Monda & 2 others v Senate & 7 others; Obebo (Interested Party) (Petition 4, 2 & 3 of 2024 (Consolidated)) [2025] KEHC 13328 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13328 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

PETITION 4, 2 & 3 OF 2024 (CONSOLIDATED)

WA OKWANY, J

SEPTEMBER 18, 2025

BETWEEN

HON DR ROBERT MONDA ..... 1ST PETITIONER

VINCENT MARIITA OMAO ..... 2ND PETITIONER

PURITY MORAA KIRERA ..... 3RD PETITIONER

AND

THE SENATE ..... 1ST RESPONDENT

THE SPEAKER OF THE SENATE ..... 2ND RESPONDENT

GOVERNMENT PRINTERS ..... 3RD RESPONDENT

HON SIMBA PAUL ARATI ..... 4TH RESPONDENT

KISII COUNTY ASSEMBLY ..... 5TH RESPONDENT

SPEAKER KISII COUNTY ASSEMBLY ..... 6TH RESPONDENT

CLERK KISII COUNTY ASSEMBLY ..... 7TH RESPONDENT

WYCLIFFE SIOCHA GESONGORI ..... 8TH RESPONDENT

AND

ELIJAH OBEBO ..... INTERESTED PARTY

JUDGMENT

Background

1. On 13th February, 2024 the County Assembly of Kisii received a Notice of Removal of Hon. Dr. Robert Onsare Monda (hereinafter also referred to as "the DG") from the Office of the Deputy Governor,

Kisii County, by way of impeachment. The grounds listed for the said notice of removal were inter alia as follows; Gross Violation of *the Constitution* and other laws, Abuse of Office, Gross Misconduct, and Crimes under National Law.

2. The Notice of Removal precipitated the filing of Petitions in various courts as follows: -

   a. Nyamira High Court Constitutional Petition No. 2 of 2024 (formerly Kisii High Court Petition No. 2/2024) filed by Dr. Monda on 26th February 2024 (the 1st Petition) challenging the impeachment proceedings before the Kisii County Assembly (hereinafter "the County Assembly").

   b. Nyamira Constitutional Petition No. 3 of 2024 (formerly Nairobi High Court Petition No. E159 of 2024) filed by Vincent Marita Omao on 21st March 2024 (the 2nd Petition) challenging the impeachment proceedings before the Kisii County Assembly and the Senate.

   c. Nyamira Constitutional Petition No. 4 of 2024 (formerly Machakos Petition No. E007 of 2024 and laterNairobi Constitutional Petition No. 10 of 2024) filed by Purity Moraa Kirera dated 1st April 2024 challenging the impeachment proceedings before the County Assembly and the Senate.

   d. Nairobi Constitutional Petition No. E003 of 2024 (formerly Machakos Constitutional Petition No. E006 of 2024) filed by Jared Mairura Ratemo against the Senate seeking conservatory orders to stop the gazettement declaring the seat of the Kisii County Deputy Governor vacant. The Petition was however withdrawn.

3. The Petitioner in the first Petition sought the following reliefs: -

   1. That an order do issue to prohibit the 1st, 2nd and 3rd Respondents from proceeding at all, or any further, with the public participation on the removal of the Petitioner/Deputy Governor (DG) and from collecting, and or collating and or compiling and or presenting any public participation report to the County Assembly session of MCA's and or acting upon any report and material obtained from the notice for public participation whatsoever pending hearing and determination of this Petition.

   2. That an order do issue to prohibit and restrain the 1st, 2nd and 3rd Respondents by themselves and or their representatives, agents, deputies, assistants, staff or whosoever whatsoever from further acts of entertaining for hearing and discussion at County Assembly MCA sessions, prosecuting, moving, arguing, debating, voting, and or making any resolution as to the Petitioner's motion to impeach him, presented to the County Assembly on 13th and 22nd February 2024 pending hearing and determination of this Petition.

   3. That a declaration do issue that there are no defined and clear issues and matters resolved and determined by the County Assembly, or otherwise through its "Relevant Committee" for which the Petitioner/DG can attend and respond to on 29th February 2024, and the Petitioner's right to be heard and in his defense has been violated pending hearing and determination of this Petition.

   4. That a declaration do issue that the law as it stands does not provide nor expect a process of public participation on matters of impeachment and removal of a Deputy Governor.

   5. That without prejudice to any other order prayed for herein, an order do issue that in this case, the public participation as formatted and published does not meet the reasonable, informed and viable public participation criteria in law and cannot result in any actionable output.

6. That a declaration do issue that any requisition for the Petitioner/DG to respond to the allegations made, being matters under active investigations by the EACC and by the police will violate his rights and fundamental freedoms.

7. That a declaration do issue that the motion to impeach and remove the Deputy Governor is improper and/or is premature.

8. That a declaration do issue that the motion to remove the Petitioner from office by way of impeachment is out of time, has abated and is null and void thereof.

9. That a declaration do issue that the law does not provide that Any And All complaints and or notice or motion for impeachment and removal be directly remitted to the person of interest as a basis for an invite, to make a defence before the County assembly has considered, evaluated, and resolved on the propriety of the motion, and issues to be answered, and that the Petitioner's legitimate expectations of right to fair administrative action, and right to the rule of law have been breached.

10. That a declaration do issue that the Petitioner's right to be heard has been infringed by the violation of the law to ensure the original notice of motion of 13th February, 2024 is exactly the same as the motion on 21st February, 2024.

11. That a declaration do issue, that the process, procedure and substance adopted for purpose of giving notice, moving the motion, entertaining Petitioner's defence, debating and voting for the purpose of this motion for impeachment and for removal from office violates the Petitioner's rights to a fair hearing.

12. That any other or further orders and or directions do issue in the best interest of justice.

13. That the 3rd Respondent (Hon. Wycliffe Siocha Gesongori) do pay costs.

4. The Petitioner in the second Petition sought the following reliefs: -

1. A Declaration that the Notice issued on 13th February, 2024 of intention to remove the 1st Interested Party (DG) from office of the Deputy Governor, Kisii County by way of impeachment was defective and unlawful for want of compliance with Section 33 (1) of the County Government Act, 2012 as read with Orders 60 (1), 60 (5) and 60 (6) of the Standing Orders of the County Assembly of Kisii.

2. A Declaration that within the intendment of Section 87 of the County Government Act, 2012 as read with Article 10 and 196 (1) of *the Constitution* of Kenya, 2010, a County Assembly must conduct a meaningful and qualitative public participation in all wards of the county on any decision that leads to a motion to impeach a County Governor.

3. A Declaration that the 2nd Respondent (Speaker of the Senate) by admitting the motion of impeachment dated 21st February, 2024 and the 1st Respondent (The Senate) proceeding to hear the said motion against the 1st Interested Party despite the 7th Respondent having not conducted a meaningful and qualitative public participation, Section 87 of the County Government Act, 2012 was violated.

4. A Declaration that the 2nd Respondent by admitting the motion of impeachment dated 21st February, 2024 and the 1st Respondent proceeding to hear the said Motion against the 1st Interested Party despite the 7th Respondent (Kisii County Assembly) having been moved and

canvassed out of time by the 7th Respondent, Section 33 of the County Government Act, 2012 was violated.

5. A Declaration that the decision of the 1st Respondent of the 14th March, 2024 to remove from office the 1st Interested Party as the Deputy Governor of Kisii County does not meet the threshold requirements in Article 181 (1) of *the Constitution* of Kenya.

6. An Order Of Certiorari be issued to remove to this Honourable Court and quash the resolution passed by the 1st Respondent on 14th March, 2024 on the removal of the 1st Interested Party as the Deputy Governor, Kisii County and all consequential Kenya Gazette Notices issued pursuant to the said Resolution.

7. An Order Of Prohibition do issue prohibiting the 3rd Respondent (Government Printers) from gazetting and/or publishing a gazette notice appointing any person to office of the Deputy Governor, Kisii County.

8. A Declaration that the actions of the Respondents in this cause violated the constitutional provisions under articles 27, 35 (1) (b) and (2). 47, 50 (1) and (2) of *the Constitution* of Kenya.

9. An ORDER compelling the 2nd Interested Party (Hon. Elijah Obebo) to refund salaries, remuneration and personal emoluments expended during the illegal tenure.

10. This Honourable Court do order that the costs of this Petition be borne by the Respondents.

11. Such other orders as this Honourable Court shall deem fit and just to grant in the circumstances.

5. The Petitioner in the third Petition, Purity Moraa Kirera, sought the following reliefs in the Petition: -

1. A Declaration that the Notice issued on 13th February, 2024 of intention to remove the 1st Interested Party (DG) from office of the Deputy Governor, Kisii County by way of impeachment was defective and unlawful for want of compliance with Section 33 (1) of the County Government Act, 2012 as read with Orders 60 (1), 60 (5) and 60 (6) of the Standing Orders of the County Assembly of Kisii.

2. A Declaration that within the intendment of Section 87 of the County Government Act, 2012 as read with Article 10 and 196 (1) of *the Constitution* of Kenya, 2010, a County Assembly must conduct a meaningful and qualitative public participation in all the wards of the county on any decision that leads to a motion to impeach a County Governor.

3. A Declaration that the 2nd Respondent by admitting the motion of impeachment dated 21st February, 2024 and the 1st Respondent proceeding to hear the said motion against the 1st Interested Party despite the 7th Respondent having not conducted a meaningful and qualitative public participation, Section 87 of the County Government Act, 2012 was violated.

4. A Declaration that the 2nd Respondent by admitting the motion of impeachment dated 21st February, 2024 and the 1st Respondent proceeding to hear the said motion against the 1st Interested Party despite the 7th Respondent having been moved and canvassed out of time by the 7th Respondent, Section 33 of the County Government Act, 2012 was violated.

5. A Declaration that the decision of the 1st Respondent of the 14th March, 2024 to remove from office the 1st Interested Party as the Deputy Governor of Kisii County does not meet the threshold requirements in Article 181(1) of *the Constitution* of Kenya.

6. An Order Of Certiorari be issued to remove to this Honourable Court and quash the resolutions passed by the 1st Respondent on the 14th March, 2024 on the removal of the 1st Interested Party as the Deputy Governor, Kisii County and all consequential Kenya Gazette Notices issued pursuant to the said Resolution.

7. An Order Of Prohibition do issue prohibiting the 3rd Respondent from gazetting and or publishing a gazette notice appointing any person to office of the Deputy Governor, Kisii County.

8. A Declaration that the actions of the Respondents in this cause violated the constitutional provisions under Articles 27, 35(1) (b) and (2), 47, 50 (1) and (2) of *the Constitution* of Kenya.

9. An Order compelling the 2nd Interested Party (Hon. Elijah Obebo) to refund the Salaries, remuneration and personal emoluments expended during the illegal tenure.

10. This Honourable Court do order that the costs of this Petition be borne by the Respondents.

11. Such other orders as this Honorable court shall deem fit and just to grant in the circumstances.

6. Concurrently with the Petitions, the Petitioners also filed various interlocutory Applications seeking conservatory orders to stop the impeachment process. On 9th April 2024 Hon. Justice E. Ogola, the Principle Judge of the High Court, issued directions for the consolidation of all the Petitions and for their hearing before this Court. The interlocutory Applications were thereafter determined by this Court after which the parties were directed to file and exchange their respective written submissions on the Petitions.

7. This judgment is therefore in respect to the consolidated Petitions challenging the removal of the 1st Petitioner herein, by way of impeachment.

8. For purposes of this judgment, the Petitioner in the 1st Petition Dr. Robert Onsare Monda shall hereinafter be referred to as the 1st Petitioner; the Petitioner in the 2nd Petition Vincent Marita Omao shall be the 2nd Petitioner; and the Petitioner in the 3rd Petition Purity Moraa Kirera shall be the 3rd Petitioner. The Respondents in the various Petitions shall appear as listed herein above while Hon. Elijah Obebo, the newly elected Deputy Governor, shall be listed herein as an Interested Party.

Submissions

9. Mr. Katwa Kigen, Learned Counsel for the DG isolated the following issues for determination in his submissions: -

   i. Whether the proceedings before the County Assembly were valid considering the time prescriptions and the Deputy Governor's right to be heard.

   ii. Whether the Speaker of the Senate abdicated his functions.

   iii. Whether the proceedings at the Senate were valid considering the 1st Petitioner's right to be heard, the new evidence/materials that were introduced at the hearing and the inaccuracy of the Senate's decision.

