. 295 of 2018.

276. In our view, the petitioner is correct, that once the Court in Petition No. 295 of 2018 held that the evidence intended to be used in her prosecution was illegally obtained, which decision the Interested Parties were aggrieved by and lodged an appeal, then the JSC was under an obligation to await the outcome of the appeals, before taking any further step in respect of the petitions grounded on the same evidence.

277. There is no dispute regarding the finding of the Court on the status of the evidence that the Interested Parties intended to use in the trial of the Petitioner at the Anti-Corruption Court. The Court record speaks for itself thus:

> " 311. The DCI in this matter obtained an order to examine an account in KCB Bank belonging to Blue Nile East Africa Ltd. In the course of examining the account the subject of that order, he may have stumbled on information that somehow led him to the Petitioner's accounts with IBL. If at that point he had reasonable cause to investigate the Petitioner's accounts, he had the option of accessing those accounts by invoking the aid of the provisions of sections 118-121 of the CPC and section 180 of the Evidence Act. Instead, the DCI appears to have misrepresented to Mohamud that the order in Miscellaneous Application No. 2225 of 2018 empowered him to access and investigate accounts in IBL, including the petitioner's.
>
> 312. The petitioner is the second highest ranking officer in an arm of government, the judiciary. The DCI obtained access to her accounts on the basis of a misrepresentation, by using a court order that was not obtained in respect of her accounts. There is thus demonstrated a clear violation of the petitioner's right to privacy guaranteed under article 31. To countenance such conduct with respect to a person of the rank of the petitioner must beg the question: how do the rights of ordinary citizens fare? In our view, the conduct of the DCI in this respect was so egregious and objectively unreasonable and deliberate that to allow reliance on any evidence obtained as a result would be detrimental to the administration of justice. We shall advert to the implications of this finding later in the judgment."

278. The Court further proceeded to make a determination on this issue as follows:

> " 426. Having found, however, that the DCI illegally obtained evidence against the Petitioner by gaining access to her accounts with IBL through the use of a court order that had no bearing on her accounts and having found that the DCI thereby misrepresented facts and misused the court order, we have come to the conclusion that the prosecution against the Petitioner cannot proceed."

279. The court then went ahead and issued a declaratory order to the effect that the evidence underpinning the intended prosecution of the petitioner was illegally obtained in a manner that was detrimental to

the administration of justice and perfected this declaration by quashing the intended criminal trial of the petitioner as follows:

> "a. A declaration be and is hereby issued that the evidence underpinning the intended prosecution of the Petitioner in Nairobi Chief Magistrate's Court ACC Criminal Case No. 38 of 2018 Republic v Philomena Mbete Mwilu and Stanley Muluvi Kiima was illegally obtained in a manner that was detrimental to the administration of justice;
>
> b. An order of certiorari be and is hereby issued to quash the criminal proceedings in Nairobi Chief Magistrate's Court ACC Criminal Case No. 38 of 2018 Republic v Philomena Mbete Mwilu and Stanley Muluvi Kiima as against the Petitioner."

280. The Interested Parties submitted that they have other undisclosed evidence and allegations against the petitioner beyond the evidence that was quashed in Petition No. 295 of 2018. They did say that they have a bigger dossier against the petitioner and that what they had presented before the Anti-Corruption Court and JSC was just a tip of the iceberg. That statement is not supported by the material that was placed before this Court.

281. We have examined the summary of the petitions against the petitioner as annexed to the replying affidavits sworn by Mrs. Anne Amadi on behalf of the respondents and it emerges that the petition by Mr. Mogire Mogaka was to the effect that the Petitioner was receiving bribes that involved several transactions through her account with Imperial Bank Limited. It is therefore clear that this particular complaint relates to alleged bribery in respect of loans advanced to the Petitioner by her bank.

282. The petitions by Mr. Peter Kirika and Mr. Alexander Mugane are both premised on the finding in Petition No. 295 of 2018 that there was a factual and legal basis informing some of the charges against the petitioner and that the decision to charge the petitioner was in accord with both the Constitution and the National Prosecution Policy.

283. From the affidavits sworn by Mrs. Anne Amadi, the material contents of these petitions filed before the JSC for the removal of the petitioner from office can also be traced to the transactions between the petitioner and her bank which was the basis for mounting her prosecution before the Anti-Corruption Court. We therefore find that the substratum of these petitions is the evidence that was declared to have been illegally obtained in Petition No. 295 of 2018 and revolves around the same transaction between the Petitioner and her bank.

284. On their part, the Interested Parties based their petition to the JSC on alleged abuse of office, tax evasion, forgery and improper conferment of a benefit. All these allegations are traceable to the Petitioner's transactions with her bank.

285. The only complaint that had no connection with the petitioner's bank account was the allegation that the Petitioner engaged in inappropriate communication with one Omar Ikumu Arafat who was a principal suspect connected to accused persons in two ongoing criminal trials in which the accused persons were charged with obtaining money by false pretenses.

286. A perusal of the complaints forming the basis of the petitions against the petitioner clearly show that apart from the allegation of inappropriate communication with a prime suspect in a pending criminal case, there is an inseparable nexus between the allegations and the evidence that was found in Petition No. 295 of 2018 to have been illegally obtained. That evidence, having been declared by the High Court

to have been illegally obtained and having been quashed, it can no longer be available for use in any court, tribunal or administrative body, unless and until the Court of Appeal finds and holds otherwise.

287. Although the consideration of the question of admissibility of evidence is ordinarily reserved for the trier of facts, that discretion is no longer available to the JSC in the circumstances of this case, since the exclusion of that evidence is by an order of a superior judicial organ and is therefore unavailable for use before any judicial or quasi-judicial body. Despite the fact that the matters before the Court of Appeal and JSC fall into separate and distinct jurisdictions, they are co-joined by the same set of facts. The legality of the evidence that the Interested Parties presented to the JSC in pursuit of the petitioner is so central to the decision of the Court of Appeal and therefore the appeals must first be determined before the JSC can take any further step in regard to the petitions before it.

288. We therefore find that it was not proper for the JSC to ask the petitioner to respond to petitions that were premised on evidence that was no longer in existence. In stating so, we are further guided by the fact that the petition lodged by the Interested Parties before the JSC against the Petitioner cannot stand in light of the finding we shall make in due course on their capacity as state officers occupying state offices to petition for the removal of a judge from office.

The Lack of Regulations

289. Another bar to the jurisdiction of the JSC raised by the petitioner is the lack of regulations to govern the proceedings for removal of judges. The petitioner's case is that the lack of rules for the exercise of the constitutional mandate of the JSC in regard to proceedings for removal of judges from office renders its actions and decisions oppressive, capricious, whimsical and a violation of rights and fundamental freedoms and in particular the rights guaranteed under articles 25(1)(c), 27, 47 and 50. Further, that section 47 of the JSA obligates the JSC to make regulations for the better carrying out of the purposes of the Act. The Petitioner relied on the decision in the Justice Prof. J.B. Ojwang' Tribunal in support of her assertion that the failure by the JSC to make rules and subjecting a judge to a process without rules violates articles 47 and 50 of the Constitution.

290. In opposition to the petitioner's submission that the lack of rules violated her constitutional rights under articles 47 and 50 of the Constitution, the respondents argued that the JSC had previously considered complaints against judges in compliance with the rules of natural justice and principles of fair administrative action notwithstanding the lack of procedural rules which are yet to be approved by the National Assembly and that the petitioner had participated in those proceedings without protest. Further, that a constitutional process cannot be fettered by lack of procedural rules.

291. The position of the DCI on this issue is that although section 47(2)(c) of the JSA empowers the JSC to make regulations to provide for preliminary procedures for making recommendations to the President under the Constitution, the absence of such rules does not take away the discretion of the JSC to adopt any fair procedure appropriate to its task.

292. We have considered the rival submissions on this issue. We observe that the importance of rules to govern administrative action that may result in adverse outcomes for the person who is being taken through such a process cannot be gainsaid. This issue was considered by the Court in the *Apollo Mboya* case as follows:

> " 229. On the issue of the need for regulations to guide the process under Article 168 of the Constitution, I find that Justice Njoki Ndung'u has a point that the JSC, as empowered by Section 47(2)(c) of the JS Act, should indeed make regulations specifically to provide for all "preliminary procedures for making any recommendations required to be made under the Constitution". Such

regulations will ensure that judges facing allegations that may lead to removal from office can clearly predict the procedure to be followed. The lack of a clear procedure is not a hallmark of a fair administrative process. A person being taken through an administrative action should be able to tell beforehand what to expect of the process. The JSC should set an exemplary record on fair administrative action. Indeed Dr. Mutunga posed a poignant question in this regard thus: "If the JSC cannot give justice to judges, how can they convince the natives of this country that the Judiciary dispenses justice"" This is a question that should play in the minds of the Commissioners of the JSC whenever they are conducting disciplinary proceedings against judges, judicial officers and Judiciary staff."

293. We are also persuaded by the statement in the Justice Prof. J.B. Ojwang' Tribunal that:

> " 289. A couple of examples from our observations suffice. First, article 47 of the Constitution guarantees fair administrative action including efficient administration. Section 47(2)(c) of the *Judicial Service Act* requires the JSC to make regulations for preliminary procedures for making any recommendations to be made under the Constitution. We have found the JSC has not complied with the provision. Therefore, the question of procedural fairness is left to conjecture."

294. In reaching the conclusion that the petition for the removal of Justice Ojwang' from office had not met the constitutional threshold, the Tribunal held that:

> " 329. We asked ourselves, whether or not, on balance, the JSC met the threshold and we have come to the conclusion that it did not. We have cited a few examples below to demonstrate its failure:
>
> (i) ...
>
> (ii) ...
>
> (iii) Further to the above, we wonder what applicable rules the JSC applied in arriving at its decisions. In the absence of any written procedure or rules available to the Judge and counsel, the Judge was forced to appear in person or be shut out of the process entirely."

295. The argument by the petitioner that the lack of rules governing the proceedings before the JSC for the removal of a judge make the actions and decisions of the JSC oppressive, capricious and whimsical is indeed not without merit. There is sufficient illustration from the past proceedings conducted by the JSC to show that a judge undergoing a process before it may be forgiven for perceiving that the procedures of the JSC are akin to a mirage which is seeable but unreachable and keep changing from case to case and depending on the judge appearing before the JSC.

296. An apt illustration can be deduced from the petitioner's complaint that previously, petitions for removal of judges have been placed before subcommittees of the JSC whose findings would later be subjected to the full Commission for adoption or rejection. According to the petitioner, no reason was given for subjecting her directly to the full Commission. The response by the JSC was that due to the importance of the offices of the Chief Justice and the Deputy Chief Justice, it was decided

that any petition for the removal of a holder of any of the two offices would be considered by the whole Commission. This position was a departure from the earlier position adopted in the case of Nancy Makokha Baraza, the first Deputy Chief Justice under the current Constitution because the petition for her removal was first submitted to a subcommittee before the decision of the subcommittee was adopted by the full Commission. The lack of rules therefore allows the JSC to whimsically keep changing its procedures thereby resulting in unpredictable and inconsistent handling of complaints against judges. Our observation is not an idle one as already demonstrated and as was observed by the Tribunal that handled the petition for the removal of Prof. Justice J.B. Ojwang'.

297. We also observe that the petitioner's case was dealt with by the JSC despite the pendency of proceedings before the Court of Appeal. The petitioner's unrebutted statement that the JSC usually decline to entertain matters that are pending before courts lends credence to her assertion that she has been treated differently from other judges who have been taken through similar processes.

298. We must however clarify that although we deprecate the effect of lack of regulations on the right to fair administrative action before the JSC, the law remains that lack of regulations is not sufficient to stop the JSC from executing its constitutional mandate so long as the JSC complies with the constitutional dictates. We find support for this statement in the Court of Appeal decision in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR where the Court addressed the issue of absence of rules to govern the process for the removal of judges and held that:

> "The jurisdiction conferred upon JSC is to itself initiate the process of removal or consider an initiating petition by a person and in case of an initiating petition by a person, to consider the petition and if satisfied that it discloses a ground for removal, to send it to the President with appropriate recommendations. Before initiating the process of removal on its own motion, JSC by necessary implication should consider if the facts it is relying on from its source disclose a ground for removal, and if so satisfied, formulate a petition to the President with necessary recommendations. In either case, neither the Constitution nor the JS Act stipulates the procedure to be followed. The JSC has power under s 47(1) (c) of JS Act to make regulations to provide for preliminary procedures for making any recommendations required to be made under the Constitution but no such regulations have been made. In the absence of any constitutional or statutory procedure the JSC has administrative discretion to adopt any fair procedure appropriate to its task." [emphasis supplied]

299. We further observe that the JSC has been involved in several litigations where lack of rules and regulations to govern its procedures for removal of judges under article 168 of the Constitution has been raised and pronouncements made on the importance of having those rules. The necessity of having rules is a statutory requirement as stipulated by section 47 (2) (c) of the JSA. This Court was informed that the rules are pending before the National Assembly for approval. We can only urge the JSC to take a proactive initiative and have those rules approved because they cannot pend before the legislature in perpetuity. In saying so, we appreciate the fact that under the *Statutory Instruments Act, 2013*, such rules must be legislated by Parliament.

300. Having said that, this Court should not be so much concerned about the way the JSC undertakes its constitutional mandate. As a body carrying out administrative functions, the JSC should be allowed the leeway to establish its own processes so long as it is shown that no judge, judicial officer or staff member appearing before it has been prejudiced by the path taken.

301. In this case, we find no material placed before us to show that by deciding to place the complaints against the petitioner before the full Commission and that for want of regulations, the JSC violated any of her constitutional rights.

302. It is important to observe, however, that despite the petitioner being a member of the JSC and having participated in cases involving judges, judicial officers and staff members without the rules, that in itself does not give justification to the JSC to operate or to ignore the importance of the rules. The petitioner is only but one of the commissioners of JSC.

303. We reiterate that the absence of rules cannot bar the JSC from executing its constitutional and statutory mandate. What the JSC only need to do is to ensure compliance with the article 47 rights and all the other constitutional dictates.

304. The conclusion to this issue is that no case has been made by the petitioner for the issuance of any orders by dint of the lack of rules to govern the process before the JSC for the removal of a judge from office. Importantly, the JSC cannot be stopped from executing its constitutional mandate due to the lack of rules to govern proceedings before it.