Proceedings before the County Assembly

10. On the validity of the proceedings before the County Assembly, Mr. Kigen submitted that while the Notice of Intention to Impeach the Deputy Governor was issued on 13th February 2024, the Motion was moved before the County Assembly on 21st February 2024 after which the Assembly considered

the motion and arrived at its decision on 29th February 2024. Mr. Katwa noted that the Notice for public participation was published on 27th February 2024 while the report on public participation report was availed on 2nd March 2024, long after the impeachment proceedings had been conducted and concluded on 29th February 2024. According to the 1st Petitioner, the delay in the presentation of the said report rendered the public participation a sham.

11. It was submitted that the Kisii County Assembly Standing Order Nos. 60 – 65 which provide for the procedure for impeaching a governor, required that the Notice of Motion for the impeachment be considered and concluded within 10 days. The 1st Petitioner contended that since the Notice of Intention to Impeach the DG was issued on 13th February 2024, the impeachment proceedings ought to have been conducted and concluded before 23rd February 2024 and not 6 days later on 29th February 2024 as was the case in the instant Petition. Counsel further noted that public participation was initiated on 27th February 2024, 3 days after the 10 days period prescribed under the County Assembly Standing Orders had lapsed. It was further submitted that the public participation report was filed on 2nd March 2024 which was also long after the cumulative 10 days prescribed by the law had expired, in clear violation of the DG's right to a fair hearing.

12. It was submitted that the proceedings before the County Assembly were null and void and could therefore not yield a proper resolution on impeachment.

13. Counsel further submitted on specific issues as follows: -

The Role of the Speaker of the Senate

14. On whether the Speaker of the Senate abdicated his duties, reference was made to the Senate Standing Order No. 80 (8) and Rules of procedure on impeachment and specifically Rules 14, 20 and 30 thereof for the argument that the Speaker did not hear or make any decision on the preliminary objection over the issue of whether new evidence could be admitted before the Senate. It was submitted that allegations of bribery, infanticide and the alleged influencing of award of tenders against the DG were new matters that did not arise before the County Assembly and should not have been entertained before the Senate.

Validity of the Senate Proceedings

15. It was submitted that allowing new witnesses and new evidence before the Senate contravened the provisions of Rule 20 of the Senate Standing Orders and rendered the Senate's proceedings null and void. Counsel contended that the Senate Plenary Sessions conducted on 13th and 14th February 2024 allowed the introduction of new evidence that the DG was neither notified about nor given sufficient time to respond to. Reference was made to the case of Martin Wambora vs. Speaker of the Senate [2014] eKLR where the court referred to Section 33 of the County Government Act on the rules of procedure.

16. It was submitted that the Senate usurped the role of the County Assembly by accepting the new evidence. Counsel cited the decision in the case of Martin Wambora (supra) for the argument that the impeachment process is hierarchical in nature, starting from the County Assembly to the Senate, such that all the evidence should have been presented before the County Assembly as opposed to the introduction of new evidence before the Senate.

17. Reference was also made to the case of County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board [2015] eKLR where the court held that impeachment proceedings conducted without a written notice of the allegations were null and void for violating the right to a fair hearing.

18. It was submitted that the Speaker of the Senate made an erroneous conclusion to the effect that it had investigated the allegations and that the provisions of Sections 33(4) of the County Government Act were applied to the proceedings when the matter was not referred to any committee.

19. Ms. Kemunto, Learned Counsel for the 2nd Petitioner submitted on the jurisdiction of the Court and breach of the fundamental rights and freedoms.

20. On jurisdiction, it was submitted that the High Court has supervisory powers, under Article 165(6) of *the Constitution*, to interrogate the impeachment proceedings before both the County Assembly and the Senate in view of the fact that they are quasi-judicial processes. Reference was made to the Martin Wambora case (supra) and Mumo Matemu case (Supra).

21. It was further submitted that the County Assembly and the Senate did not follow the due process in their proceedings thus leading to the violation of fundamental rights under Article 47 (1) and (2) of *the Constitution* on the right to fair administrative action. Counsel maintained that the DG was not furnished with all the evidentiary material so as to enable him effectively defend himself before the Senate where new matters that he did not know about were raised. Reference was made to the case of Catherine Chepkemoi Keya vs. Evanson [2020] eKLR where the court allowed a petition for lack of fair administrative action where the Respondent did not supply the Petitioner with the documents that they relied upon.

22. Counsel reiterated that public participation was not conducted by the County Assembly as envisaged under Article 196 (1) (b) of *the Constitution*. She noted that notice of public participation was issued on 24th February 2024 and the public participation exercise carried out two days later on 26th February 2024 which was not adequate time to get the views of every resident in the county.

23. It was submitted that the threshold of public participation as set out under Section 87 of the *County Governments Act* was not met. Counsel submitted that the impeachment was driven by political witch-hunt and was conducted in blatant disregard to the ideals of democracy.

24. Mr. Maeche, Learned Counsel for the Petitioner 3rd Petitioner associated himself with the submissions of the other Petitioners and added that there was no competent impeachment motion before the County Assembly as the Notice of Impeachment was not served upon the DG so as to enable him defend himself and that the one third (1/3) threshold of support of the motion by the Members of the County Assembly (MCAs) was not met. Reference was made to Kisii County Assembly Standing Orders 60(1) and (2).

25. It was submitted that the impeachment motion was time barred having been canvassed before the County Assembly five (5) days after the expiry of the 10-days' period. It was submitted that the quantitative and qualitative components of public participation were also not met owing to the short notice given and the fact that it was conducted after the motion was tabled on 21st February 2024. Reference was made to the decision in Biosystem Consultants vs. Nyali Links Arcade Case No. E185 of 2023 where it was held that anything done out of time is a nullity as timelines go to the merit since they create rights. Reliance was also placed on the decision in British American Tobacco (Kenya) vs. CS – Health & 2 Others Pet. No. 5 of 2017 where the Supreme Court outlined the principles governing public participation.

The Respondents' Submissions

26. Mr. Ochieng' Oginga, Learned Counsel for the County Assembly cited the doctrines of Parole Rule of evidence and estoppel by conduct and representation founded on Section 120 of the *Evidence Act*. He submitted that pursuant to Section 59 (f) of the *Evidence Act*, the court should take judicial notice

of Gazette Notice No. Vol. CXXVI No. 11 of 11/7/2024 being a notification to the public of the election of the Interested Party herein as the new Deputy Governor of Kisii County. According to Mr. Ochieng', only an election court could, under Article 88 (4) of *the Constitution*, annul the said election after its conclusion. He submitted that this Court's jurisdiction is limited to determining if there were any violations during the impeachment process which jurisdiction did not extend to the nullification of the election of a Deputy Governor.

27. It was further submitted that the Court lacks the jurisdiction to enter into a merit review of the decision of the Senate and the County Assembly and could not interrogate the allegations made against the DG, the evidence tendered against him and the decision or rulings made, as that was the preserve of the two houses. Reference was made to the decision in Justus Kariuki Mate & Anor. vs. Martin Nyaga Wambora [2027] eKLR and the case of Mike Mbuvi Sonko vs. County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR) (5 December 2022) where the Supreme Court outlined the court's role in impeachment cases.

28. It was submitted that the substantive prayers in the 1st Petition had already been overtaken by events and that the Court was therefore being invited to engage in an academic exercise.

29. On the alleged breach of fundamental rights and freedoms under *the Constitution*, it was submitted that the Petitioner did not make out a case or discharge the burden of proving the violation of the said rights.

30. On the right to fair hearing, reference was made to the decision in the Mike Sonko case (supra) where it was held that the County Assembly is vested with the jurisdiction and latitude to conduct an impeachment process. Reference was made to the Kisii County Assembly Hansard to show that the County Assembly deliberated on the requirement for public participation and decided to adjourn its sittings so as to conduct public participation pursuant to its Standing Orders. Reliance was placed on the Mike Sonko case (supra) where the Supreme Court considered the strict timelines in impeachment proceedings and held that even 2 days was sufficient period for public participation.

31. It was submitted that the Public Participation Report was submitted on 27th February 2024 and not 2nd March 2024 as alleged by the Petitioners. Counsel added that public participation was conducted in all the wards in Kisii County and that no evidence was presented to show that anyone was denied the opportunity to present their views or that they did not see the advertisement or complained that the period was too short.

32. On the competence of the Impeachment Motion, it was submitted that it was misleading for the Petitioners to allege that there were no affidavits to support of the impeachment as there were affidavits sworn by Dennis Mokaya Misati, Reuben Monda Orangi and Joseph Misati.

33. On whether the County Assembly should have considered the impeachment motion in a committee, it was submitted that the County Assembly had the discretion to move in a committee or the full house and that the speaker ruled that the motion be determined by the full house after it failed to get approval for hearing through the committee.

34. On the claim that the DG was impeached over allegations that were still pending before criminal courts, it was submitted that this Court lacks the jurisdiction to consider/review the merits of the impeachment decision and that proof of even one ground of impeachment was sufficient to support an impeachment, the existence of the criminal investigations notwithstanding.

35. It was submitted that the submission of new evidence before the Senate did not vitiate the impeachment proceedings before the County Assembly and that even assuming that the new evidence was to be omitted, the impeachment would still stand.

36. It was the Respondents' case that the doctrine of estoppel is applicable in this case since the DG was duly represented by counsel before both the Senate and the County Assembly. Counsel noted that the DG's advocates cross-examined all the witnesses who testified before the Senate which means that the alleged new evidence was fully interrogated.

37. Reference was made to Article 124 of *the Constitution* which gives the Standing Orders a constitutional underpinning. It was submitted that Petitions Nos. 2 and 4 of 2024 were identical and exact replica of each other thus amounting to an abuse of the court's process through duplicity of pleadings. It was submitted that the said petitions are based on matters of pure hearsay by parties who did not participate in the proceedings before the Senate and the County Assembly.

38. Mr. Wambulwa, Learned Counsel for the Senate, submitted that the impeachment proceedings before the Senate were conducted in strict compliance with the law and the Senate Standing Orders. He argued that the Senate complied with all the laws and procedures on impeachment upon receiving the resolution by the County Assembly. It was also submitted that the Senate acted within the law when it considered the impeachment motion in the plenary.

39. It was submitted that the Senate's decision on the issue of gross violation of *the Constitution* under Article 181 was a merit decision which is an exclusive preserve of the Senate and the County Assembly that the Court could not review. Reference was made to the decision in Mwangi Wairia case (supra) where it was held that the Senate, as the impeachment court, was expected to investigate and interrogate the process undertaken at the County Assembly.

40. On the claim that the Speaker of the Senate did not make a ruling on the preliminary issues raised by the DG, it was submitted that all the parties were granted an opportunity to canvass the preliminary issues and that the Speaker thereafter issued a detailed and reasoned ruling on all the matters that had been raised.

41. On the claim that the Senate erred in allowing the introduction of new evidence, reference was made to Article 125(1) of *the Constitution* and Rule No. 10 of the Senate Rules for the argument that the Senate may summon any person to appear before it to give evidence. It was the Senate's case that the Speaker did not allow new evidence as the witnesses tendered evidence that was limited to the charges that were read out to the DG. Counsel argued that the Petitioners did not establish any basis for the granting of the orders sought in the Petitions.

42. Ms. Opola, Learned Counsel for the Senate referred to the decision in Justus Mate case (supra) among other cases, and urged this Court to restrain itself from interfering with the mandate of other institutions in the spirit of Separation of Powers. Counsel also submitted that the allegation that the Senate was biased against the DG was not proved. She added that the jurisdiction of this Court has been invoked in order to circumvent *the Constitution* and the County Government Act.

The Petitioners' Rejoinder

43. Mr. Katwa Kigen, advocate for the 1st Petitioner, submitted that there were four irreducible uncontested facts namely; that the impeachment proceedings of 29th February 2024 were conducted outside the set timelines; that public participation was carried out on very short notice and the report made on 27th February 2024; that new evidence was presented before the Senate and lastly, that the DG was not supplied with witness statements beforehand so as to enable him prepare his defence.

44. It was submitted that the Petitioners' case was about the fairness of the procedure adopted by both the County Assembly and the Senate and the enforcement of the DG's rights under the Articles of *the Constitution*.

45. On the application of Rule 10 of Senate Rules on the summoning of witnesses, counsel submitted that Rule 20 thereof requires that the name(s) of the witnesses be availed before the County Assembly and not the Senate, and further, that the evidence should have been presented before the County Assembly and that such evidence must be part of the allegations made before the said Assembly.

46. The Petitioner maintained that Article 125 of *the Constitution*, on freedom to call evidence, was subject to Article 181 (2) on the removal of the Governor or his Deputy.