Whether the DPP and the DCI have locus standi to petition for the removal of a judge from office

305. Another jurisdictional issue raised by the petitioner is whether the DPP and the DCI have the *locus standi* to petition the JSC for the removal of a judge from office. The petitioner's argument is that the DPP and the DCI being State officers occupying State Offices as defined under article 260 of the Constitution have no *locus standi* to petition the JSC for the removal of a judge from office. It was her assertion that the phrase "any person" under article 168 (2) of the Constitution is not an ordinary English word but a technical legal term which ought to be interpreted as excluding a "State office" and "State officer." The petitioner submitted that the purpose of article 168(2) was to limit those who can initiate the removal of a judge as is manifested from the use of the word "

306. In response, the DPP and the DCI submitted that they fall within the term "any person" in article 168 (2). Their argument is that article 260 of the Constitution defines a "person" to include a company, association or other body of persons whether incorporated or unincorporated. They submitted that in defining the word "person", article 260 uses the word 'includes' and that it would be monstrous if this Court interpreted the Constitution in such a manner as to exclude them from the definition of the phrase "any person." Further, that the interpretation proposed by the petitioner would imply that they are not bound by the Bill of Rights as stipulated in article 20(1).

307. Resolving this issue of the locus standi of the DPP and the DCI to petition the JSC for the removal of a judge require interrogation and interpretation of relevant provisions of the Constitution. To effectively determine the issue, it is important to bear in mind the relevant guiding principles of interpretation of the Constitution.

308. Article 259 of the Constitution enjoins the Court to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and in a manner that contributes to good governance. Further, article 259(3) requires every provision of the Constitution to be construed according to the doctrine of interpretation that the law is always speaking.

309. In exercising its judicial authority, this Court is obligated under article 159 (2) (e) of the *Constitution* to protect and promote the purposes and principles of the Constitution.

310. The principles of interpreting the Constitution were highlighted by the Supreme Court In the matter of Advisory Opinion of the Court; *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR, as follows:

> "(86) The rules of constitutional interpretation do not favour formalistic or positivistic approach (article 20(4) and 259(1). The Constitution has incorporated non legal considerations which we must take into account in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based and social justice oriented state and society. The values and principles articulated in the preamble, in article 10 in chapter 6 and in various provisions, reflect historical economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the court."

311. Further, *In the matter of Kenya National Commission on Human Rights* [2012] eKLR, the Supreme Court stated:

> "(26) But what is meant by a holistic interpretation of a Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision reading it alongside and against other provisions so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of issues in dispute and of the prevailing circumstances."

312. Also in the *Nancy Baraza* case, the court was clear on how the Constitution should be interpreted and stated that:

> "In Barnes v Jarvis, (1953) 1 WLRL 649 Lord Goddard CJ said that "A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered". In Warburton v Loveland (1832), 5 ER 499, a case decided in 1832 held that "Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."
>
> In Nambuye's case it was stated that "in interpreting the Constitution one must take into account the words used and whether or not they are ambiguous because the spirit of the Constitution must derive from the words used and not those implied. I find no ambiguity in the words used under section 62 of the Constitution." In the case of James vs. Commonwealth of Australia [1936] AC 578 it was held that "A Constitution must not be construed in a narrow or pedantic, manner and that construction must be beneficial to the widest possible amplitude of its powers, must be adopted or that a broad and liberal spirit should inspire those whose duty is to interpret the Constitution."

313. The Court further stated that:

> "The current Constitution is transformative. The challenge of constitutional interpretation is to define and give life and substance to values and broad principles enunciated in the Constitution in an ever-changing society by application of a principled theory of

constitutional interpretation as articulated in article 259. The Constitution is a living constitution, always seeking to understand the original purpose of each and every clause. The interpretation of the Constitution should not be textualist. It requires more than a formalized reading of the text, as would be the case in the interpretation of an ordinary statute. It requires a unified approach, one that seeks to read the Constitution as a whole, harmonizing the component parts of the Constitution, the empowering provisions, the limiting provisions, and the entire gamut of rights created under it. The original purpose, and safeguards can only be expanded and nurtured but not constrained by literal, instructionist, textual interpretation. This argument is buttressed by article 259 of the Constitution itself. It is for that reason that, like Githinji, J.A. says, article 168(5) cannot be read in isolation, and must be read together with article 158, 251 and any other articles that may relate to removal of constitutional office holders."

314. The interpretation of words and phrases in statutory instruments is also guided by dictionaries. The *Oxford Dictionary* 12th edition at page 1070 defines the word "person" as a human being regarded as an individual. On its part, the *Black's Law Dictionary*, 10th edition at page 1324 defines the term "person" as a human being- also termed natural person or an entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being.

315. The tools for interpreting the words and phrases used in the Constitution were provided by the Supreme Court in the case of *Council of Governors v Attorney General & 7 others* [2019] eKLR as follows:

"(42) Under article 2(1), the Constitution is the Supreme law of the land. Article 259 of the Constitution then gives the approach to be adopted in interpreting the Constitution, basically in a manner that promotes its purposes, values and principles. Suffice it to say that in interpreting the Constitution, the starting point is always to look at article 259 for it provides the matrix, or guiding principles on how it is to be interpreted and then article 260 where specific words and phrases are interpreted. It is imperative to note that while article 259 deals with construing of the Constitution and outlines the principles that underpin that act; article 260 deals with interpretation, that is, it is explicit in assigning meaning to the words and phrases it addresses. Hence the opening words in that Article are: "In this Constitution, unless the context requires otherwise-".

(43) Consequently, in search of the meaning assigned to some words and phrases as used in the Constitution, one needs to consult Article 260 to find out if that particular term or phrase has Already been defined. It is only where the same has not been defined that the Court will embark on seeking a meaning by employing the various principles of constitutional interpretation. So that in looking for the meaning of a particular word or phrase in the Constitution one will go to article 260 for 'Interpretation". For example in defining the word 'adult', the Constitution states thus: "adult" means an individual who has attained the age of eighteen years. As explicit as that is, the search for the meaning of the word 'adult' will end there. Where the meaning is provided in terms of a collectivity of acts and things, the Constitution in article 260 is also clear, for instance: "affirmative action" includes any measure designed to overcome or ameliorate an inequity or system denial or infringement of a right or fundamental freedom". So that in giving meaning to words and phrases

under the Constitution, article 260 is direct in using the term 'means' and also deductive in using the term 'includes'."

316. From the above principles of constitutional interpretation espoused in articles 159 and 259 of the Constitution and as pronounced in the various judicial decisions, it is clear that courts must adopt a purposive interpretation of the Constitution. As was observed in the *Nancy Makokha Baraza* case,

> "The provisions of article 2(3) bar us from questioning the validity of the Constitution. In interpretation of the Constitution we must bear in mind the principle that as far as possible the words used should be given their ordinary and plain meaning and those words must be interpreted in the context of the Constitution in which they are used, but not in abstract. Again in performing our task we must recognize that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and the exhaustiveness and the rule of paramountcy of the written Constitution."

317. Essentially, what the petitioner has urged this Court to determine is whether the DPP and the DCI had the locus standi to petition the JSC for her removal from office. The standard guide for determining locus standi in court cases is found in article 258 of the *Constitution* which provides that:

> "258.
>
> (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
>
> (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
>
> a) a person acting on behalf of another person who cannot act in their own name;
>
> b) a person acting as a member of, or in the interest of, a group or class of persons;
>
> c) a person acting in the public interest; or
>
> d) an association acting in the interest of one or more of its members."

318. The DPP and the DCI contended that they have *locus standi* before the JSC and that in any event, it is the Court in Petition No. 295 of 2018 that referred them to file their complaint before the JSC for the removal of the Petitioner from office. They submitted that excluding them from the definition of "any person" in article 168(2) will imply that they are not bound by the Bill of Rights contrary to the provisions of article 20(1) of the Constitution which provides that the "Bill of Rights applies to all law and binds all State organs and all persons."

319. We have already pronounced ourselves on the issue of whether the Court in Petition 295 of 2018 referred the DPP and the DCI to the JSC.

320. On the claim by the DPP and the DCI that interpreting article 168(2) of the Constitution to exclude them from the word "person" would mean that the Bill of Rights does not bind them, we find that

our decision on the meaning of the phrase "any person" in article 168(2) cannot, by any means exclude them from being bound by the Bill of Rights, for that is the express requirement of article 20(1).

321. The DPP and the DCI submitted that the term "person" under article 260 of the Constitution includes both incorporated and unincorporated persons and that they also fall in that category. They argued that the Article in defining the phrase "person", uses the words "including" and that therefore they cannot be excluded from that definition.

322. We have examined various constitutional provisions in which the word "person" is positioned. In our view, the phrase "any person" as used in article 168(2) is similar in its use in all the other provisions in the Constitution where the word "person" is used. For instance, article 22(1) of the Constitution provides that:

> " Every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

323. Our understanding of article 22(1) is that it is only a natural or legal person and not a State organ who can petition for redress of violation of rights and fundamental freedoms. In *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR the Court in interpreting article 22(1) held that the provision meant that any member of society was at liberty to approach the High Court to adjudicate on the infringement or violation of a right or rights.

324. Similarly, in the instant case, we hold the view that the framers of the Constitution intended that "any person" as used in article 168(2) of the Constitution was meant to stand for any individual member of the society and not State organs or State officers in their official capacity. Any contrary interpretation would go into breach of the doctrine of separation of powers as espoused by Montesquieu who sought to address the eternal mischief of abuse of power by those to whom it is entrusted. He observed in The Spirit of the Laws (1748) that:

> When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers."

325. This principle of separation of powers is reflected in article 1(3) of the Constitution which provides that the sovereign power of the people is delegated to:

> " (a) Parliament and the legislative assemblies in the county governments;
>
> (b) the national executive and the executive structures in the county governments; and
>
> (c) the Judiciary and independent tribunals.

326. The applicability of the concept of separation of powers in our country was confirmed by the High Court in *Trusted Society of Human Rights v The Attorney-General and others* [2012] eKLR when it stated that:

> " Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the

Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."

327. The broad principle of separation of powers integrates a structure of checks and balances thereby ensuring the autonomy of State organs while at the same time safeguarding the ultimate goal of good governance through co-operation and collaboration between and among State organs. The Supreme Court captured this position in *Re the Matter of the Interim Independent Electoral Commission* Advisory Opinion No.2 of 2011 where it expressed itself as follows:

> " The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

328. There is merit in the argument by the petitioner that the use of the word "only" in article 168(2) actually limits the power to initiate the removal of a judge from office to the JSC or upon a petition by a natural or legal person. The JSC is the only State organ allowed by the Constitution to initiate the removal of a judge from office. Of course we need not belabor the obvious that the initiation of the removal of a judge from office solely reposes with the JSC. If article 168(2) intended to include State organs among the bodies that can petition for the removal of a judge from office, it would have expressly stated so in the manner that article 20(1) expressly provides that "the Bill of Rights applies to all law and binds all State organs and persons."

329. It is therefore apparent that where the drafters of the Constitution wanted to refer to State organ or person or both, they clearly and expressly stated so.

330. Similarly, the "any person" envisioned by the framers of the Constitution in article 168(2) must be a person or a determinate class of persons and not a State organ. If it were not so, article 260 would not have belaboured to define the phrases 'person,' 'State organ' and 'State officer' independently. It would simply have defined person to include State officer.

331. The Constitution should be read as a whole and the provisions dealing with the same or related subjects should be given the same meaning. In this regard, article 168(2) cannot be read in isolation. The JSC is among the commissions and independent offices listed in article 248(2). article 252(1)(a) provides that each commission, and each holder of an independent office may conduct investigations on its own initiative or on a complaint made by a member of the public. Further, article 252(2) states that a complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under article 22(1) and (2).

332. The fact that the constitutional provisions on commissions and independent offices apply to the JSC was confirmed in the *Nancy Makokha Baraza* case. The use of the phrase a member of the public in article 252(1) (a) clearly shows that it is only a natural or legal person and not a State organ or State officer who can complain to a commission or an independent office.

333. When it comes to the removal of a member of a commission or the holder of an independent office, article 251(2) only allows "a person" to petition for their removal from office. When this provision is

read in comparison with article 168(2), the obvious conclusion is that State organs and State officers are excluded from petitioning for the removal of certain constitutional office holders. The DPP and the DCI are holders of State offices and as occupants of those offices, are State officers. They are therefore not "person" as defined in article 260 and as used in articles 22, 168(2), 251(2) of the Constitution, among other provisions.

334. Another analogy can be gleaned from the provisions of article 158 of the Constitution on the removal from office of the DPP. Under article 158(2), a person desiring the removal of the DPP may present a petition to the Public Service Commission (PSC) in writing, setting out the alleged facts constituting the grounds for the removal of the Director. Our understanding of this provision is that a petition for the removal of the DPP can only be presented before the PSC by a person in their individual capacity and not by a State organ or a State officer.

335. The *locus standi* of a party is what gives the court jurisdiction to entertain a dispute as was recently observed by the Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR that:

> " [45] In the Matter of the National Gender and Equality Commission Reference No. 1 of 2013 the Court further set out certain key considerations in applying the essentials expounded in Re Matter of the Interim Independent Electoral Commission (Supra). The Court thus set out that, a party moving the Court under article 163 (6) must have locus standi. It held that under this condition, the Court must always consider whether the party seeking to move it, falls within the categories of parties decreed as having such standi by the Constitution. The Court would then proceed to consider the subject-matter to ascertain whether it is one involving a County Government and if it finds in the affirmative, the other considerations then come into play."
>
> "[46] In that regard the Court opined;
>
> > "However, there are certain key considerations in applying these essentials. The starting point will always be that the party must have *locus standi*. The Court will always consider whether the party seeking to move it, falls within the categories of parties decreed by the Constitution. The Court will then proceed to consider the subject-matter: whether it is one involving County Government. Once it rules in the affirmative, the other considerations come into play." [Emphasis added]"

336. From our above analysis, we find that had the JSC bothered to interrogate the question whether State organs can petition it for the removal of a judge from office, it would have easily come to the conclusion that State organs cannot petition for the removal of a judge from office. What this means is that the JSC in calling upon the petitioner to respond to the petition filed by the DPP and the DCI seeking her removal from office was exercising jurisdiction that it did not have.

337. As was held by the Supreme Court in *Martin Wanderi & 106 others v Engineers Registration Board & 10 others* [2018] eKLR:

> " [126] In examining article 47(1) of the Constitution, the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the

power exercised, is when the court will delve into inquiring whether in the carrying out of that administrative action, there was violation of article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry. Where the act done was *ultra vires* the mandate of the administrative entity, the act is void ab initio and the inquiry stops there as there is an outright violation of the Constitution. The question of legality or the lawfulness of an act lies at the core article 47(1)."