47. Mr. Ochoki, Learned Counsel for the 1st Petitioner submitted that the substantive prayers in the Petition had not been overtaken by events as they related to the violation of constitutional rights. He noted that the facts in the Justus Mate case (supra) were distinguishable from the facts in this case as the said case involved issues of interference with the ongoing process of impeachment while, in the instant case, the impeachment process had been concluded.

48. Regarding the issue of the gazettement of the new Deputy Governor, it was submitted that the instant case does not fall under the ambit of an election court as it related to infringement of constitutional rights.

49. On the allegation that the Petitions were founded on matters of hearsay, Ms. Kemunto submitted that the evidence that the Petitioners relied on were matters available on public records/documents.

Issues For Determination

50. I have considered the grounds enumerated in the Petitions, together with the evidence presented by the parties and their rival submissions. I find that the following issues arise for this court's determination: -

    a. Whether the court has the jurisdiction to hear and determine the Petitions.

    b. Whether the impeachment proceedings against the 1st Petitioner were valid. Under this issue, the court will consider: -

        i. Validity of Notice and legal timelines for impeachment at the County Assembly.

        ii. Threshold set for Public Participation.

        iii. Validity of the Senate Proceedings - Introduction of new evidence and failure to provide witnesses' statements.

    c. Whether the 1st Petitioner's constitutional rights were violated.

    d. Whether the proceedings before the County Assembly and the Senate met the threshold for Impeachment of the 1st Petitioner under Article 181 of *the Constitution*.

Analysis And Determination

Whether the Court has the jurisdiction to hear and determine the Petitions filed before it.

51. The 5th Respondent, Kisii County Assembly, submitted that this Court lacks the jurisdiction to entertain the Petition as it does not have the power to review the merits of the decision of the Senate and the County Assembly. It was the 5th Respondent's case that impeachment is vested only in the two houses.

52. The Petitioners, on their part, argued that in the performance of their quasi-judicial functions during the impeachment process, the County Assembly and the Senate committed constitutional violations

which violations could only be addressed by this court in the exercise of its supervisory powers, under Article 165 (6) of *the Constitution*.

53. I have considered the powers of the High Court as outlined under Article 165 of *the Constitution* which stipulates as follows: -

165. High Court

(3) Subject to clause (5), the High Court shall have—

a. unlimited original jurisdiction in criminal and civil matters;

b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State Organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191; and

e. any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b. falling within the jurisdiction of the courts contemplated in Article 162(2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

54. It is trite that the process of impeachment of a governor (Deputy Governor) is not only a constitutional process but is also a political process. This unique yet multifaceted process must however be anchored on *the Constitution* and Statute which vest the mandate of the removal of a Deputy Governor, through impeachment, on the County Assembly and the Senate. The impeachment process, which commences before the County Assembly and ends at the Senate is a quasi-judicial process that is subject to the

High Court's supervisory jurisdiction in accordance with the provisions of Articles 165 3(d) and 165 (6) of *the Constitution*.

55. In the conduct of their quasi-judicial functions, the County Assembly and the Senate must adhere to the legal principles expected in such a process including, but not limited to, upholding the tenets of *the Constitution*, statutes and the rules of natural justice such as fair hearing. In this regard, the two houses must also uphold the constitutional rights of the person(s) affected by the impeachment. The role of the High Court, in the impeachment, is to satisfy itself as to the constitutionality and legality of the process and to address any violations of fundamental rights and freedoms. This is the position that was taken by the Court of Appeal in Martin Nyaga Wambora & 3 Others vs. Speaker of the Senate & 6 others, Court of Appeal at Nyeri Civil Appeal No. 21 of 2014 [2014] eKLR where the Court explained the sequential nature of the impeachment process and outlined the role and the powers of the High Court in the process as follows: -

> " 31. Our reading and interpretation of Article 181 of *the Constitution* as read with Section 33 of the *County Governments Act* shows that removal of a Governor is a constitutional and political process; it is a sui generis process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed.....
>
> It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. .....
>
> 32. In all the sequential steps identified above, courts have neither been vested with jurisdiction to initiate a motion, consider a resolution nor to hear the charges levied against the Governor. This position is in tandem with the core function test and the concept of separation of powers. The constitutional and statutory mandate to initiate and consider a motion to remove a County Governor is vested in the County Assembly and the Senate. Section 33 of the *County Governments Act* which is an implementing legislation for Article 181 of *the Constitution* does not vest the courts with the jurisdiction to hear charges relating to the removal of a Governor from office. From the dicta in Marbury – vs- Madison, – 5 US. 137, it is our considered view that in so far as the process of removal of a Governor from office is concerned; the province of the court is solely to decide on the rights of individuals and not to enquire how the County Assembly and Senate perform duties in which they have discretion.
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> 33 .....
>
> 34. Our reading of Article 165 (6) of *the Constitution* reveals that the role of the High Court for purposes of removal of a Governor from office is inter alia supervisory in nature to ensure that the procedure and threshold provided for in *the Constitution* and the *County Governments Act* are followed. If the process for removal of a Governor is unconstitutional, wrong, un-procedural or illegal, it cannot be said that the court has no jurisdiction to address the grievance arising therefrom. (See Mumo Matemu – vs- Trusted Society of Human Rights Alliance & 5 Others (supra)). In its supervisory role, the jurisdiction of the High Court is dependent on the process and constitutionality of the action taken. In the instant case, in its supervisory role, the High Court is to examine

whether any procedural law was violated by the County Assembly or Senate in arriving at their decision. (Emphasis added)

56. The principle that emerges from the above case law is that when considering the Petition challenging an impeachment, the High Court must be focused on the constitutionality and legality of the process and must steer clear from venturing into the merits of the decisions made by the County Assembly and Senate. This means that the Court cannot fetter the discretion exercised by the two quasi-judicial bodies in their performance of oversight function over the role of the Deputy Governor and cannot act as an appellate court over such decisions. In other words, the role of the High Court, in an impeachment process is merely supervisory in the sense that the court acts as a defender of the constitutional rights. Such jurisdiction is limited to the constitutionality and procedural propriety of the impeachment process, not the merits of the decision.

57. In Martin Nyaga Wambora & 3 others vs. Speaker of the Senate & 6 others (supra) the Court of Appeal held thus: -

> " 52 In our view, in addition to the supervisory jurisdiction of the High Court under Article 165 (6) of *the Constitution*, the High Court has a specific constitutional jurisdiction under Article 165 (3) (d) (ii) and (iii) of *the Constitution*. These paragraphs vest upon the High Court jurisdiction to hear any question on whether anything said to be done under the authority of *the Constitution* or any law is inconsistent with or in contravention of this Constitution; and to hear and determine any matter relating to constitutional powers of state organs in respect of county government. It is not contestable that removal of a Governor from office is a thing done under the authority of *the Constitution* and it is the duty of the High Court to determine if such removal is inconsistent with or in contravention to *the Constitution*.
>
> 53. It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove the threshold in Article 181 of *the Constitution*. For example, was the 4th appellant an employee of the 1st appellant or of the County Government" Is a Governor to bear personal vicarious liability for the acts and omissions of officers of the County Government" We are of the view that Article 181 and Section 33 of the *County Governments Act* are not ouster clauses that limit or oust the jurisdiction of the High Court as conferred by Article 165 (3) (d) (ii) and (iii) of *the Constitution*. Though the process of removal of a governor from office is both a constitutional and a political process, the political question doctrine cannot operate to oust the jurisdiction vested on the High Court to interpret *the Constitution* or to determine the question if anything said to be done under the authority of *the Constitution* or of any law is consistent with or in contravention of *the Constitution*." (Emphasis added)

58. As the custodian and defender of *the constitution*, this Court must adhere to the principles governing the rule of law such as separation of powers and independence of the arms of government which form the bedrock of our democracy. The court must in this regard, respect the functions of the County Assembly and the Senate by allowing them room to perform their constitutional and statutory functions in order to fulfil their mandate. This is the reason why courts have held that they cannot interfere or intervene in an impeachment process that is still underway and may only invoke their jurisdiction when the impeachment process before the two houses has been concluded. As I have

already stated in this judgment, the court's intervention in the impeachment process will only be to the extent of the legality and constitutionality of the procedure.

59. In carrying out its mandate, the Court must also be able to address itself on the question as to whether the constitutional threshold under Article 181 of *the Constitution* was met by considering the nexus between the charges and evidence adduced against the decisions of the two Houses. It is to be noted that this power is only to the extent that the Court must be satisfied that the charges and the evidence are in consonance with each other and not whether the charges and the evidence are true. Dealing with the merits of the decisions would amount to usurping the powers by Senate and County Assembly. The Court must not only review the procedure adopted in the impeachment but also consider if the threshold under Article 181 of *the Constitution* was met. The Court of Appeal dealt with this subject in Martin Nyaga Wambora vs. County Assembly of Embu & 37 Others [2015] eKLR; Court of Appeal at Nairobi Civil Appeal No. 194 of 2015 where it was held thus: -

> "(48) .....Thus in determining the petition before it, the High Court had to go beyond its supervisory mandate, by invoking its constitutional mandate to determine whether the removal of the appellant was done in accordance with *the Constitution*, and in particular whether the facts laid before the Senate in support of the allegations made against the appellant had met the threshold in Article 181 of *the Constitution* that lays down the grounds upon which a Governor can be removed....
>
> (51) It is evident from the above that the High Court only exercised its supervisory jurisdiction by reviewing the exercise of the Senate's powers in so far as the report of the Special committee was concerned. The High Court failed to discharge its constitutional mandate that required it to go beyond mere review, and determine whether the charges levelled against the appellant had met the threshold of Article 181 of *the Constitution*. Article 165(3) (d) (iii) of *the Constitution* gives the High Court jurisdiction to hear any question respecting the interpretation of *the Constitution* including the determination of any matter relating to constitutional powers or state organs in respect of County Governments and any matter relating to the constitutional levels relating to the constitutional relationships between the levels of Government.
>
> (52) The High Court put a caveat to the exercise of its constitutional mandate by stating that it did not have the facts which it could interrogate to enable it determine the issue of nexus and threshold with regard to the exercise of the Senate's power in the removal of the appellant as Governor. In undertaking the process of removal of the appellant as Governor of Embu County, the 1st and 2nd respondent, and the Senate, were exercising constitutional and statutory powers. A question having arisen regarding the exercise of those powers, the High Court was obligated to make a determination whether what was done was consistent with *the Constitution*.
>
> (53) In that regard, it was material that the nexus and threshold regarding the allegations upon which the appellant was being impeached be established. As already noted the evidentiary burden was upon the 1st and 2nd respondent whom it was not disputed, caused the motion for removal of the appellant to be debated in the County Assembly and its resolution carried to the Senate. That burden was also upon the Senate that passed the resolution for

removal to satisfy the Court that the there was nexus and threshold to meet the constitutional standard required for removal of the appellant as County Governor. This is information that was especially within the knowledge of the 1st and 2nd, 3rd, and 4th respondents. Interestingly, the 3rd and 4th respondents did not even challenge the petition! Again in this regard, the learned judges not only misdirected themselves in regard to the burden of proof, but also failed to discharge its constitutional mandate of determining whether nexus between the appellant's governance function and the impugned procurement process was established such as to meet the threshold of Article 181 of *the Constitution*." (Emphasis added)

60. The doctrine of Separation of Powers was discussed by the Court of Appeal in Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR, thus: -

> "(54). In our view, the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the object and purpose of the Ethics and Anti-Corruption Act as construed in light of article 79 of *the Constitution* of Kenya. Under this test, the courts will not be sitting in appeal over the opinion of the organ of appointment, but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision makers. This in our view provides a fact-dependent objective test that is judicially administrable in such cases....
>
> (56) The question then becomes, what is the standard or the test of the review? It was the contention of the appellant that the standard of review must be deferential given that appointments are committed to the other organs of government. In view of our constitutional design and the institutional competences attendant to it, it seems to us that this view cannot and has not been seriously contended in principle by any of the respondents. Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches." (Emphasis added)

61. It is trite that the High Court, as the Constitutional Court, has the ultimate authority to consider questions of constitutional violations that may arise in an impeachment processes. A perusal of the grounds listed in the three Petitions shows that they are premised on constitutional violations allegedly committed against the Deputy Governor during the impeachment process. I find that the claim, on constitutional violations, brings the Petitions within the purview of this court. I find that this Court has the jurisdiction to hear and determine the Petitions, albeit only with respect to the constitutionality and legality of the impeachment process, the threshold under Article 181 and alleged violations of the constitutional rights. I find guidance in the decision in Mate & another vs. Wambora & another

(Petition 32 of 2014) [2017] KESC 1 (KLR) (Civ) where the Supreme Court held thus at paragraph 84: -

> " 84. From the facts of this case, it is clear to us that the integrity of Court orders stands to be evaluated in terms of their inner restraint, where the express terms of *the Constitution* allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under *the Constitution*, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case."

Whether the impeachment proceedings against the 1st Petitioner were valid.

i. Validity of Notice and legal timelines for impeachment at the County Assembly.

62. Mr. Katwa Kigen, advocate for the 1st Petitioner, challenged the validity of the impeachment proceedings and referred to the Notice served on 22nd February 2024 inviting the DG to defend himself before the County Assembly on 29th February 2024. He raised the issue of limitation of time and argued that the DG was given very short notice within which to defend himself. He further argued that the Notice issued to the DG to appear on 29th February 2024 was also time barred based on the provisions of Section 33 of the County Government Act, as it was issued 5 days after the set statutory timelines of 23rd February 2024.

63. The 1st Petitioner also took issue with the public participation exercise that was scheduled to take place on 26th February 2024 and argued that it was conducted 3 days out of time, thereby making the whole process fatally defective and void under Section 33 of the County Government Act, 2012 and Standing Order 60(1). It was submitted that the impeachment process having been initiated by the Notice of 13th February 2024, should have been concluded by 23rd February 2024.

64. For the argument that anything done out of time is a nullity, reference was made to several authorities including the case of Riunga vs. County Planning Committee Nairobi County Government & Others [Appeal 053 of 2022, eKLR where an appeal filed at the Nairobi County Physical and Land Use Planning Liaison Committee was disallowed and rendered null and void, on the basis that it was filed outside the prescribed timeline; Allen Waiyaki Gichuhi SC & 2 others vs. Data protection Commissioner and 2 others JR.E028 of 2023 eKLR 2023 where the court nullified a decision made by the Commissioner Data Protection after the 90 days statutory timelines under the Data Protection Act; Biosytems Consultants vs. Nyali Links Arcade, Mombasa CA E185 of 2023 where the court stated that timelines are derived either from procedural aspects, or on substance or from *the Constitution*, that timelines are binding and that constitutional timelines are inflexible; Neeraj J. Kalaiya vs. Cheruiyot & 5 others, Nairobi ELRC E394 of 2022, where the court deemed anything filed out of time as null and void and Chabari vs. District land and Adjudication Chuka ELC E001 of 2023, eKLR 2024 where the court stated that the timelines prescribed by rules were binding.

65. Mr. Maeche, advocate for the 3rd Petitioner also submitted that the proceedings before the County Assembly were a nullity because there was no competent motion before them and that the impeachment proceedings were time barred having been canvassed before the County Assembly 5 days after the expiry of 10 days' period.

66. It was also submitted that the Notice of 13th February 2024 did not indicate the identity of the one-third of the Members of the County Assembly (MCAs) who verified it in accordance with the law; that it lacked details and particulars required by law and differed from the "Motion" that was subsequently moved on 21st February 2024.

67. Article 181 of *the Constitution* provides for the grounds for removal of a Governor (Deputy Governor) from office as follows: -

181. Removal of a county governor

1. A county governor may be removed from office on any of the following grounds—
    a. gross violation of this Constitution or any other law;
    b. where there are serious reasons for believing that the county governor has committed a crime under national or international law;
    c. abuse of office or gross misconduct; or
    d. physical or mental incapacity to perform the functions of office of county governor.
2. Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).

68. The process of impeachment of a Governor (Deputy Governor) is outlined in the County Government Act Cap 265. Section 33 which provides as follows: -

33. Removal of a Governor

1. A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the Governor under Article 181 of *the Constitution*.
2. If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—
    a. the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and
    b. the Governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.
3. Within seven days after receiving notice of a resolution from the speaker of the county assembly —
    a. the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the Governor; and
    b. the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.
4. A special committee appointed under subsection (3)(b) shall—
    a. investigate the matter; and
    b. report to the Senate within ten days on whether it finds the particulars of the allegations against the Governor to have been substantiated.

5. The Governor shall have the right to appear and be represented before the special committee during its investigations.

6. If the special committee reports that the particulars of any allegation against the Governor—

   a. have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

   b. have been substantiated, the Senate shall, after according the Governor an opportunity to be heard, vote on the impeachment charges.

7. If a majority of all the county delegations of the Senate vote to uphold any impeachment charge, the Governor shall cease to hold office.

8. If a vote in the Senate fails to result in the removal of the Governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the Governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

9. The procedure for the removal of the President on grounds of incapacity under Article 144 of *the Constitution* shall apply, with necessary modifications, to the removal of a Governor.

   (9A) Subsections (1) to (9) shall, with necessary modifications, apply to the removal from office of a deputy Governor.

10. A vacancy in the office of the Governor or deputy Governor arising under this section shall be filled in the manner provided for by Article 182 of *the Constitution*.

69. The Standing Orders of Kisii County Assembly further particularize the process of impeachment of a deputy governor as follows: -

60. Procedure for removal of Governor by impeachment

1. Before giving notice of Motion under, Section 33 of the *County Governments Act*, 2012 the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of a gross violation of a provision of *the Constitution* or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.

2. The Clerk shall submit the proposed Motion to the Speaker for approval.

3. A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days' notice calling for impeachment of the Governor.

4. Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given.

5. When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is supported by at least a third of all Members of the County Assembly to move the motion; Provided that within the seven days' notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled " Signatures In Support Of A Motion For Removal Of Governor By Impeachment"

6. Any signature appended to the list as provided under paragraph (5) shall not be withdrawn.

7. When the Motion has been passed by two-thirds of all members of the County Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days

61. Procedure for removal of Deputy Governor

The Standing Orders relating to removal of Governor shall apply, with the necessary modifications, to the removal of the Deputy Governor. [Emphasis added]

70. My understanding of the above provisions is that while Section 33 (1) of the County Government Act, allows a member of the County Assembly to give notice to the speaker to move a motion for the removal of the Governor, Standing Order No. 60 provides for the procedure to be adopted in the impeachment on a step by step basis as follows: -

a. The first step is taken before notice of the motion is given under Section 33 of the *County Governments Act* (hereinafter "the Act"). At this point the member seeking to move the motion delivers a copy of the proposed Motion for the impeachment of the Governor (or Deputy Governor) to the Clerk of the County Assembly.

b. The Clerk then submits the proposed Motion to the Speaker for approval.

c. The member who has obtained the Speaker's approval gives a seven days' notice calling for the impeachment of the Governor.

d. Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days;

71. A perusal of the pleadings filed herein reveals the following chronology of events that took place at the Kisii County Assembly in relation to the impeachment proceedings: -

1. On 13th February 2024, Hon. Wycliffe Siocha, delivered a copy of the proposed Motion for the impeachment of the Deputy Governor to the Clerk of the County Assembly.

2. Speaker of the County Assembly through the Clerk, approved the Motion for tabling before the County Assembly and the same was listed in the Order Paper for 21st February 2024.

3. On 21st February 2024, the substantive Motion dated 21st February 2024 was tabled before the County Assembly for debate. The proceedings were then adjourned for seven days to allow for public participation and notice/invitation to be sent to the Deputy Governor.

4. On 22nd February 2024, notice for public participation was published in the local dailies. The DG received the Speaker's invitation letter dated 21st February 2024 requiring him to appear before the County Assembly on 29th February 2024.

5. On 26th February 2024 – Public Participation conducted.

6. On 27th February 2024 – Public Participation Report prepared.

7. On 28th February 2024 - Public Participation Report tabled before the County Assembly.

8. On 29th February 2024 – Impeachment proceedings and debate conducted over the motion and the DG is impeached by 53 members voting for his impeachment.

72. From the above narration of the sequence of activities that took place before the County Assembly, it is clear that contrary to the Petitioners' claim that the Notice of impeachment was issued on 13th February 2024, what happened on the said date was the delivery a copy of the proposed Motion for the impeachment of the Deputy Governor to the Clerk of the County Assembly for the Speaker's approval. I note that the Speaker approved the proposed Motion on the same date, being 13th February 2024.

73. The Petitioners argued that the 7 days' notice envisaged under Standing Order 60(3) was to run from 13th February 2024 being the date of the delivery and approval of the proposed motion of impeachment. I however respectfully disagree with the Petitioners' argument and find that the Standing Order only states that the member shall, after obtaining the Speaker's approval, give a seven (7) days' notice calling for impeachment of the Governor. The said Standing Order does not state that the 7 days start to run from the date of the said approval.

74. To my mind, if indeed the drafters of the Standing Orders intended that the 7 days were to run from the date of the approval of the proposed motion, nothing would have been easier than for them to make such a specific provision. My understanding of Standing Order 60 (3) is that the 7 days were to run from 21st February 2024 being the date that the mover of the motion tabled the substantive motion before the Assembly and issued a notice of the impeachment of the Deputy Governor.

75. For the above reasons, I find that the Petitioners' contention that the impeachment motion was time barred and therefore a nullity was founded on misinterpretation of Standing Order 60 (3) and therefore misconceived. I say so because a finding that time was to run from 13th February 2024 would connote that time started to run even before a formal substantive motion was tabled before the house and the affected parties notified. I find that the substantive motion having been filed on 21st February 2024 and the DG notified on 22nd February 2024 after which the motion was heard and determined on 29th February 2024, the said proceedings were properly conducted within the 10 days statutory timelines specified in the Standing Orders.

76. The above findings notwithstanding and even assuming, for argument's sake, that time was to run from 13th February 2024, I am alive of the principle governing the interpretation of statutes which requires courts to consider the intent of the law makers. In doing this, courts are required to consider the provisions contained in the entire statute in order to understand their purpose, design, nature and any resulting effects or consequences that may arise therefrom.

77. It is instructive to note that the word "shall" has been used in Kisii County Standing Order 60 which may be interpreted to mean that the provisions are couched in mandatory terms. I have considered the provisions of S.O. No. 60 (4) which states that if the County Assembly shall not be sitting after the 7 days' notice period is over, then the Speaker is at liberty to summon the Assembly to meet, over the Motion, upon issuance of adequate notice. The period within which the notice for summoning the County Assembly is to be issued is however not specified in the Standing Orders. It can therefore be presumed that such notice is to be issued as soon as is practically possible. This therefore implies that the three days' period subsequent to the 7 days' notice is not cast on stone and can be extended

depending on the circumstances of the case especially where the 3 days' period falls outside the days when the County Assembly should have been sitting.

78. S.O. No. 27 provides for sittings of the Kisii County Assembly as follows: -

27. Hours of meeting

1. Unless the Speaker, for the convenience of the County Assembly otherwise directs, the County Assembly shall meet at 9.00 a.m. on Wednesday and at 2.30 p.m. on Tuesday, Wednesday, and Thursday, but more than one sitting may be directed during the same day.

2. Unless for the convenience of the County Assembly the Speaker or the Chairperson (as the case may be) directs earlier or later interruption of business, at 6.30 p.m. or (if it is an Allotted Day) at 7.00 p.m., on the occasion of an afternoon sitting and at 12.30 p.m. on the occasion of a morning sitting, the Speaker or the Chairperson of Committees shall interrupt the business then under consideration and if the County Assembly is in Committee the Chairperson shall leave the Chair and report progress and ask leave to sit again.

79. The Standing Orders further provide that the County Assembly may upon agreement by the members adjust the timelines for their sitting as need be. S.O. Nos. 27 (3) and (4) provide: -

(3) Notwithstanding paragraphs (1) and (2), the County Assembly may resolve-

(a) to extend its sitting time, or

(b) to meet at any other time on a sitting day; or

(c) to meet on any other day, in order to transact business.

(4) A Motion under paragraph (3)(a) shall be moved at least thirty minutes before the time appointed for adjournment.

80. Having regard to the above provisions, I find that even though S.O. No. 60 (3) and (4) have employed the use of the term shall, the rules on timelines were not meant to be mandatory or peremptory as shown by the fact that the same Standing Orders allow for the extension of time, by the Speaker, when such a motion is proposed by a member as was the case herein.

81. Considering the totality of the impeachment process, it is my finding that the spirit of the Standing Orders, in respect to the stipulated timelines, was meant to ensure that such proceedings are commenced and concluded within reasonable timelines. I find guidance from the decision of Mativo J. (as he then was) in the case of Republic vs. Principal Kadhi, Kadhis Court at Mombasa; Karama (Interested Party); Mohamed (Ex-parte) (Judicial Review No. E006 of 2020) [2022] KEHC 11285 (KLR) where the court aptly expounded on the use of the word "shall" and held thus: -

> " 16. The operative word in the above provision is "shall." The Black's Law Dictionary, defines the word "shall" as follows: -
>
> "As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a

public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."