338. By entertaining a complaint from bodies not authorised by the Constitution to petition for the removal of a judge from office, the JSC was, as was stated by the Supreme Court in the just cited case, the action of the JSC having been *ultra vires* its mandate, was void *ab initio* as it was an outright violation of the Constitution.

339. We have therefore no hesitation in concluding that the JSC had no jurisdiction to entertain the petition of the DPP and the DCI for the removal of the petitioner from office because the Interested Parties are not 'any person' as defined in article 168(2) as read with article 260 of the Constitution and therefore they had no locus standi to file the aforesaid petition.

Ultra vires

340. Another aspect of the petitioner's objection to the DPP and DCI's petition for her removal is that their actions are ultra vires their constitutional and statutory mandates. Consideration of this argument takes us to the legal instruments establishing these two offices. The Office of the DPP is a constitutional office established under Article 157 of the Constitution and empowered as hereunder:

(1) ...

(2) ...

(3) ...

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(5) ...

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

(12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

341. The Directorate of Criminal Investigations is established under section 28 of the *National Police Service Act, 2011* and is headed by the DCI. The functions of the Directorate are provided by section 35 as follows:

(a) collect and provide criminal intelligence;

(b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;

(c) maintain law and order;

(d) detect and prevent crime;

(e) apprehend offenders;

(f) maintain criminal records;

(g) conduct forensic analysis;

(h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to article 157 (4) of the Constitution;

(i) co-ordinate country Interpol Affairs;

(j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and

(k) perform any other function conferred on it by any other written law.

342. These functions of the DCI are directly linked to the mandate of the National Police Service under article 245(4) of the Constitution, to independently investigate any particular offence or offences and to enforce the law against any particular person or persons.

343. Considering the functions and powers of the DPP and the DCI as provided for under the Constitution and the statutes, we are persuaded by the petitioner's argument that these functions do not extend to presentation and prosecution of petitions before the JSC for the removal of judges from office. Those powers are indeed limited to the criminal justice arena. That is not to say that the DPP and the DCI cannot share any relevant information in their possession with the JSC, upon which the JSC may initiate the process of removal of a judge if satisfied that the threshold in article 168 (1) has been met.

344. As was pointed out by the petitioner, although the complaints against the former DCJ Nancy Baraza and Justice Phillip Tunoi had a criminal element, the proceedings for their removal were initiated by the JSC acting on information supplied by investigatory agencies. In the instant case, there is no dispute that the DPP and the DCI filed a petition for the removal of the petitioner from office. Their argument that they did so as advised by the Court in Petition No. 295 of 2018 is not supported by our reading of that decision. In any event, the question as to whether State organs can petition the JSC for the removal of a judge did not arise in Petition No. 295 of 2018.

345. From the pleadings, the petition for the removal of the petitioner from office was brought by the DPP and the DCI in their official capacities and that in doing so, they were carrying out their constitutional and statutory mandates.

346. There is no bar for the occupants of the offices of the DPP and the DCI as private citizens to petition the JSC for the removal of a judge. In such a situation, they will have to demonstrate that they have a direct personal interest in the complaint to be presented before the JSC.

347. It is our finding that the DPP and the DCI are State officers occupying State offices and that they cannot and do not meet the description "any person" as provided in article 168(2) of the Constitution. Further as explained above, the DPP and the DCI in their official capacities are distinct from members of the public. The DPP exercises State powers of prosecution whereas the DCI is mandated to carry out criminal investigations.

Whether the 2nd & 3rd Respondents were wrongly enjoined in the petition

348. On the question of whether the 2nd & 3rd respondents are not proper parties to these proceedings the respondents submitted that they are not and have been wrongly joined. The respondents maintain that the 2nd and 3rd respondents were performing their functions as members of the JSC which actions are protected under Article 250 (9) of the Constitution. To buttress the aforementioned argument, the respondents cited the case of *Isaac Aluoch Polo Aluochier v Independent Electoral & Boundaries Commission (IEBC) & 7 others* [2019] eKLR where it was held that Article 250(9) of the Constitution, insulates commissioners and holders of independent offices from personal liability for actions and decisions taken in good faith in the course of that function.

349. According to Counsel for the respondents, the JSC is an independent commission under article 171 of the Constitution hence it is clothed with a separate legal personality from its members under articles 253, 249 and 250. The respondents argue that the role of the JSC is to process petitions against judges on the basis of fair administrative action under article 47 and to ensure that only petitions that meet the *prima facie* standard proceed to a tribunal to be appointed under article 168(5).

350. The Interested Parties supported the respondents' position on this issue.

351. The petitioner's argument is that the 2nd and 3rd respondents should not be allowed to rely on collective comfort when responding to the issue of being sued in their personal capacities when they did not resort to collective responsibility while addressing the issue of their recusal via the decision of August 13, 2020.

352. We have considered the above arguments. We observe that the only relief that the Petitioner seeks against the 2nd and 3rd respondents is an order prohibiting them from participating in the consideration of the petitions filed against her before the JSC on account of their alleged bias and conflict of interest.

353. In addressing our minds to the question of whether the two Respondents were wrongly joined to this petition, we are guided by the definition in the *Constitution of Kenya (Protection of Rights and*

Fundamental Freedoms) Practice and Procedure Rules, 2013(hereinafter the Mutunga Rules) that a "respondent" is "a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom."

354. Counsel for the respondents submitted that the 2nd and 3rd respondents were performing their functions as members of the JSC and as such cannot be held personally liable for anything done in good faith in the performance of a function of their office as provided for under article 250(9) of the Constitution. Counsel further argued that the JSC is an independent commission under article 171 of the Constitution clothed with a separate autonomous legal personality. This submission is indeed correct since under article 253 of the Constitution each commission and each independent office is a body corporate with perpetual succession and a seal and is capable of suing and being sued in its corporate name.

355. The Constitution under article 250(9) insulates the commissioners and holders of independent offices from personal liability for actions and decisions taken in good faith in the course of performing their duties. In addition, section 45 of the JSA insulates all the individuals working for the JSC from any civil action or suit for or in respect of any matter or thing done or omitted to be done in good faith. The same provision also protects a member of the Commission or the Chief Registrar from arrest under civil process while participating in any meeting of the Commission or of any Committee thereof.

356. In the American case of *Kentucky v. Graham*, 473 U.S. 159, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985) the US Supreme Court when called upon to unravel the distinctions between personal- and official-capacity suits held that:

> "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent."

357. The 2nd and 3rd respondents have been sued as commissioners of the JSC. The petitioner has alleged that they are biased against her and that despite her protests, they refused to recuse themselves from considering the petitions for her removal from office.

358. We observe that the 2nd and 3rd respondents were all along executing their responsibilities as members of the JSC. The alleged bias is said to have occurred in the course of the discharge of their mandates. It is for that reason that their individual rulings on the recusal applications were adopted as the decision of the Commission. In the circumstances, we do not find that the two commissioners were advancing their own interests which can make them personally liable to the petitioner. Just like judges and judicial officers who cannot be named as parties in applications for recusal, the commissioners of the JSC when executing their mandates cannot be named as parties. Even where an appeal arises from the decision of a judge or a judicial officer not to recuse themselves, they cannot be named as respondents. This position is applicable to commissioners of the JSC. We therefore find that the 2nd and 3rd respondents were performing their functions as members of the JSC and as such they cannot be sued in their individual capacities. Accordingly, their joinder to this petition was erroneous.