17. The definition goes on to say "but it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefits to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense." So "shall" does not always mean "shall." "Shall sometimes means "may."

18. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions. (Dr. Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2). But it must be kept in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. (ibid) The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance." (Emphasis added)

82. In addition to the above findings, this Court finds the arguments, by the 1st Petitioner, that the proceedings should have been concluded by 23rd February 2024 in line with the 10-days rule to be untenable. This is because any administrative action must entail fairness and justice which embody due process. The centrality of the fair hearing as a major plank of the rule of law and natural justice is a matter of paramount importance that this court cannot overlook. In Mohinder Singh Gill vs. Chief Election Commissioner, (AIR 1978 SC 851), the Supreme Court of India explained the principle of natural justice thus:-

> "Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendary days of Adam-and of Kautllya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. ....."

83. Taking a cue from the above cited case, I find that it would have been impractical to expect the substantive hearing and disposal of an impeachment motion to happen within 10 days from the date the proposed motion was presented for approval even before the substantive motion was tabled before the Assembly and the DG called upon to respond to the charges that were levelled against him. If the argument by the Petitioners was to be adopted, then it means that the impeachment proceedings would have been concluded on 23rd February 2024, thus denying the DG his right to be heard or to be given

adequate time to prepare his defence. My finding is that the spirit of the Standing Orders is to ensure efficiency and expediency of the impeachment process within reasonable timelines.

84. My further finding is that since Standing Orders fall under subsidiary legislation, they must be aligned to *the Constitution* which sets outs inalienable rights that cannot be abrogated by any state organ or other legislation. In this regard, the right to fair administrative action and fair hearing under Articles 47 and Article 50 (1) of *the Constitution* respectively come into play. The said Articles stipulate that: -

> 47. Fair administrative action
>
> (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> 50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of law or, if appropriate another independent and impartial tribunal or body.

85. This court is of the view that Standing Orders cannot defeat or derail the provisions of *the Constitution* and the rules of natural justice. Article 124 of *the Constitution* provides as follows: -

> 124. Committees and Standing Orders
>
> (1) Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.

86. Section 14 (1) of the *County Governments Act*, on the other hand, stipulates that the Standing Orders shall be consistent with *the Constitution*. The Section provides as follows: -

> 14. Procedure and committees of the county assembly
>
> (1) A county assembly—
>
> (a) may make standing orders consistent with *the Constitution* and this Act regulating the procedure of the county assembly including, in particular, orders for the proper conduct of proceedings; and

87. I have perused the proceedings contained in the County Assembly Hansard for 21st February to 29th February when the leader of the Majority, Hon. Henry Moracha, moved a motion for adjournment to allow for public participation. I note that the Speaker considered the arguments made on the issue of adjournment, and appreciated the sovereignty of *the Constitution* and the rules of natural justice in his decision. Part of the said proceedings was as follows: -

> "Hon. Speaker: .....Public participation is very critical. Considering the High Court decisions we are talking about, those are recommendations. We cannot table the motion and expect the accused to be here today. It is not possible! Honourable members, let us accept that *the Constitution* of Kenya is superior to the Standing Orders....
>
> HON. SPEAKER: Whereas the Standing Orders provides three days, let us accept that *the Constitution* of Kenyan and other written laws are superior because the Standing Orders borrow from *the Constitution* of Kenya which governs how to carry out business..... That is why as the Speaker, I have allowed Public Participation to be done. We have not reached

> the stage of removing the Deputy Governor. We are saying, let the Kisii County People participate and give their views. Let us give the Deputy Governor a fair hearing. Let us give him enough time to make his submissions before we make a decision .... I do not want this House to be accused that we have removed the Deputy Governor from office unlawfully. ..... Further, I will issue a notice of seven days to the Deputy Governor, Hon. Robert Monda to invite him to appear before this House to rescue himself from the charges...."

88. I find that the decision, by the Speaker of the County Assembly, to extend the timelines was not only proper and in accordance with the dictates of *the Constitution* and natural justice, but that the DG and his legal team also rode on the said extension without any objection. I find that the extension of the timelines was permitted by Standing Orders and that the impeachment proceedings were concluded within a reasonable time.

89. I further find that the Speaker of the County Assembly correctly exercised his discretion to adjourn the impeachment process so as to allow for the issuance of proper notice of the intended impeachment to the DG in line with the rules of natural justice. In Swadeshi Cotton Mills vs. Union of India [(1981) 1 SCC 664, the Supreme Court of India emphasized the importance of notice and found that an order taking over the management of a company by the Government to be bad and contrary to law because it was effected without prior notice or hearing. The court emphasized the need for the government to adhere to the principles of natural justice, which include providing a fair hearing, unbiased decision-making, and presenting proper evidence before taking any action against a company.

90. Similarly, in Onyango Oloo vs. Attorney General (1986-1989) EA 456the Court of Appeal echoed the same sentiments and held as follows: -

> " The principle of natural Justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural Justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural Justice...To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion .... A decision in breach of the rules of natural Justice is not cured by holding that the decision would otherwise have been right since if the principle of natural Justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided." [Emphasis added]

91. I find no fault in the decision by the County Assembly to extend time and allow for public participation and notification to the DG. I also find that there was also no unreasonable delay and that whatever extensions granted were only meant to afford the 1st Petitioner a fair hearing before a decision was rendered at the County Assembly.

92. I also note that Article 181 of *the Constitution* and Section 33 (1) of the County Government Act are silent on the issuance of the Notice of impeachment to the Governor or Deputy Governor. Section 33 (1) merely refers to a notice issued to the Speaker of the County Assembly through the clerk but not to the person who is the subject of the impeachment. In the instant case, the County Assembly first debated the motion for impeachment when it was tabled before it on 21st February 2024 at which

point the DG was not present and had not been formally notified of the said proceedings. The Speaker subsequently issued an invitation letter dated 21st February 2024 informing the DG to appear before the Assembly which letter was received on 22nd February 2024.

93. As I have already noted elsewhere in this judgment, the actual process of impeachment commenced, in earnest, when the motion was first tabled before the County Assembly on 21st February 2024 because it is on the said date that the DG, who is the person intended to be impeached, was informed of the impeachment motion. I find guidance in the decision by the 3 judge bench in Martin Nyaga Wambora & 4 others vs. Speaker of the Senate & 6 others [2014] eKLR, when faced with a similar scenario, found that Section 33 (1) only provides a notice to the Speaker and not to the governor or deputy governor intended for impeachment thereby creating a lacuna in the law. The said judges held thus: -

> " 307. We take the view that the resolution proposing the removal of a Governor from office involves a process in which a motion is tabled in the County Assembly which is debated before it is either approved or rejected. This is the process that triggers the removal proceedings at the Senate in the event that the motion is approved. Since it is at the County Assembly that adverse findings against the conduct of a Governor while in office are first made, and it is those findings in the form of a resolution that lead to the removal proceedings at the Senate whose outcome may affect his political right to hold an elective office, we are persuaded to find, which we hereby do, that even at the County Assembly the right to a hearing must be accorded to a Governor at any time that the motion proposing removal from office is being debated before it is approved or rejected.
>
> 308. Failure of Section 33(1) to make provision for a Governor facing a proposal of his removal from office is the Lacuna in law which Githua J. sought to fill when she made the orders of 23rd January 2014 which we have found elsewhere in this Judgment that the 5th and 6th Respondents chose to disobey." (Emphasis added)

94. I therefore reiterate my earlier finding that the 10 days' period was to be computed from 21st February 2024 which was the date of tabling of the motion before the County Assembly and also the date when the notice to the DG was issued.

95. I hasten to add that there can be no greater legitimacy to administrative proceedings than the issuance of adequate notice as notice is what heralds the possibility of an adverse decision. It is essential that parties are afforded an opportunity to be heard in line with the principle of audi alteram partem which Lord Denning expounded in the oft cited case of Pett vs. Greyhound Racing Assn (I) (1968) 2 All ER 545 thus: -

> " When a man's reputation or livelihood is at stake, he not only has a right to speak by his mouth. He also has a right to speak by counsel or solicitor"

96. A similar finding was made in the case of Walid Khalid vs. County Assembly of Mombasa & 2 Others [2018] eKLR, where it was also held thus: -

> " It is trite law that the power to remove a public officer or state officer for that matter, is a Siemens (sic) twin with duty to follow due process and the two are conjoined at the hips. Under *the constitution* every person in authority who for any lawful and justifiable reason

contemplates removing a public officer or state officer from office is duty bound to follow the tenets of a fair process."

97. In sum, I find that the proceedings before the County Assembly were a methodical and conscientious inquiry conducted in accordance with *the Constitution* and all the attendant statutes and in strict adherence to principles of natural justice by affording the DG an opportunity to be heard. I find that the County Assembly legitimately discharged its functions and that this Court is therefore precluded from delving into the merits of the decision that resulted from the said process.

98. The Petitioners also submitted that the Notice of 13th February 2024 was defective because it was not verified by one-third of the MCAs, that it lacked the details and particulars required by law and differed from the "Motion" that was subsequently moved on 21st February 2024.

99. A perusal of the proposed motion dated 13th February 2024 shows that it was supported by one third of the MCAs and was duly approved by the speaker who listed it in the order paper of 21st February 2024 thereby paving way for the filing of the substantive motion. In my considered view, the Speaker could only approve the proposed motion upon satisfying himself that the 1/3 MCAs verification threshold was met. I also note that there was no marked difference between the proposed motion and the substantive Notice of Motion that was eventually tabled before the house and served on the DG. I therefore dismiss the Petitioners' argument that there was no competent motion before the County Assembly and that the motion was different from the one the DG was served with.

ii. Threshold of Public Participation

100. Article 196 of *the Constitution* stipulates as follows on the principle of public participation: -

196. Public participation and county assembly powers, privileges and immunities.

1. A county assembly shall—

   a. conduct its business in an open manner, and hold its sittings and those of its committees, in public; and

   b. facilitate public participation and involvement in the legislative and other business of the assembly and its committees.

2. A county assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so.

3. Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.

101. Section 3 of the County Government Act provides that the object and purpose of the Act are as follows: -

3. Object and purpose of the Act

The object and purpose of this Act is to—

(f) provide for public participation in the conduct of the activities of the county assembly as required under Article 196 of *the Constitution*;

102. Courts have taken the position that participation is a key process in ensuring the legitimacy in decisions involving the public or public officials. The parties intending to rely on public participation must not conduct it in a perfunctory manner by merely ticking off the box or glossing over it as some illusory

process in order to legitimize their actions. It must be procedural, meaningful and reasonable. This is particularly important because it is only through public participation that the public is made aware of the decision that is to be made, and through it, they can also express their concerns and give their views on the issue.

103. The positions of the Governor and his Deputy are elective positions and it is therefore expected that the electorate should be allowed to express their views in the event of an impeachment. In Doctors' for Life International vs. The Speaker National Assembly and Others (CCT12/05) (2006) ZACC 11) the South African Constitutional Court held that public participation was not only important but was a fundamental human right set out under international and regional instruments. The said court held thus: -

> " The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected.... Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalization of the right to take part in the conduct of public affairs. The broader right, which is provided for in article 25(a), envisages forms of political participation, which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation....."

104. It therefore follows that, in a democratic society public participation cannot be done away with especially on matters of public interest. The same South African court further stated: -

> " The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72 (1) (a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in *the Constitution* is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."

105. In the present case, I note that the 1st Petitioner first filed a Petition before the High Court in Kisii seeking to stop the Respondents from conducting public participation over his removal as Deputy Governor. The 1st Petitioner also sought a declaration that the law, as it stands, does not provide for or expect a process of public participation on matters of impeachment and removal of a Deputy Governor. The 1st Petitioner urged the court to find that public participation, as formatted and published, did not meet the reasonable, informed and viable public participation criteria in law and could not result in any actionable output.

106. The 2nd and 3rd Petitioners, on their part, also sought orders for a declaration that the process of public participation was not conducted in a meaningful and qualitative manner in accordance with the provisions of Section 87 of the County Government Act, 2012.

107. The 1st Petitioner submitted that the process of public participation was initiated on 27th February 2024 and a report filed on 2nd March 2024, after the 10-days' statutory timelines, thereby violating the DG's right to a fair hearing.