Abuse of the court process

359. The petitioner submitted that the violation of the doctrines of *sub judice* and *res judicata* amounted to abuse of the court process. She maintained that it would be an abuse of the court process to have the petitions before the JSC proceed as the same were sub judice. Counsel relied on the case of *Peter Kamau Ikigu v Westlands Residential Resort Limited & another* [2018] eKLR and that of *Tom Mboya Odege*

v Edick Peter Omondi Anyanga & 2 others [2018] eKLR where the Court in both cases considered what is sub judice and when it's applicable and submitted that this court must grapple with the issue of whether the Court of Appeal decision might deal with the same issues before the JSC on a matter before it and if the answer is in the affirmative, then it must tell the JSC to stop and down its tools. It was further submitted that the actions by the DPP amounted to an abuse of the legal process and further that the action by the 1st Interested Party in bringing proceedings against the petitioner was contrary to the DPP mandate as provided in article 157(11) of the Constitution.

360. The respondents argued that the petitioner's decision to stop the administrative process before the JSC by filing the present petition amounted to an abuse of the court process. The respondents submitted that the issues raised in the present petition were similar to the preliminary objection raised by the petitioner at JSC thus the orders obtained prevented the JSC from hearing and determining the Preliminary Objection before it.

361. On his part, the DPP submitted that the Petition is an afterthought. The DPP referred to the case of Apondi vs. Canuald Metal Packaging (2005)1 EA 12, where the Court stated that:

> " A party is at liberty to choose a forum which has jurisdiction to adjudicate its claim or choose to forego part of its claim and he cannot be heard to complain about that choice after the event and it would be otherwise offensive and prejudicial to other parties and an abuse of the court process to allow litigation by instalments."

362. It is trite law that the Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as: "Everything which is contrary to good order established by usage that is a complete departure from reasonable use "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."

363. It is the DPP's case that the Petitioner has brought a multiplicity of cases and applications with the intention of not having the matter determined with finality. It was further submitted that the Petitioner has failed to establish any basis for the grant of any of the reliefs sought and urged us to dismiss the petition and allow the hearing and determination of the petitions before the JSC as they raise serious triable issues touching on integrity of the Petitioner.

364. In *Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 [2009] KLR 229, the Court of Appeal held that:

> " The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -
>
> i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

365. In *Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others* Nairobi (Milimani) HCCC No. 363 of 2009, the Court stated with respect to the court's power to prevent abuse of its process as follows:

> "This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."

366. The Court of Appeal in *Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others* (*supra*) opined that:

> "In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of *Ashmore v Corp of Lloyds* [1992] 2 All E.R 486 at page 488 where Lord Roskil states:
>
>> 'It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.'

Unless a trial is on discernable issues it would be farcical to waste judicial time on it."

367. We have considered the arguments of the parties on the issue of abuse of court process. In light of our determinations on the other issues in this judgment, we find that the petitioner's case is not an abuse of court process. On the other hand, the JSC's decision to proceed with the petitions for the removal of the petitioner from office, despite the existence of the appeals before the Court of Appeal amounted to its own process.

Alleged bias on the part of the 2nd and 3rd Respondents

368. In separate rulings delivered on August 13, 2020 by the 2nd and 3rd respondents and adopted by the JSC, the petitioner's applications asking the 2nd and 3rd respondents to recuse themselves from hearing the petitions for her removal from office were dismissed. As against the 2nd respondent, she had alleged that he was biased and conflicted because he was a party to Petition No. 295 of 2018 and also the Chairperson of the Multi-Agency Taskforce Team that recommended her prosecution in the Anti-Corruption Court. Further, that the 2nd respondent had hired a Queens' Counsel to prosecute her in Nairobi ACC No. 38 of 2018 and to oppose Petition No. 295 of 2018 in challenging her prosecution in the magistrate's court. It is submitted that the 2nd respondent justified his refusal to recuse himself from the petition by misrepresenting/misapprehending material facts before the JSC.

369. In respect of the 3rd Respondent, the Petitioner alleged that she overheard him discuss with someone on phone as they waited for virtual proceedings to commence, on how he had influenced the fast tracking of the petitions for her removal. She also claimed that the 3rd Respondent had attempted to fast track the disposal of the appeals arising from Petition No. 295 of 2018. Further, that the language and tone in his ruling in regard to the application for recusal evidenced bias. She also alleged that the 3rd Respondent was affiliated to the 2nd Respondent who was already biased against her.

370. In the decision dismissing the Petitioner's applications for recusal, the JSC stated that it was an independent commission with independent commissioners and thus it could not call upon a member to recuse themselves and that they would abide by the individual decisions of the 2nd and 3rd Respondents.

371. The 2nd Respondent asserted in his decision that the Petitioner had not established the complaint of bias and conflict of interest and refused to recuse himself. The 3rd Respondent similarly declined to recuse himself.

372. The 2nd and 3rd Respondents further contended that it is peculiar that the Petitioner does not seek any relief against them and that instead, alleges without providing cogent evidence, that by virtue of their offices, the 2nd Respondent is biased against her while the 3rd Respondent has 'openly by conduct and utterances' demonstrated his predisposition on the petitions before the JSC and thus lacks fairness, objectivity and impartiality against her in all deliberations of the JSC.

373. The 2nd & 3rd Respondents further submitted that they sit as commissioners of the JSC by virtue of Article 171(2) (e) & (f) of the Constitution and are mandated to carry out the functions under Article 172 of the Constitution and thus presumed to be competent, impartial and faithful to their constitutional and statutory obligations and oath of office.

374. It was further submitted for the DPP that the petitioner's failure to adduce cogent evidence on the allegations of bias against the 2nd and 3rd Respondents show that the allegations are unreasonable and grounded on apprehension and conjuncture. To buttress this position, the DPP relied on the case of Robert Tom Martins Kibisu v Republic [2018] eKLR, where the Supreme Court held underscored

that where a judge is alleged to be biased, cogent evidence is required, and allegations based on apprehension and conjecture are insufficient.

375. The DPP referred to the case of *Philip K. Tunoi & another v Judicial Service Commission & another* [2016] eKLR, where the Court of Appeal held that the test of bias is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Further reliance was placed on the decision of the Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2013] eKLR.

376. The DPP submitted that the Petitioner's allegations of bias are an afterthought and an act calculated to convolute the matter before the JSC, her preferred forum, in an effort to have the petitions for her removal abandoned. This, he submitted is informed by the fact that the petitioner did not raise her doubt on the independence of the 2nd and 3rd respondents *sua sponte* either at the time she filed Civil Appeal No. 298 of 2019 or at the first appearance before the JSC. To support this proposition, reliance was placed on the case of *Apondi v Canuald Metal Packaging* (2005)1 EA 12, where the Court stated that if a party chooses a competent forum for litigation, they cannot be heard to complain about that choice after the event and that it would be otherwise offensive and prejudicial to other parties and an abuse of the court process to allow litigation by instalments.

377. In exercising its mandate under article 168(2) of the Constitution, the JSC acts as a quasi-judicial body. What is required of a body exercising quasi-judicial functions was pertinently stated in the case of *Local Government Board v Arlidge* (1915) AC 120 (138) HL as follows:

> "...those whose duty it is to decide must act judiciously. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice."

378. In addition to the requirement to act judiciously, a body exercising a quasi-judicial function must accord parties a fair hearing. In our jurisdiction, the requirement of fairness was emphasised in *Onyango Oloo v The Attorney General [1986 – 1989] EA 499* (as cited in *Judicial Service Commission v Speaker of the National Assembly & 8 others* [2014] eKLR) that:

> "...ordinary people would expect those making decisions which will affect others to act fairly..."

379. The ingredients of a fair hearing as per article 50(1) of the Constitution includes a public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The petitioner submitted that the 2nd and 3rd respondents refused to recuse themselves from sitting in the deliberations of the petitions for her removal from office despite the risk or danger of possible bias or lack of impartiality which was brought to their attention as early as October 17, 2019.

380. The law on bias has been established in a chain of authorities. In the case of *Kaplan and Stratton v LZ Engineering Construction Ltd and 2 others* Civil Application No. NAI. 105 of 2000 the Court summarized the law on bias as follows:

> "To sum up, the present state of the law in relation to apparent bias, as it applies to judges, is that there is an automatic disqualification for any judge who has a direct pecuniary or proprietary interest in any of the parties....

Apart from that, if an allegation of apparent bias is made it is for the court to determine whether there is a real danger of bias…in the sense that the judge might have unfairly regarded with favor or disfavor the case of a party…".

381. As observed in the case of *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000]1 All ER 65 "a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case."

382. Nevertheless, one must always bear in mind the words of the South African Court in the case of the President of the *Republic of South Africa and others v South African Rugby Football Union and others* (CCT16/98) [1999] ZACC 11 (4th June 1999) that:

> " [40] In applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence… A presumption in favour of judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased."

383. An allegation of bias against a judge must therefore be supported by cogent evidence and apprehension of bias alone is not sufficient to have a judge recuse themselves from a case. We find support from the Supreme Court decision in *Robert Tom Martins Kibisu v Republic* [2018] eKLR where it was stated:

> " "[64] We fully agree with the foregoing jurisprudence as regards allegations of bias on the part of a judge and in the application before us, no cogent evidence has been placed before the Court to warrant a finding of bias being made on the part of the presiding judge even if we had the jurisdiction to entertain such a complaint. While a petition filed by the Justice has been cited for the Court, we find this not sufficient as evidence of bias. The applicant's allegations are not only based on apprehension, but on conjecture…"

384. In exercising the quasi-judicial function of the JSC, each commissioner is expected to be impartial. In the instant case, the 2nd & 3rd respondents submitted that the petitioner had failed to substantiate her allegations of bias and impropriety. The petitioner's complaint against the 2nd respondent relates to his position as the Attorney General as the principal legal advisor to the executive. She alleged that he was part of the team which recommended her prosecution. We have considered this complaint and find that besides being the principal legal advisor to the executive, the Attorney General carries out other functions including sitting in cabinet meetings, a member of the National Council on Administration of Justice, member of the JSC, Chairperson of the Multi-Agency Taskforce Team, among others. Our reading of sections 5 and 6 of the *Office of the Attorney General Act* Cap 49 of Laws of Kenya shows that his functions and powers are expansive and gives him leeway to do anything that may be necessary for the effective discharge of the duties and the exercise of the powers of his office.

385. We therefore find that the participation of the Attorney General in the Multi-Agency Taskforce Team was part of his regular duties and he cannot therefore be accused of bias for chairing the Taskforce. This applies to the litigations where he is made a party by virtues of his office. We do not see how the Attorney General could be accused of being biased yet it is the Petitioner who named him, and correctly so, as one of the Respondents in Petition No. 295 of 2018 and her subsequent appeal.

386. The petitioner also read bias in the action of the Attorney General approving the Queens' Counsel to prosecute her in the Anti-Corruption Court and defend Petition No. 295 of 2018. We note that under section 11(1) of the *Advocates Act*, Cap 16 of Laws of Kenya, the Attorney-General may, in his absolute discretion, admit to practise in Kenya for any specified suit or matter an advocate who is entitled to appear before superior courts of a Commonwealth country. Again, it is obvious that the Attorney General was exercising his statutory mandate in approving the Queens' Counsel.

387. Further, as correctly pointed out by the DPP, he exercises his prosecutorial powers independently as stipulated in article 157 of the Constitution. No material has been placed before us to demonstrate that the Attorney General or any member of the Multi-Agency Taskforce Team influenced the DPP's decision to prosecute the petitioner in the Anti-Corruption Court.

388. In respect of the 2nd respondent therefore, we find no iota of evidence of bias against the petitioner. He was simply performing his Constitutional and statutory duties. We therefore find that the petitioner's apprehension of bias and conflict of interest in as against the 2nd respondent is unsupported.

389. The 3rd respondent is alleged to be biased because of his affiliation to the 2nd Respondent, his overzealous approach to the petitions before the JSC and fast-tracking of the appeals before the Court of Appeal. The petitioner also implied bias from the language and tone used by the 3rd Respondent in his ruling dismissing her application for his recusal. She also alleged that the 3rd respondent was affiliated to the 2nd respondent who was already biased against her.

390. As already demonstrated, there is nothing to show that the 2nd respondent had taken any position in respect of the petitions for the removal of the Petitioner upon which the 3rd respondent can be said to have been aligned to.

391. On the allegation that the language used by the 3rd respondent in his ruling declining to recuse himself betrayed his partiality, we indeed agree that language and tone used by a judicial officer or a decision maker may at times give the impression of bias. However, that in itself is not evidence of bias or impartiality. Each decision maker has his own style of communicating a decision.

392. The enthusiasm of the 3rd respondent in disposing the petitions against the petitioner was explained in his ruling as an effort to improve the accountability of the Judiciary. This is part of the mandate of the JSC. This is also in line with the dictates of article 47(1) of the Constitution that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Each element of this right is important and those who exercise judicial or administrative functions are expected to expeditiously dispose of matters before them.

393. The apparent overzealousness of the 3rd Respondent by itself cannot amount to bias and neither can he be said to have taken a particular position on the petitions for the removal of the Petitioner from office. Even the telephone call allegedly overheard by the Petitioner being made by the 3rd Respondent can be attributed to his anxiety to have the matters against the Petitioner disposed of expeditiously.

394. From our findings above we are not satisfied that a case has been made for the prohibition of the 2nd and 3rd respondents from sitting in the petitions for the removal of the Petitioner from office.

Virtual Proceedings

395. The petitioner complained that the JSC violated her right to fair hearing when it resorted to virtual hearing instead of her preferred mode of physical hearing. We appreciate that the Petitioner, like any other party to proceedings, was entitled to a fair hearing before the JSC. We however observe that the petitioner did not specify the manner in which her rights were violated.

396. Our brief observation on this issue is that in this age and times of the Covid-19 pandemic, virtual hearings of cases is encouraged and should be embraced unless there is material to support the assertion that such a hearing would violate the rights of any party to proceedings. Indeed, it is for that reason that all parties were in agreement that these proceedings be conducted virtually. Our courts are at the moment dispensing justice virtually and it would actually be discriminatory to hold that a certain segment of our society is entitled to in-person arbitration of disputes. We need not say more on this issue but to state that we find no merit in this particular assertion and complaint raised by the Petitioner. We decline the invitation to hold that the call by the JSC to hear the Petitioner virtually violated her rights.

Double Jeopardy

397. According to the Petitioner, the DPP and the DCI should not be allowed to pursue Civil Appeal No. 314 of 2019, with the ultimate goal of being permitted to prosecute her in the Anti-Corruption Court, and at the same time seek her removal from office through the JSC. This, in her view would amount to double jeopardy as the two processes are based on the same facts. The Petitioner did not elaborate on this issue and neither did the Respondents and Interested Parties respond to the same.

398. The only observation we make on the issue is that the petitioner is not facing any criminal trial at the moment. We have also found that the JSC cannot consider petitions for her removal while the two appeals are pending determination by the Court of Appeal. It therefore follows that the question of the petitioner suffering double jeopardy if the JSC is allowed to proceed with the matters against her does not arise. It would also be speculative on our part if we found otherwise because the outcome of the appeals cannot be predicted. This position finds support in the judgement in the case of *Nancy Makokha Baraza*(*supra*) where the Court addressed a similar issue as follows:

> " 110. On the issue of double-jeopardy, we must stress that so far the petitioner has not been tried and convicted. As far as we know there are no criminal proceedings against her pending in any court... We therefore do not agree that the mere fact that criminal charges may be preferred against any of the parties to the incident in question or both, bars the Commission from carrying out its Constitutional mandate as provided under Article 168(2) of the Constitution. On the issue whether the Commission should have suspended its mandate and awaited for a conviction before taking the steps taken, we are not aware of any criminal proceedings that have been commenced so far and we cannot speculate that a criminal trial will be commenced against the petitioner. The DPP is on record as saying that he will await the conclusion of the process commenced by the JSC."

399. Given the facts and circumstances of this case, we find no merit on the complaint of double jeopardy.

OTHER ISSUES

400. The respondents and the Interested Parties accused the petitioner of staying the appeals before the Court of Appeal on the ground that the petitions for her removal before the JSC ought to have been heard first. They further submitted that when she appeared before the JSC, instead of responding to the petitions for her removal from office, she claimed that there were appeals pending before the Court of Appeal. The record of the Deputy Registrar for November 12, 2019 reads as follows:

> " Mr. Havi the appellant is not ready to take directions in this appeal because the DPP has also filed a petition before the JSC on the same issues coming for hearing on December 16,

2019. The case management today be deferred as the two should not proceed concurrently. Appeal No 314 of 2019 was filed by DPP on July 11, 2019. There is a cross appeal. The court needs to give directions on the hearing of these two appeals and the cross appeal.

For DPP:

We oppose the same. Process before JSC is for removal of office unrelated to substance of this appeal. We submit that parties should file submissions. The Court will determine how matters will proceed. JSC will proceed with hearing on 16th which does not bar these proceedings. DPP is ready to proceed with Appeal 314 of 2019.

For Interested Parties:

We agree with submissions by counsel for the appellant. The full bench needs to give directions on these issues.

For the AG:

We support the DPP submissions

For amicus:

We shall abide by your decision

Directions

1. I disagree with the submission that the Court needs to give directions on the hearing of the two appeals and the cross appeal. These are ordinary directions given by the Deputy Registrar during case management.

   However, I have considered the pending hearing before the Judicial Service Commission on 16/12/2019. This is also the first time this matter is coming for case management before me.

   I will defer case management today.

   Fresh C/M dates will issue from the Registry after December 16, 2019.

Order to apply to appeal No 314/2019

Signed"

401. Our appreciation of the above record of the Deputy Registrar of the Court of Appeal is that no order staying the hearing of the two appeals was issued. All the record reveals is that case management was deferred and new dates were to be taken from the registry after the 16th of December, 2019.

402. There was an accusation that the petition has been brought after inordinate delay and in violation of the requirement that a person seeking review of administrative action should file for judicial review within six months. On this we observe that this is a constitutional petition alleging violation of rights and the institution of constitutional claims has no timelines. In any event the process before the JSC was ongoing. The Petitioner could not, therefore be expected to seek court intervention for each and every alleged misstep by the JSC.

403. Before we issue the final orders, we must record our concern in the suggestion by the respondents and the Interested Parties that the petitioner ought not to have filed this petition. No person should be taken on a guilt trip for asserting and seeking the protection of their constitutional rights and fundamental freedoms by the courts. The Bill of Rights was put in the Constitution not as a page filler but to be enjoyed by all to whom the rights apply. The fact that the petitioner is a judge does not mean

that she has a lesser entitlement to the rights available to every other person. As was affirmed by the Supreme Court in *Robert Tom Martins Kibisu* (*supra*):

> " ...The office of a judge does not indeed strip a judge from the enjoyment of rights under the Bill of Rights".

DISPOSAL

404. From our above analysis, we have come to the irresistible conclusion that the petition is merited and substantially succeeds. We do proceed to make the following final orders:

(a) A declaration be and is hereby issued that the decision made by the Judicial Service Commission on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring her to respond to the four petitions lodged against her on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations; and all proceedings undertaken by the Judicial Service Commission subsequent thereto, are unconstitutional and in violation of articles 1(3), 27(1) and 50(1);

(b) A declaration be and is hereby issued that the decision made by the Judicial Service Commission on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring the Petitioner's response to the four petitions lodged against her on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations; and all proceedings undertaken by the Judicial Service Commission subsequent thereto, amounts to an abuse of process and administrative power of the Judicial Service Commission in view of the pendency of appeals before the Court of Appeal in Civil Appeal No. 298 of 2019, Honourable Philomena Mbete Mwilu v DPP & 6 others and Civil Appeal No. 314 of 2019, The Director of Public Prosecutions and the Director of Criminal Investigations v Honourable Philomena Mbete Mwilu, arising from the judgement of the High Court in Petition No. 295 of 2018, Honourable Philomena Mbete Mwilu v DPP & 4 others;

(c) An order of *certiorari* be and is hereby issued calling into this Court and quashing the decision of the Judicial Service Commission made on July 8, 2019 and communicated to the petitioner on July 9, 2019 requiring her to respond to the four petitions lodged against her on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations;

(d) An order of *certiorari* be and is hereby issued calling into this Court and quashing all the proceedings undertaken by the Judicial Service Commission in respect of the four petitions lodged against the Petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; on June 11, 2019 by Peter Kirika; and on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations;

(e) A declaration be and is hereby issued that the Director of Public Prosecutions and the Director of Criminal Investigations as State officers, do not fall into the category of "any person" as envisaged under article 168(2) as read with article 260 of the Constitution and they therefore cannot petition the Judicial Service Commission for the removal of the Petitioner or any judge from office as allowing them to petition for the removal of a judge from office violates the doctrine of separation of powers under article 1(3) of the Constitution;

(f) An order of *certiorari* be and is hereby issued calling into this Court and quashing the petition lodged on June 27, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations seeking the removal of the Petitioner from office;

(g) A conservatory order be and is hereby issued suspending the Judicial Service Commission's consideration of the three petitions lodged against the Petitioner on October 18, 2018 by Mogire Mogaka; on June 7, 2019 by Alexander Mugane; and on June 11, 2019 by Peter Kirika pending the final outcomes of the appeals pending before the Court of Appeal in Civil Appeal No. 298 of 2019, Honourable Philomena Mbete Mwilu v DPP & 6 others and Civil Appeal No. 314 of 2019, The Director of Public Prosecutions and the Director of Criminal Investigations v Honourable Philomena Mbete Mwilu, arising from the judgement of the High Court in Petition No. 295 of 2018, Honourable Philomena Mbete Mwilu v DPP & 4 others; and

(h) This being a constitutional petition, the appropriate order on costs is to direct each party to meet their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2021

SAID J. CHITEMBWE

JUDGE

W. KORIR

JUDGE

R.E. ABURILI

JUDGE