108. Ms. Kemunto, advocate for the 2nd Petitioner submitted that the threshold of public participation was not met as provided under Section 87 of the *County Governments Act* and Article 196(1)(b) of *the Constitution* because the notice of public participation was issued on 24th February 2024 and the exercise carried out on 26th February 2024 which was inadequate time to get everyone's participation.

109. Mr. Ochieng Oginga advocate for the 1st Respondent, in his counter-argument, referred to the County Assembly Hansard and noted that the Assembly deliberated on the requirement for public participation and opted to adjourn its proceedings so as to comply with the requirement for public participation. Counsel cited the decision in the Mike Sonko case (supra) where the Supreme Court considered the timelines in impeachment proceedings and held that even 2 days was sufficient for public participation. He also rebutted the assertion that the public participation report was submitted on 2nd March 2024 and maintained that the process was conducted both orally and in writing in all the wards in Kisii County and the report tabled on 27th February 2024.

110. This court has been called upon to determine whether public participation met the requisite threshold. From the outset, it is important to state that no prescribed threshold or standard for conducting public participation has been set in *the Constitution* or by Statute. Courts have however addressed what constitutes adequate public participation in several authorities. In Kioko vs. Clerk, Nairobi City County Assembly & 11 others (Civil Appeal E425 of 2021) [2022] KECA 405 (KLR) the Court of Appeal in outlined the principles that underpin a reasonable threshold for public participation as follows: -

    a. It was incumbent upon the government agency or public official involved to fashion a programme of public participation that accorded with the nature of the subject matter. It was the government agency or public official who was to craft the modalities of public participation but in so doing the government agency or Public Official had to take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoyed some considerable measure of discretion in fashioning those modalities.

    b. Public participation called for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. No single regime or programme of public participation could be prescribed and the courts would not use any litmus test to determine if public participation had been achieved or not. The only test the courts used was one of effectiveness. A variety of mechanisms could be used to achieve public participation.

c. Whatever programme of public participation was fashioned, had to include access to and dissemination of relevant information.

d. Public participation did not dictate that everyone had to give their views on the issue at hand. To have such a standard would be to give virtual veto power to each individual in the community to determine community collective affairs. A public participation programme had to, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official had to take into account the subsidiarity principle: those most affected by a policy, legislation or action had to have a bigger say in that policy, legislation or action and their views had to be more deliberately sought and taken into account.

e. The right of public participation did not guarantee that each individual's views would be taken as controlling the right way for individuals to represent their views – not a duty of the agency to accept the views given as dispositive. However, there was a duty for the government agency or public official involved to take into consideration, in good faith, all the views received as part of the public participation programme. The government agency or public official could not merely be going through the motions or engaging in democratic theatre so as to tick the constitutional box.

f. The right of public participation was not meant to usurp the technical or democratic role of the officeholders but to cross-fertilize and enrich their views with the views of those who would be most affected by the decision or policy at hand.

111. In Mui Coal Basin Local Community & 15 others vs. Permanent Secretary Ministry of Energy & 17 others [2015] eKLR the court summarized the principles of public participation as follows: -

    a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

    b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

    c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:-

"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

d. Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

112. The principle that can be derived from the above cited cases is that the issue of public participation is a matter of fact that must be established through cogent evidence. In this case, the record reveals that the Clerk of Kisii County Assembly placed an advertisement in the Daily Nation newspaper of 22nd February 2024 wherein he called on the electorate in Kisii County to participate in a public hearing and to submit their memoranda on the issue of removal from office, by way of impeachment, of the Deputy Governor of Kisii County. The record also shows that a Public Participation report dated 27th February 2024 was forwarded to the Speaker who appended his signature to it on the same date and noted; "Approved for tabling".

113. I find that the Notice calling for public participation was clear and unambiguous. The purpose for the public participation was also clearly stated and the date, time and venues for the exercise in the various wards was also indicated. The Notice also called for submissions of both oral or written memoranda on this issue. I have also had the liberty to peruse the public participation report and I note that it was comprehensive as it indicated the wards in which members voted for the impeachment. The report also showed the wards that were against the impeachment and the areas where violence erupted such as Monyereroo and Kegogi in Kitutu Chache North Sub-county. There is also a report on the places where residents did not turn up for public participation such as Bogiakumu, Marani and Sensi wards.

114. I find that the public participation exercise was carried out in a satisfactory manner as no material was placed before this court to show that any resident was locked out of the public participation process. The Petitioners did not tender any evidence to show that anyone from Kisii County was denied an opportunity to present their views. No member of the public came forward to state that they were not aware of the public participation exercise or that the period allocated for the exercise was too short or that they were unaware of the impeachment proceedings altogether.

115. Section 107 of the *Evidence Act* stipulates that: -

1. of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

116. In line with the above provision, I find that it was incumbent upon the Petitioners to tender evidence to show that people who desired to participate in the public participation process were denied an opportunity to do so or were locked out due to time constraints.

117. While the rules of public participation may not necessarily be cast on stone, it is my view that the adequacy of qualitative and quantitative public participation exercise can only be determined based on the circumstances of each case. This means that the Court is only required to satisfy itself that whichever method was employed in conducting the exercise was reasonable and ensured inclusivity and diversity. This court is of the view that it cannot be expected that all members of the public will participate in such an exercise.

118. For the above reasons, this Court does not share a similar standpoint with the Petitioners that the public participation exercise was not adequate or proper. In the same vein, I am not persuaded that the public participation exercise was a witch-hunt against the DG as suggested by Ms. Kemunto. I find that the report was holistic and clearly indicated areas that were for and against the impeachment.

119. I further find that considering the requirement that the impeachment process be concluded within set timelines, the County Assembly properly conducted the public participation exercise in respect to the motion for impeachment and find no reasons to fault its validity. Accordingly, I dismiss this ground of the Petitions.

Validity of the Senate Proceedings – Alleged introduction of new evidence and failure to provide witnesses' statements.

120. Mr. Katwa Kigen, Counsel for the 1st Petitioner, submitted that the 1st Petitioner was forced to answer to new charges of bribery, infanticide and the influencing of award of tenders which charges were not raised before the County Assembly. He also faulted the Senate Speaker for not making a decision on the DG's preliminary objection on the issue of introduction of new evidence contrary to the Senate Standing Order No. 80(8) and Rules of procedure on impeachment and specifically Rules 14, 20 and 30. It was submitted that the impeachment process is hierarchical in nature, from the County Assembly to the Senate, and that all charges and evidence ought to have first been presented before the County Assembly and not introduced afresh at the Senate.

121. Mr. Oginga advocate for the County Assembly submitted that the calling of new evidence before the Senate did not vitiate the impeachment proceedings before the County Assembly and that even assuming that the new evidence was to be omitted, the impeachment would still stand. He also argued that the DG's legal team adequately cross-examined all the witnesses who testified before the Senate and therefore fully interrogated the alleged new evidence.

122. Mr. Wambulwa, advocate for the Senate referred to Article 125(1) of *the Constitution* and Rule No. 10 of the Senate Rules which permits the Senate to call anyone before it and give evidence. Counsel submitted that no new evidence was introduced because the witnesses who appeared before the Senate only testified on the charges that were read out to the DG in the County Assembly and the Senate.

123. S.O. No. 80 of the Senate Standing Orders provide for the process of impeachment of a governor/ deputy governor as follows: -

80. Procedure for removal of a Governor

1. Within seven days after receiving notice of a resolution from the speaker of a County Assembly supporting the removal of a governor of the county pursuant to Article 181 of *the Constitution*—

    a. the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

    b. the Senate may-

        i. by resolution, appoint a Special Committee comprising eleven of its members to investigate the matter; or

        ii. investigate the matter in plenary.

2. The Senate sitting in plenary or the Special Committee appointed under subsection (1) shall within ten (10) days -

    a. investigate the matter; and

    b. in the case of the Special Committee, report to the Senate on whether it finds the particulars of the allegations against the Governor to have been substantiated.

3. The governor shall have the right to appear and be represented before the Senate or a Special Committee during the investigations.

4. If the special committee reports that the particulars of any allegation against the governor—

    a. have not been substantiated, no further action shall be taken under this section in respect of that allegation; or

    b. have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the charges.

5. The provisions of paragraph (4) shall apply with necessary modifications to the findings of the Senate, while investigating the matter in plenary.

6. If a majority of all the county delegations of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

7. If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the Speaker of the concerned County Assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate after the expiry of three months from the date of such vote.

8. The rules of procedure to be followed by the Senate or a Special Committee of the Senate are set out in the Third Schedule of these standing orders.

9. The procedure set out in paragraphs (1) to shall apply with the necessary modifications to impeachment of a Deputy Governor.

124. I have considered the issue of introduction of new evidence. I note that the Notice that was first issued to the Speaker of the County Assembly indicated that the charges against the DG were as follows: -

    a. Gross violation of *the constitution* or any other law

b. Abuse of office

c. Gross misconduct

d. Crimes under national law

125. The Notice of Preliminary Objection dated 11th March 2024 raised three grounds, namely; that the County Assembly was adducing new evidence and material that was not presented during the hearings before it and that the proceedings were incompetent as they were conducted outside the statutory timelines. In his Ruling delivered on 13th March 2024 at page 4 of the Hansard proceedings, the Speaker of the Senate held as follows upon considering the issues raised in the preliminary objection: -

> "....
>
> (3) For similar reasons, the preliminary objections raised on behalf of the Deputy Governor that certain paragraphs in the bundle of documents with the County Assembly be expunged on the ground they introduce new evidence is disallowed on the basis that the objection of necessity requires evidence to be adduced and its support or rebutted. This can best be achieved in the course of the hearing. I therefore rule that this objection be subsumed and taken up by the defence in the course of the presentation of the case of the Deputy Governor.
>
> On the objection of Counsel of the Deputy Governor that the proceedings at the County Assembly were conducted outside of the timelines provided for in the *County Governments Act* and the Standing Order of Kisii County Assembly, were therefore fatally incompetent – I also rule that this is a matter of fact requiring the adducing of evidence. It will best be determined by hearing both parties and entertaining evidence that they have in respect thereof. This preliminary objection is accordingly disallowed at this stage....."

126. I have carefully considered the ruling, by the Speaker of the Senate, and it is my view that the issues raised in the preliminary objection regarding new evidence and the issue of statutory timelines were competently addressed. I further find that the Speaker's Ruling did not in any way bar the 1st Petitioner from challenging the new evidence that was allegedly introduced before the Senate. The fact that Petitioner was represented by legal counsel meant that the probative value of the said evidence, its admissibility and veracity could very well be challenged during cross-examination of the witnesses. I also find that it was, in any case, premature to call for the expunging of the said alleged new evidence at that preliminary stage when the Rules of Procedure outlined in the 3rd Schedule of the Rules of Procedure permitted the Senate to call for any evidence in order to satisfy itself on the veracity of the allegations. Rule 10 states as follows: -

> Third Schedule -rules Of Procedure For The Hearing And Determination Of The Proposed Removal From Office By Impeachment Of A Governor
>
> [Standing Order 80(8)]
>
> Part 1: Rules of Procedure when considering the proposed removal in Plenary
>
> 10. The Senate may, at the request of the County Assembly or the Governor, invite or summon any person to appear and give evidence before the Senate.

127. The above provision is backed by Article 125 (1) of *the Constitution* which states: -

125 (1) Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.

128. My understanding of the above provisions is that *the Constitution* and the Senate Standing Orders permit the Senate to call for the evidence of any person to verify the charges made against a governor or deputy governor during impeachment. In this regard, the Senate's role, as a quasi-judicial body, is not to blindly adopt the decision by the County Assembly as it must undertake an investigative inquiry and make a determination on the charges against a party, based on the law and evidence adduced before it. In the performance of its quasi-judicial functions, the Senate acts as the trial court where a full hearing is conducted.

129. Rule 20 of Part 1 in the 3rd Schedule of the Senate Standing Orders guards against the introduction of new evidence that would be unlawful. It states as follows: -

> 20. In presenting its evidence, the Assembly shall not introduce any new evidence that was not a part of the allegations against the Governor by the County Assembly as forwarded by the Speaker of the County Assembly to the Speaker of the Senate.

130. My take is that Rule 20 only prohibits the introduction of evidence that does not speak to the charges originally filed in the County Assembly. In this regard new evidence refers to evidence that discloses a different offence for which the party was charged before the County Assembly. Rule 10 provides an avenue for the Senate to call on the evidence of any person they may deem fit in order to substantiate or counter any of the charges that were filed before the County Assembly.

131. It did not escape the attention of this court that the Hansard shows that the Speaker of the Senate cautioned the parties against the introduction of new evidence in his ruling. To my mind, this illustrates that the Senate guarded itself against the introduction of new evidence that did not relate to the charges made before the County Assembly. I note that the Temporary Speaker, Sen. Veronica Maina, at page 125 of the Senate Hansard proceedings of 13th March 2024, noted that the County Assembly's witness Hon. Karen Magara was veering into other issues that were not within the purview of the House. In upholding a Point of Order by Senator Thang'wa, the Speaker urged Mr. Elias Mutuma, Counsel for the County Assembly to guide Hon. Magara to limit her evidence to the documents produced before the Senate.

132. On the issue of a new witnesses, the Petitioners took issue with the evidence of one Mr. David Haggai Oyagi, the Ag. Director Enforcement and Compliance Kisii County. At the proceedings held on 13th March 2024, Counsel for the County Assembly applied for summons to issue to the said Mr. Oyagi to appear and testify before the Senate. The Senate Speaker considered his request and directed that he be summoned for purposes of presenting his appointment letter and confirming if the persons alleged to be working in the DG's home were officials of the County Government of Kisii. This court is of the view that the Senate acted well within its legal mandate when it summoned the said witness as shown in the Hansard proceedings,.

133. A perusal of the County Assembly and Senate proceedings reveals that the same charges that were lodged before the County Assembly are also the same charges that were presented before the Senate. I also note that other than Mr. Oyagi, the same witnesses who swore affidavits before the County Assembly are the ones who testified before the Senate. Furthermore, the parties in these proceedings were expected to make full disclosure of the witnesses they intended to call and the manner in which they were to appear before the Senate. The witnesses who appeared before the Senate only reiterated what they had stated in their respective affidavits. I note that the said witnesses were also adequately

cross examined by the Senators and the Petitioners' advocates. I find that there was therefore no prejudice occasioned to the Deputy Governor or the 2nd and 3rd Petitioners.

134. It is also my finding that the DG was served with all the necessary documents that he required to enable him prepare his defence and that there was full disclosure of all the witnesses that the County Assembly intended to call. This is contained in the County Assembly Speaker's correspondence to the Senate dated 8th March 2024 in compliance with Rule 8 of the 3rd Schedule of the Senate Standing Orders. I note that the Speaker of Senate ensured that the parties were served with all the documents filed by the other parties in compliance with the principles of full disclosure. Accordingly, I dismiss this ground that the Senate allowed the introduction of new witnesses and permitted the matter to proceed before the Petitioners were served with witness statements.

135. I am satisfied that the impeachment proceedings were valid and were meticulously conducted by both Houses in accordance with set legal principles and procedures as stipulated in *the Constitution*, the County Government Act and the respective Standing Orders.

Whether the 1st Petitioner's constitutional rights were violated.

136. The 1st Petitioner alleged that his constitutional rights were violated. He outlined the constitutional violations as: infringement of his right to a fair hearing; right to labor rights; right to fair administrative action; right to the rule of law and, right to legitimate legal expectations. At paragraph 30 of the 1st Petitioner's Supporting Affidavit dated 26th February 2024, the DG listed the grounds of constitutional violations as follows: -

a. Reports to EACC were made after the motion had been moved on 13th February 2024, signed by the 3rd Respondent alone, seeking the Deputy Governor's impeachment. This could not therefore be a ground at a point in time of moving the motion.

b. The original motion of 13th February 2024 is not the same as the motion of 21st February 2024 as required in law.

c. Additionally, the motion was forwarded to public participation without the establishment of a designated committee. Public participation was announced on 22nd February 2024, with only four days' notice, and without specifying the issues for public input. This lack of clarity and short notice undermines the fairness and transparency of the process.

d. He was served notice to appear before the County Assembly on 29th February 2024, to present his defense. However, the assembly resolved to proceed with public participation without proper logistics or a designated committee.

e. The lack of specific details initially provided for the accusations, coupled with the rushed and unclear public participation process, indicates a lack of procedural fairness.

137. The DG stated, at page 3 of his response, that he was given an unduly late service of Notice dated 22nd February 2024 to appear before the Count Assembly which notice had no defined charges and that the allegations brought against him were meant to mutate as the County Assembly conducted a parallel process of public participation. He also averred that the County Assembly ran a parallel inquiry and investigative process against the Ethics and Anti-Corruption Commission (EACC) and that the police was the correct institution mandated to investigate the charges of corruption levelled against him. He termed the impeachment process premature.

138. The DG urged this court to declare the entire impeachment proceedings a nullity since there were constitutional violations that did not guarantee him a fair and just hearing before the two Houses.

Reference was made to the case of Chunky Limited vs. Director of Criminal Investigations (Petition E004 of 2022) [2022] KEHC 297 (KLR) (27 April 2022) (Judgment), where the court, relying on the case of Mbaki & others vs. Macharia & Another [2005] eKLR at page 210, stated that *the Constitution* recognizes the duty to accord a person procedural fairness or natural justice when a decision is made that affects their rights, interests or legitimate expectations. The court added that a fundamental rule of the common law doctrine of natural justice is that there is a legitimate expectation that a person is entitled to know the case sought to be made against him and to be given an opportunity to reply to it.

139. The 3rd Petitioner herein, Ms. Purity Kirera, also contended that the DG's right to a fair hearing, under Articles 27, 35 (1) (b) and (2), 47, 50 (1) and (2) of *the Constitution* of Kenya, 2010 was violated and that he was not given sufficient time to defend himself.

140. The issues raised by the Petitioners in respect of violation of the DG's constitutional rights can be summarized as the right to fair hearing and fair administrative action. The 1st Petitioner took issue with the timelines within which he was served with the notice and expected to prepare and appear before the County Assembly without well-defined charges. He also took issue with an alleged rushed and unstructured process of public participation which, he claimed, was conducted parallel to the impeachment proceedings and the EACC investigations.

141. The legal underpinnings for the above alleged violations can be found in the following provisions: -

35. Access to information

1. Every citizen has the right of access to—

a. _

b. information held by another person and required for the exercise or protection of any right or fundamental freedom.

41. Labour relations

1. Every person has the right to fair labour practices.

47. Fair administrative action

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b. promote efficient administration.

50. Fair hearing

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

2. Every accused person has the right to a fair trial, which includes the right—

   a. to be presumed innocent until the contrary is proved;

   b. to be informed of the charge, with sufficient detail to answer it;

   c. to have adequate time and facilities to prepare a defence;

   d. to a public trial before a court established under this Constitution;

   e. to have the trial begin and conclude without unreasonable delay;

   f. to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

   g. to choose, and be represented by, an advocate, and to be informed of this right promptly;

   h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

   i. to remain silent, and not to testify during the proceedings;

   j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

   k. to adduce and challenge evidence;

   l. to refuse to give self-incriminating evidence;

   m. to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

   n. not to be convicted for an act or omission that at the time it was committed or omitted was not—

      i. an offence in Kenya; or

      ii. a crime under international law;

   o. not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

   p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

   q. if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

e Section 4 of the *Fair Administrative Action Act*, 2015 provides the parameters of the right to fair administrative action as follows: -

   1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2. Every person has the right to be given written reasons for any administrative action that is taken against him.

3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

    a. prior and adequate notice of the nature and reasons for the proposed administrative action;

    b. an opportunity to be heard and to make representations in that regard;

    c. notice of a right to a review or internal appeal against an administrative decision, where applicable;

    d. a statement of reasons pursuant to section 6;

    e. notice of the right to legal representation, where applicable;

    f. notice of the right to cross-examine or where applicable; or

    g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4. The administrator shall accord the person against whom administrative action is taken an opportunity to-

    a. attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully etc.

    b. be heard;

    c. cross-examine persons who give adverse evidence against him; and

    d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of *the Constitution*, the administrator may act in accordance with that different procedure.

142. It is trite that a party seeking redress for any alleged constitutional violations must plead such violations with a high degree of specificity and particularity. This means that they must not only mention the alleged constitutional violations but must also state the breached constitutional provisions, demonstrate to the court the manner in which the said violations have occurred and outline the jurisdictional basis for the case. This was the principle established in the locus classicus case of Anarita Karimi Njeru vs. Republic (1976-1980) KLR 1272 where the court stated: -

> " Constitutional violations must be pleaded with a reasonable degree of precision."

143. Similarly, in Meme vs. Republic [2004] eKLR, the Court held that: -

> "Where a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed".

144. The Supreme Court also laid out this principle in Communication Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others [2014] eKLR thus: -

> "(349) Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement..."

145. The tenets of fair hearing were outlined by Onah, H.C. & Nwodo, A. J. (supra) as follows: -

1. Sufficient and valid notice to be given to allow for adequately preparation.
2. That a person will be entitled to know what evidence has been produced against him or her. All evidence in form of arguments, allegations, documents, photos, etc presented by one party must be disclosed to the other party, who may then subject it to scrutiny. In our jurisprudence, it is also called "front loading" of all material facts.
3. A reasonable chance to consider their position and prepare a response. What is reasonable can vary according to the complexity of the issue, whether an urgent decision is essential or any other relevant matter.
4. Proper opportunity to contest, correct or contradict any such evidence from the adversary and raise any relevant matters before the tribunal.
5. An opportunity to reply in a way that is appropriate in the circumstance.
6. Opportunity to receive all relevant information before preparing his/her reply as decision must be based upon logical proof or evidence (material).
7. Opportunity for his/her reply to be received and considered before the decision is made.
8. A genuine consideration of any submission. One needs to be fully aware of everything written or said, and proper and genuine consideration to his/her case. An investigator or decision maker should be able to visibly point to the evidence on which the inference or determination is based.

146. Sir Mathew Hale, the then Chief Justice of King's Bench (1671-76), in 1676, outlined 18 tenets for dispensing of justice with the 6th one reading as follows: -

> " 6. That I suffer not myself to be possessed with any judgment at all till the whole business of both parties be heard."

147. The rights to fair hearing and fair administrative action, though intertwined, are separate and distinct as legal principles. While the right to a fair hearing is one that must be exercised by either a court of law or tribunal, the right to fair administrative action is one that is exercised by state organs or statutory bodies in the discharge of their administrative functions as stipulated by *the Constitution* and statute. At the same time, fair hearing is an inalienable right under our Bill of rights that cuts across any legal inquiry or trial in a judicial set up. Fair hearing must feature in a fair administrative action whose determination may result in the taking away the personal liberties of a person or their ability to hold a public office. In Judicial Service Commission vs. Mbalu Mutava & another [2015] eKLR, the Court of Appeal explained the distinction and correlation in the principles of fair hearing and fair administrative action thus: -

> " Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. "Fair hearing" in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body. It is clear that fair hearing as employed in article 50 (1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By Article 25 that right cannot be limited by law or otherwise."

148. In this case, it was the Petitioner's case that he was not afforded adequate opportunity to prepare his defence and that the Notice of 21st February 2024 inviting him for the hearing before the County Assembly was not only served late, but was different from the substantive motion tabled before the County Assembly. He added that the Notice did not particularize the actual charges that he was required to respond to since the County Assembly had not yet considered and resolved what he should have been answering to.

149. As I have already established elsewhere in this judgment, the Petitioner was duly served with the Notice of the Impeachment Motion together with the Motion itself whereupon he was called upon to answer to the charges. I noted that the invite dated 21st February 2024 was received on 22nd February 2024. The hearing before the County Assembly was thereafter scheduled for 29th February 2024. There was an interval of seven (7) days which I find to have been sufficient time to prepare a defence for consideration by the County Assembly considering the limited timelines for the proceedings before the County Assembly.

150. I have also found, elsewhere in this judgment, that the purpose of the adjournment, by the County Assembly on 21st February 2024 was to allow for the service of the Motion upon the DG so that he

could appear before the County Assembly to present his case. The Speaker of the County Assembly was clear that it was of utmost importance that the Assembly adheres to the principle of natural justice so as to ensure a fair hearing and fair administrative action before arriving at the decision.

151. I am not persuaded that the DG proved that he was denied a fair hearing or that the principles of fair administrative action were not adhered to. I find that he was given notice and granted adequate time to respond to the charges besides being made adequately aware of the charges he was facing together with the evidence in support thereof. I note that he prepared a detailed Affidavit in response to the charges and was allowed legal representation before both houses. The DG's advocates led him competently in presenting his own evidence-in-chief and cross examined all the witnesses.

152. I also find that the 1st Petitioner did not demonstrate how his fair labour rights were denied as alleged by the 3rd Petitioner or how he was denied information needed to assist him in preparing his defence. No material was presented to show that the DG's rights were violated as asserted in the Petitions.

Whether the County Assembly and the Senate met the threshold for Impeachment of the 1st Petitioner under Article 181 of *the Constitution*.

153. In Kioko vs. Clerk, Nairobi City County Assembly & 11 others (Civil Appeal E425 of 2021) [2022] KECA 405 (KLR) (4 March 2022) (Judgment) the Court of Appeal in explained the standard for impeachment proceedings at paragraph 30 thereof as follows: -

> " 30. There was need to maintain a high threshold for removal of a governor and the need to ensure strict adherence to the law. The standard of proof was neither beyond reasonable doubt nor on a balance of probability. The standard of proof required for removal of a governor was above a balance of probability, but below reasonable doubt, and therefore in between the two standards."

154. Black's Law Dictionary, 11th Edition at Page 901 defines the term 'impeachment' thus:-

> The act (by a legislature) of calling for the removal from office of a public official, accomplished by presenting a written charge of the official's alleged misconduct; esp., the initiation of a proceeding in the U.S. House of Representative against a federal official, such as the President or a judge.

155. In the present case, the DG was charged with the offences of gross violation of *the constitution* and other laws, abuse of office, gross misconduct, and crimes under national law vide motion dated 21st February 2024.

156. Under the charge of gross violation of *the Constitution* and other laws, it was alleged that the DG requested for and received a bribe which compromised the integrity of the recruitment process of Gusii Water and Sanitation Company (hereinafter referred to as GWASCO). It was further alleged that the DG was driven by nepotism, favoritism, improper and ulterior motives for corrupt purposes in complete disregard of Article 73 *the Constitution*.

157. On the charge of abuse of office, it was alleged that the DG used his office to solicit for Kshs. 800,000/= thereby conferring a financial benefit on himself and thereafter sent Kshs. 100,000/= to the Managing Director of GWASCO to secure the award of contract of employment to a preferred interviewee. The County Assembly adduced the evidence of Hon. Wycliffe Siocha and Dennis Mokaya Misati, the son of the DG's friend Joseph Misati, who testified in respect of the first and second charges that the DG asked his family for the said bribe in order for him to secure the job of commercial manager at GWASCO. On the same charge, it was also alleged that the DG unilaterally used his office to intimidate his family

members into hiding out of fear for their lives in contravention with Section 34 of the *Leadership and Integrity Act* 2012. It was further alleged that the DG continuously diverted county enforcement officers from their course of duty to work in his farm.

158. The County Assembly called on the evidence of Reuben Monda, the DG's brother, who testified on the issue of intimidation of family members. Mr. David Haggai Oyagi, testified that county officials were employed to work in the personal farm of the DG in support of the charge of abuse of office.

159. On the charge of gross misconduct and crimes under National Law, it was alleged that the DG interfered with the recruitment process of the Commercial Manager at GWASCO and used his office to confer a personal financial benefit upon himself contrary to Section 6 (1) (a), (c), (2) and (3) of the *Bribery Act*. The County Assembly presented the evidence of Dennis Mokaya Misati, Lucy Wahito, Hon. Wycliffe Siocha and Hon. Karen Magara who all testified to the issue of a bribe in the sum of Kshs. 800,000/=.

160. At the hearing before the Senate, the County Assembly called the evidence of six witnesses in support of their case. The first witness, Dennis Misati explained how he had to sell his salon/barber shop business so as to secure the amount needed to bribe the DG for the position of commercial Manager at GWASCO. Hon. Siocha testified that he received a complaint from the said Dennis concerning the DG's conduct thus prompting him to conduct investigations when he confirmed that the DG was indeed canvassing with the Managing Director GWASCO to secure employment for Dennis Misati.

161. Ms. Lucy Wahito testified that she received the sum of Kshs. 100,000 from the DG without being informed of the purpose for the payment. Hon. Karen testified on the issue of public participation and informed the Senate that she also conducted her own investigations to ascertain the allegations made against the DG before she seconded the motion for his impeachment.

162. Reuben Monda, the DG's brother testified on the issue of abuse of office and stated that the DG employed county officials to work for him at his private home and farm. He also stated that the DG employed intimidation tactics against the family members who opposed against him and stated that the DG's actions affected his mental and physical health. David Haggai testified to the issue of unprocedural deployment of county officials by the DG to his home.

163. The DG, on his part, denied all the allegations of bribery and stated that he had erroneously sent the money to Lucy Wahito and that the money he received from Dennis Misati was a refund of the monies that his father, Joseph Misati, who was the DG's long time and personal friend, had borrowed from him.

164. On the issue of abuse of office, he stated that he was entitled to six staff and that the County had assigned him up to 4 enforcement officers to guard his compound. On the issue of intimidation of his family members, he stated that his brother was arrested after he cut down his trees which he (the DG) had planted from 2007 and that the police were working within their mandate to make the arrest after he reported the matter.

165. I have considered the evidence adduced before the Senate and County Assembly with a view to determining if it was sufficient to justify the impeachment charges against the DG. Gross violation, is not defined under *the Constitution* or statute but can mean any conduct that prejudices the public and brings contempt to the office of the offender. In "The Impeachment of the Federal Judiciary", 26 Harvard Law Review at pp. 684-706 Wrisley Brown states as follows: -

> " To determine whether or not an act or a course of conduct is sufficient in law to support an impeachment, resort must be had to the eternal principles of right, applied to public

propriety and civil morality. The offense must be prejudicial to the public interest and it must flow from a willful intent, or a reckless disregard of duty ..... It may constitute an intentional violation of positive law, or it may be an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute."

166. In Martin Nyaga Wambora & 3 others vs. Speaker of the Senate & 6 others [2014] eKLR the Court of Appeal explained what amounts to gross violation and held: -

> " 43.....What amounts to gross violation must be considered on a case by case basis taking into account the peculiar facts and circumstances of each case. We concur with High Court's statement that whether conduct is gross or not will depend on the facts of each case and not every violation of *the Constitution* or other law is gross violation. The Nigerian Supreme Court in the case of Hon. Muyiwa Inakoju & Others – vs- Hon. Abraham Adaolu Adeleke, S.C.272/2006 opined as follows: -
>
> The following constitute grave violation or breach of *the Constitution*:
>
> a. interference with the constitutional functions of the legislature and the judiciary by an exhibition of over constitutional executive power;
>
> b. abuse of the fiscal provisions of *the Constitution*;
>
> c. abuse of the Code of Conduct for public officers;
>
> d. disregard and breach of the provisions on fundamental rights;
>
> e. interference with local government funds and stealing from the funds, pilfering of the funds...for personal gains...;
>
> f. instigation of military rule and military government and
>
> g. any other subversive conduct which is directly inimical to the implementation of some other major sectors of *the Constitution*."

167. It is noteworthy that while not every constitutional violation will be construed as gross violation, the charges brought against a person and the seriousness of impeachment motions calls for a higher standard of scrutiny from the body conducting the inquiry so that they can satisfy themselves that the evidence adduced supports only the worst of offences committed by a holder of a political office. In the same vein, because persons who hold elective offices are vested with authority by the electorate, through a popular vote, the bodies conducting the oversight mandate must be keen to satisfy themselves that the charges have been substantiated to avoid overturning the will of the people whimsically. In other words, impeachment should only be a remedy of last resort. This proposition is anchored on the Article by David E. Kendall, et al, 2nd October 1998, "Memorandum Regarding Standards for Impeachment" where they opined that: -

> " Impeachment is a constitutional remedy addressed to serious offenses against the system of government. . .. It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even *the Constitution* itself, and thus are `high' offenses in the sense that word was used in English impeachments. . .. The emphasis has been on the significant effects of the conduct -- undermining the integrity of office, disregard of

constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. . .. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the president office."

168. In the case of Martin Nyaga Wambora & 3 others vs. Speaker of the Senate & 6 others [supra] it was held that: -

> " 45 .....We concur and adopt the following findings of the High Court as part of what constitutes gross violation: -
>
> "253. The question therefore is how to measure what constitutes gross violation. We are of the view, that the standard to be used does not require a mathematical formula, but it must take into account the intendment of Article 181(1) of *the Constitution*."
>
> In our view therefore whatever is alleged against a Governor must;
>
> a. Be serious, substantial and weighty.
>
> b. There must be a nexus between the Governor and the alleged gross violations of *the Constitution* or any other written law.
>
> c. The charges framed against the Governor and the particulars thereof must disclose a gross violation of *the Constitution* or any other written law.
>
> d. The charges as framed must state with degree of precision the Article(s) or even sub-article(s) of *the Constitution* or the provisions of any other written law that have been alleged to be grossly violated."
>
> 46. We reiterate that what constitutes gross violation of *the Constitution* is to be determined on a case by case basis. Gross violation of *the Constitution* includes violation of the values and principles enshrined under Article 10 of *the Constitution* and violation of Chapter six (Leadership &Integrity) of *the Constitution*; or intentional and/or persistent violation of any Article of *the Constitution*; or intentional and blatant or persistent violation of the provisions of any other law. The rationale for this definition is that the values and principles embodied in *the Constitution* provide the bedrock and foundation of Kenya's constitutional system and under Article 10(1) these values bind all state organs, state officers, public officers and all persons. We hasten to state that the facts that prove gross violation as defined above must be proved before the relevant constitutional organ...."

169. Similarly, in his book, 'Kenyan Constitution: An Instrument for Change', 2nd Edn, 2021, Prof. Yash Pal Ghai defined gross misconduct as follows:

> " Gross misconduct"
>
> This phrase is used in many constitutions. Precisely what it means will depend on the office involved. The Supreme Court of Nigeria said in one case:

> "It ... means generally in the context atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking. All these words express some extreme, negative conduct. ... Whether a conduct is gross or not will depend on the matter as exposed by the facts."

170. I have carefully analyzed the evidence presented against the DG before the County Assembly and the Senate. My task is only to consider if there is any nexus between the charges and the conduct of the 1st Petitioner, the DG herein. I reiterate that, it is not within the purview of this Court to delve into the merits of the determination of the two Houses. I find that there was sufficient evidence to demonstrate that the Deputy Governor acted in a manner that led to the abuse of his office when he used his position to solicit for a bribe and canvass for a job for one Dennis Misati.

171. I am also satisfied that the allegations made against the DG concerning the illegal deployment and use of county officials at his home were substantiated. It is my view that even if the evidence of Haggai Oyagi was to be discarded or expunged from these proceedings, the other evidence that was adduced before the County Assembly and forwarded to the Senate connected the DG to the charges herein. I find that even if the evidence was sufficient to prove only one charge and if the Senate found any of the charges to have been proved, then the threshold of impeachment was met. My finding is bolstered by the decision, by the Supreme Court, in Sonko vs. County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR) (5 December 2022) (Reasons) where it was held at paragraph 129 thus: -

> " 129..... It is only when sufficient evidence is presented to substantiate the claims that the Senate will, after according the Governor an opportunity to be heard, vote on each of the charges. If a majority of all the members of the Senate vote to uphold any of the charges, the Governor shall cease to hold office. We reiterate that proof of even a single charge will suffice for purposes of article 181 of *the Constitution*. But should the vote for removal fail, that will bring the proceedings to an end."

172. In conclusion, I find that the Petitioners herein did not prove their case on illegality of the impeachment process or violation of the 1st Petitioner's rights under *the Constitution*. It is my finding that from the material presented before this Court, the County Assembly and the Senate duly complied *the Constitution*, the County Government Act and the Standing Orders in conducting the impeachment of Hon. Dr. Robert Onsare Monda from the office of Deputy Governor of Kisii County. In the final analysis, I find that the three Petitions lack merit and hereby dismiss them.

173. Before I pen off, I wish to state that since impeachment proceedings of a deputy governor is a matter of public interest that directly affected the residents/electorate of a County, it would be advisable that in future, such proceedings before filed at the High Court where the cause of action arose so as to avoid a flurry of petitions being filed all over the country as was witnessed in this case. This would also allow the residents/voters from the affected county to access the court and follow the proceedings.

174. Since the Petitions herein involved a matter of public interest, I order that parties will bear their own costs of the Petitions.

175. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER 2025.

W. A. OKWANY

JUDGE

Brown argues to that extent that:

26 To determine whether or not an act or a course of conduct is sufficient in law to support an impeachment, resort must be had to the eternal principles of right, applied to public propriety and civil morality. The offense must be prejudicial to the public interest and it must flow from a willful intent, or a reckless disregard of duty. . . . It may constitute an intentional violation of positive law, or it may be an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute"