



REPUBLIC OF KENYA



KENYA LAW
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**Kioko v Clerk, Nairobi City County Assembly & 11 others (Civil Appeal
E425 of 2021) [2022] KECA 405 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 405 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E425 OF 2021
RN NAMBUYE, HM OKWENGU & KI LAIBUTA, JJA
MARCH 4, 2022**

BETWEEN

MIKE SONKO MBUVI GIDION KIOKO APPELLANT

AND

CLERK, NAIROBI CITY COUNTY ASSEMBLY 1ST RESPONDENT

SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT

CLERK OF THE SENATE 4TH RESPONDENT

SPEAKER OF THE SENATE OF KENYA 5TH RESPONDENT

SENATE OF KENYA 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 8TH
RESPONDENT**

**ASSUMPTION OF THE OFFICE OF THE COUNTY GOVERNMENT
COMMITTEE, NAIROBI CITY COUNTY 9TH RESPONDENT**

ACTING GOVERNOR, NAIROBI CITY COUNTY 10TH RESPONDENT

ANNE KANANU MWENDA, THE DEPUTY GOVERNOR 11TH RESPONDENT

OKIYA OKOITI OMTATAH 12TH RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (S. Chitembwe, W. Korir, and W. Okwany, JJ) delivered on 24th June, 2021 in Constitutional Petition No. E425 of 2020 (As consolidated with Constitutional Petition No. E014 of 2021)



Due process in the impeachment of the Governor of Nairobi County was followed by the County Assembly.

Reported by Ribia John

Civil Practice and Procedure – appeals – first appeal – duty of the first appellate court - what was the duty of the first appellate court.

Constitutional Law – fundamental rights and freedoms – right to fair administrative action – right to a fair trial – due process in impeachment proceedings - whether due process was followed by the county assembly in the impeachment of the Governor of Nairobi County - whether the Governor of Nairobi County was accorded a fair hearing during his impeachment – Constitution of Kenya, 2010, articles 47 and 50; County Governments Act, Act No. 17 of 2021, section 33; Nairobi City County Standing Orders, standing order 72; Senate Standing Orders, standing order No. 75.

Devolution – impeachment – impeachment of a county Governor – impeachment motion – verification of an impeachment motion - whether verification by affidavit or other statements on oath was required to authenticate a motion for impeachment – Constitution of Kenya, 2010, article 181; County Governments Act, Act No. 17 of 2021, section 33; Nairobi County Assembly Standing Orders, standing order No. 67; Senate Standing Orders, standing order No. 75.

Devolution – impeachment – impeachment of a county governor – requirement to conduct the business of a county assembly in an open manner – where county assembly proceedings were conducted both physically and virtually due to the Covid 19 Pandemic - whether the Nairobi City County Assembly complied with the requirements to conduct its business in an open manner where the proceedings were conducted both physically and virtually due to the Covid 19 pandemic - whether the sittings of the Nairobi City County Assembly could be said to have been held in public where the proceedings were conducted both physically and virtually due to the Covid-19 pandemic – Constitution of Kenya, 2010, article 181 and 196(1); County Governments Act, Act No. 17 of 2021, section 33; Nairobi County Assembly Standing Orders, standing order No. 67; Senate Standing Orders, standing order No. 75.

Constitutional Law – national values and principles of governance – public participation – requirement of public participation in the impeachment of a county governor – whether the Nairobi City County Assembly facilitated sufficient public participation in the impeachment proceedings/process of the Nairobi County Governor - Constitution of Kenya, 2010, articles 10 and 196; County Governments Act, section 87 and 91.

Constitutional Law – national values and principles – public participation – principles of public participation – threshold to be met to prove sufficient public participation - what principles were applicable to ascertain whether a reasonable threshold was reached in facilitating public participation - Constitution of Kenya, 2010, articles 10 and 196.

Devolution – impeachment – impeachment of a county governor – threshold to impeach a sitting county governor – standard of proof required to impeach a sitting county governor – what was the required standard of proof to impeach a sitting county governor - Constitution of Kenya, 2010, article 181 and 196(1); County Governments Act, Act No. 17 of 2021, section 33; Nairobi County Assembly Standing Orders, standing order No. 67; Senate Standing Orders, standing order No. 75.

Words and Phrases – verification – definition of verification - to prove to be true; to confirm or establish the truth or truthfulness of; to authenticate - Black's Law Dictionary

Brief facts

The appellant was elected as Governor of the Nairobi City County during the general elections which took place on August 8, 2017 for a term of 5 years. On assumption of office, the appellant served as Governor of Nairobi City until December 17, 2020 when he was removed from office by way of the impugned impeachment pursuant to article 181 of the Constitution, section 33 of the County Governments Act,



standing order No. 67 of the Nairobi County Assembly Standing Orders, and standing order No. 75 of the Senate Standing Orders

Aggrieved by his impeachment, the appellant challenged the decision to impeach him in the High Court of Kenya at Nairobi on grounds that his rights to a fair trial and fair administrative action had been violated as he had not been given sufficient time to prepare his defence, and that new evidence was tabled at the tail end of the proceedings and on grounds that there was lack of public participation in the impeachment process. The trial court dismissed the petition on all grounds.

Aggrieved, the appellant filed the instant appeal in which he claimed that the trial court erred in fact and law in not finding that the impeachment process was not subjected to public participation, that the trial court erred in not finding that his rights to a fair trial and fair administrative action had been violated.

Issues

- i. Whether the due process was followed by the County Assembly in the impeachment of the Governor of Nairobi County.
- ii. Whether the Governor of Nairobi County was accorded a fair hearing during his impeachment.
- iii. Whether verification by affidavit or other statements on oath was required to authenticate a motion for impeachment.
- iv. Whether the Nairobi City County Assembly complied with the requirements to conduct its business in an open manner where the proceedings were conducted both physically and virtually due to the Covid-19 pandemic.
- v. Whether the sittings of the Nairobi City County Assembly could be said to have been held in public where the proceedings were conducted both physically and virtually due to the Covid-19 pandemic.
- vi. Whether the Nairobi City County Assembly facilitated sufficient public participation in the impeachment proceedings/process of the Nairobi County Governor.
- vii. What principles were applicable in ascertaining whether a reasonable threshold was reached in facilitating public participation?
- viii. What was the required standard of proof in impeachment proceedings against a sitting county governor?

Held

1. Being a first appeal, it was the appellate court's duty to analyze and re-assess the evidence on record and reach its own conclusion in the matters in controversy as mandated by rule 29(1)(a) of the Court of Appeal Rules. The first appellate court was not bound necessarily to follow the trial court's findings of fact if it appeared either that the trial court had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence. The first appellate court was called upon to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the trial court were to stand or not and give reasons either way.
2. To answer that the appellant was impeached without due process, the court had to be satisfied that the impugned procedure was not in compliance with the Constitution, the County Governments Act, and the relevant Standing Orders of the Nairobi City County Assembly. If not the appellant would have established his claim for the alleged procedural impropriety or breach of due process in his impeachment, and the alleged violation of his right to a fair hearing as guaranteed by article 50 of the Constitution.
3. Article 50 of the Constitution laid the foundation for the protection of the fundamental right to a fair hearing. In the spirit of Article 50, Standing Order No. 72 of the Nairobi City County Standing Orders prescribed the procedure for hearing a petition or proposal for the removal of a person from office.
4. While the mandate of the first appellate court was to re-examine and re-evaluate the evidence on record to ascertain the veracity of the appellant's claims, the court's findings had to be made in the context of the grounds advanced on appeal. Upon scrutiny of the evidence put to the court, there was nothing to suggest that the appellant was not accorded a fair hearing. The appellant was given a fair and public



- hearing, but chose not to participate in the proceedings before the County Assembly; he had the right to legal representation, but failed to formally instruct one; he was informed of the charges and given the opportunity to prepare his defence, adduce evidence, or challenge the evidence adduced in support of the motion; he was presented with the report/resolution of the County Assembly to enable him to prepare his response before the Senate; and that the hearing and determination of the impeachment motion was without delay.
5. The rules of natural justice, in particular the right to a fair hearing, (*audi alteram partem* rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. The three features of natural justice were:
 1. the right to be heard by an unbiased tribunal;
 2. the right to have notice of charges of misconduct; and
 3. the right to be heard in answer to those charges.
 6. When dealing with the class of cases of dismissal from the office where there had to be something against a man to warrant his dismissal, an unbroken line of authority to the effect that an officer could not be dismissed without first telling him what was alleged against him and hearing his defence or explanation.
 7. The appellant was accorded a fair hearing within the meaning of article 50 of the Constitution and standing order No. 72 of the Nairobi City County Assembly Standing Orders. The instant court upheld the decision of the trial court in that respect.
 8. By signing the motion of impeachment, a member confirmed its veracity. In their finding on perusal of the motion and the list containing 86 names and signatures of the members of the County Assembly (MCAs) who supported it, none of the signatories thereto came forward to dispute the same. According to the trial court, verification of a valid motion pursuant to standing order No. 67(1) did not require an affidavit, deposition or other declaration on oath.
 9. The word verify meant to prove to be true; to confirm or establish the truth or truthfulness of; to authenticate. That was the ordinary meaning contemplated by the framers of order 67(1) of the standing orders. If verification by affidavit or other statements on oath were required to authenticate a motion under the order, nothing would have been easier than to make an express provision requiring submission of such affidavits or statements on oath. There was nothing to fault the trial court's finding that the motion for the impeachment of the appellant was duly verified in accordance with order 67(1) of the Nairobi City County Assembly Standing Orders, which did not require verification by anything beyond the signatures of at least one-third of members in support. The appellant's contention that the particulars set out in the motion for his impeachment were not verified by those members of the Assembly who were in support failed.
 10. The findings of fact by the trial court on whether the 7 members of the Assembly swore affidavits stating that they did not vote virtually, contradicted the appellant's allegations in that respect.
 11. The trial court found that the appellant had failed to establish that the two-thirds statutory requirement for the impeachment of a governor was not met. The trial court correctly concluded that the appellant had failed to prove that the requisite statutory quorum for a resolution to impeach a governor had not been met. The court found as a fact that the Hansard, which was the official record of the county assembly showed that 90 MCAs (out of 122, constituting more than two-thirds of the membership) voted on the motion. The appeal on that account failed.
 12. The counsel representing the appellant did not present any written evidence of authority to act for the appellant. The appellant was not by any means denied a fair hearing at the county assembly. The impeachment process complied with the constitutional and statutory requirements for a fair hearing.
 13. There was no reason to interfere with the trial court's finding that there was sufficient public participation.



14. Article 196(1) of the Constitution and sections 87 and 91 of the County Governments Act were suitably designed to give effect to the national values and principles of governance, which included the participation of the people enshrined in article 10 of the Constitution.
15. In the circumstances prevailing at the time of the impeachment process on account of restrictions placed on in-person public engagement due to the COVID-19 pandemic, sufficient public participation had been conducted. The assembly had, through print media, invited submission of memoranda in response to which 40,000 submissions had been made directly to learned counsel for the appellant. The 1st respondent's averment that online platforms were also opened to enable residents to air their views on the issues raised in the motion. In addition, questionnaires had been circulated to the public for their response, which was documented in the report of December 3, 2020, a copy of which was annexed to the 2nd respondent's affidavit filed in reply to the appellant's petition. The court was at a loss as to what more could be done to enhance the assembly's efforts to ensure sufficient public participation. Neither the Constitution nor statute law prescribed the threshold or any particular means by which state organs would ensure meaningful public participation. The choice of such means remained the prerogative of the state organ concerned.
16. In principle, the facilitation of public participation was key in ensuring the legitimacy of the law, decision or policy reached. While there was no statutory prescription of the quantity or quality of citizen participation, there was a need to ensure that public participation was meaningful and not merely a gesture innovatively designed to gloss over the requirements of article 196 of the Constitution and sections 87 and 91 of the County Governments Act.
17. The following practical principles were applicable in ascertaining whether a reasonable threshold was reached in facilitating public participation:
 1. 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.
 2. 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.
 3. Whatever programme of public participation was fashioned, had to include access to and dissemination of relevant information.
 4. 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.
 5. 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.

6. 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.
18. Engagement with the public was essential. Public participation informed the public of what was to be expected. It allowed the community to express concerns, and fears and even to make demands. In any democratic state, participation was integral to its legitimacy. When a decision was made without consulting the public the result could never be an informed decision.
19. There was sufficient evidence to show that the county assembly conducted a survey in Nairobi County that sought the views of its residents on the matter. The court found nothing to warrant interference with the findings of the trial court in that regard. Consequently, the appeal failed on those grounds.
20. There was nothing to fault the trial court's finding that the 3rd respondent was not barred from moving, debating and passing a resolution on the motion to impeach the appellant from 3.00 pm on December 3, 2020. There was no reason to interfere with the High Court's finding that the process undertaken by the Nairobi City County Assembly leading to the appellant's impeachment was procedurally fair and in accord with statute law, and with its Standing Orders of the Nairobi County Assembly.
21. A resolution having been passed by the 3rd respondent to impeach the appellant on December 3, 2020 as notified to the Speaker of the Senate by the Speaker of the County Assembly on December 4, 2020 in accordance with section 33(2)(a) of the County Governments Act, it remained for the Senate to convene to hear charges against the appellant pursuant to section 33(3)(a) of the Act. The grounds on which the county assembly resolved to impeach the appellant accord with the provisions of article 181(1) of the Constitution.
22. A Select Committee of the Senate was established on December 9, 2020 to investigate the proposed impeachment of the appellant and resolved to have the impeachment heard and determined by way of plenary pursuant to standing order 75 of the Senate Standing Orders which, in effect, dispensed with the need for a Committee Report. The 5th respondent then gazetted for the special sitting of the Senate and the appellant and the 3rd respondent were notified to appear before the Senate in plenary on December 16, 2020. They were required to submit to the Senate, and serve on the other party, relevant documents in support of, or response to, the impeachment motion. They did.
23. The 3rd respondent wrote to the 4th respondent confirming that they would appear in person and by advocates and that they would call witnesses. They also requested the 4th respondent to issue summons to its witnesses to aid in the prosecution of the appellant. The appellant filed with the 6th respondent his written response to allegations together with a preliminary objection to the proceedings on the grounds *inter alia* that there were pending 4 related cases in various courts, and that the proceedings in the Senate were *sub-judice*.
24. The 4th respondent supplied each party with copies of the documents filed by the other party in preparation for the hearing, which took place as scheduled. The motion for impeachment proceeded to hearing and, at the conclusion, the 6th respondent voted and resolved to remove the appellant from office.
25. By a gazette notice, the 5th respondent published the 6th respondent's resolution to remove the appellant from office by impeachment whereupon the appellant petitioned the High Court faulting the 6th respondent for the manner in which it conducted the proceedings leading to its resolution to impeach him.



26. Standing Order No. 75 of the Senate Standing Orders prescribed the maximum time limits within which the Senate, either by a special committee or in plenary, could convene to hear the charges levelled against a governor (that was within 7 days) and to make a determination within 10 days from the date on which it convened. Standing Order No. 75 did not prescribe the minimum period within which the House could convene to hear and determine a motion for the impeachment of a governor, provided that it convened within 7 days of the receipt of the county. Nothing prevented the 6th respondent from convening any time before the expiry of the prescribed 7 days or from reaching its determination any period not exceeding 10 days after so convening. In any event, the appellant had 7 days to prepare his response. At the very least, he had three days to peruse and acquaint himself with what he claimed to be a voluminous bundle of evidential documents filed in support of the charges against him. The appellant's submissions at the Senate to the effect that the hearing was *sub-judice* on account of various pending suits on related charges suggest that the appellant was at all times familiar with the nature of charges levelled against him, which probably explained his ability to present a 118-page written response prior to the hearing.
27. Nothing stood in the way of the appellant to cross-examine the 3rd respondent on the contents of the impugned evidential documents to ascertain the truth or otherwise of their contents. The alleged late service of voluminous documents did not infringe on the appellant's right to fair administrative action and hearing.
28. There was no evidence to confirm the appellant's claim that there was introduction of new evidence during the hearing before the Senate. No new evidence or charges were presented before the Senate other than those contained in the impeachment motion.
29. The charges on which the appellant was impeached were the subject of deliberations by the Senate and, contrary to the appellant's contention, the Senators had not pre-determined the outcome of the motion to impeach him. Neither was their voting influenced by bias. The Senate's deliberations were part and parcel of its evaluation of evidence in the impeachment proceedings before the County Assembly; that in voting on the impeachment motion, whether as a committee or in plenary, the Senators made a decision on all the issues touching on the proceedings, including the lawfulness of the proceedings; that there was a debate in the Senate in which each Senator was entitled to voice his/her own views; that the Senate Hansard report did not indicate that the Senators had previously met and reached a decision to impeach the appellant so as to justify his claim that the vote was pre-determined; and that, since each Senator was exercising his/her quasi-judicial role as an umpire in the matter, the court could not question their decision to consistently and uniformly vote in support of or against each of the charges. The trial court correctly observed that proof of even one of the charges was sufficient to warrant the appellant's impeachment.
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.
31. With regard to the charge that the appellant acted in violation of the Constitution or any other written law (article 181(1)(a)), there was sufficient proof at the county assembly, Senate and the trial court that the charge had been proved against the appellant to the required standard. The appellant had signed a deed of transfer of certain functions of the Nairobi City County Government to Nairobi Metropolitan Services (NMS), but subsequently refused to facilitate NMS with relevant documents to complete the process of transfer thereby hampering the delivery of services to the people of Nairobi City County. The appellant's conduct did not meet the high standards expected of a governor. That amounted to a violation of the trust bestowed upon the office of governor by the electorate. Such conduct was against the basic principles of good governance, accountability and integrity expected of state officers under article 10 of the Constitution.



32. On the charge of abuse of office, there was sufficient evidence of a high turnover of chief executive committee members and chief officers, which was occasioned by the appellant's unjustified refusal to renew their contracts. In addition, the office of CEC for Finance and that of the chief officer of finance were held by the same person during the period between 2018 and early 2019. The fact that the holder of the two offices was an appointee of the appellant, offended the principle of good governance on the part of the appellant in breach of article 10 of the Constitution.
33. The County Assembly, the Senate and the trial court were satisfied that the appellant grossly misconducted himself by repeatedly using abusive, embarrassing, inappropriate and unprintable language, which undermined the office of governor; and that he published abusive and unbecoming words in social media posts, which he did not deny. The office of the governor represented the aspirations of the residents. It was a seat of honour and respect, and the holder of such office was expected to carry himself with dignity, humility, integrity, and respect for others. The appellant did not. The charges levelled against the appellant were substantiated and proved to the required standard, and the County Assembly and the Senate could not be faulted for impeaching him.
34. There was no fault in the 8th respondent's publication of the Gazette Notice No. 232/10914 of 2020 issuing a Notice of a By-Election for County Governor, Nairobi City County, which was scheduled to be held on February 18, 2021 in accordance with article 182 of the Constitution. The appellant's appeal on the ground that the trial court erred in law and misdirected themselves to the application of strict constitutional timelines for the conduct of by-elections in the circumstances of his case as prescribed in article 182(4) and (5) of the Constitution and thereby arriving at an unconstitutional decision did not stand. Furthermore, the notice in issue was overtaken by events following the order given by the High Court in Constitutional Petition No. E425 of 2020 by consent of the parties on January 4, 2021 suspending the special Gazette Notice in issue.
35. The appellant's impeachment resulted in a vacancy in the office of governor at a time when there was also a vacancy in the office of deputy governor. It became necessary, therefore, for the 2nd respondent to assume office as acting governor pursuant to article 182(4) of the Constitution. In the circumstances, the 8th respondent was mandated to hold elections for the office of governor within 60 days from December 21, 2020 when the 2nd respondent assumed office in an acting capacity as county governor.
36. By consent of the parties in Constitutional Petition No. E425 of 2020, the High Court granted orders suspending the Special Gazette Notice No. 232/10914 by which the 8th respondent had set in motion the process of holding a by-election as contemplated by article 182(5) of the Constitution. That paved way for vetting of the 11th respondent for the office of deputy governor whereupon she assumed office as deputy governor.
37. The 10th respondent resigned from office as acting governor whereupon the High Court in Constitutional Petition No. E019 of 2021 issued conservatory orders restraining the swearing-in of the 11th respondent as Governor of Nairobi City County. Further restraining orders were given in Constitutional Petition No. E425 of 2020, which remained in force until July 6, 2021 when they were intended to lapse. It was not until November 16, 2021 when the 11th respondent was eventually sworn in and assumed office as governor. The belated assumption of office of governor by the 11th respondent long after the 60 days contemplated by article 182(5) of the Constitution could not be attributed to the respondents. The instant court could not ignore the 12 or so constitutional petitions and conservatory orders that, for a long time, stood in the way of assumption of office of the then Deputy Governor as Governor of Nairobi City County. The appellant was therefore properly impeached and thus, there was a substantive governor in office.

Appeal dismissed.

Orders

- i. *The judgment and decree of the High Court were hereby upheld.*



- ii. *Each party was to bear its own costs.*

Citations

Cases

East Africa;

1. *Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR — (Mentioned)
2. *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR — (Explained)
3. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR — (Explained)
4. *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR — (Explained)
5. *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR — (Mentioned)
6. *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR — (Followed)
7. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR — (Followed)
8. *Selle & another v Associated Motor Boat Company Ltd & others* [1968] 1 EA 123 — (Mentioned)

United Kingdom;

1. *Ridge v Baldwin* [1964] AC 40 — (Followed)
2. *Selvarajan v Race Relations Board* [1976] 1 All ER — (Explained)

South Africa;

Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others CCT 86/08 [2010] ZACC 5 — (Explained)

Statutes

1. Assumption of the Office Of Governor Act, 2019 (Act No 4 of 2019) sections 11, 15 — (Interpreted)
2. Constitution of Kenya, 2010 articles 25(1); 27; 38(3); 47(1)(2); 50(2)(b)(c); 122; 123; 159; 174A (i), 175; 180; 181; 182(4)(5); 196; 259 — (Interpreted)
3. County Governments Act, 2012 (Act No 17 of 2012) sections 33, 87, 91 — (Interpreted)
4. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 29(1)(a) — Interpreted
5. Elections Act, 2011 (Act No 24 of 2011) In general — (Cited)
6. Public Finance Management Act, 2012 (Act No 18 of 2012) In general - (Cited)

Advocates

None mentioned

JUDGMENT

1. The appellant (Hon Sonko) was elected as Governor of the Nairobi City County during the general elections which took place on or about 8th August 2017 for a term of 5 years. Upon his election, the Hon Sonko assumed office on 21st August 2017. His election was in accordance with article 180 of [the Constitution](#) and the Elections Act, Revised 2019 [2011].
2. On assumption of office, Hon Sonko served as Governor of Nairobi City until 17th December 2020 when he was removed from office by way of the impugned impeachment pursuant to article 181 of [the Constitution](#), section 3 3 of the *County Governments Act*, Revised 2020 [2012], Standing Order No. 67 of the Nairobi County Assembly Standing Orders, Revised 29th June 2017 [30th April 2013], and Standing Order No 75 of the Senate Standing Orders, Revised 21st July 2020 [14th June 2017].



3. Aggrieved by his impeachment, Hon Sonko challenged the decision to impeach him in the High Court of Kenya at Nairobi (Constitutional and Human Rights Division) by way of a Petition No E425 of 2020 dated 18th December 2020 and amended on 22nd December 2020 seeking –
- a. a declaration that the petitioner’s rights and fundamental rights and freedoms under articles 25(1), 38(3), 47 and 50 of the Constitution of Kenya, 2010 have been denied, infringed, violated and/or threatened;
 - b. a declaration that the resolutions passed by the 1st, 2nd and 3rd respondents herein on 3rd December 2020, and the 6th respondent’s resolution of 17th December 2020 on the removal of Hon Sonko from office of Governor of Nairobi City County were in violation of the Constitution and legal process, hence null, void and invalid;
 - c. a declaration that the impeachment process undertaken by the 1st, 2nd, 3rd and 4th respondents was invalidated by the deliberate breaches of the preamble, articles 10, 25 (c), 27, 47(1) and (2), 48, 50(2) (b) and (c), and 174A (i) of the Constitution;
 - d. a permanent injunction restraining the 8th respondent from publishing in the Kenya Gazette, electronic and the print media of national circulation a notice of holding elections of gubernatorial seat for Nairobi City County as a consequence of the resolutions passed by the 4th respondent on 17th December 2020 and published in the Kenya Gazette on 17th December 2020 and/or taking any steps towards the replacement of Hon Sonko as Governor of Nairobi City County;
 - e. a declaration that the impeachment process undertaken by the 1st, 2nd, 3rd, 4th and 5th respondents was null, void and invalid for the failure to comply with the principles and values in the Constitution under articles 174(1) and 175 of the Constitution;
 - f. a declaration that the impeachment process undertaken by the 1st, 2nd, 3rd, 4th and 5th respondents violated the structure, values, principles and norms of the doctrine of legitimate expectation, separation of powers and the sub-judice rule;
 - g. a declaration that the swearing in of the 11th respondent on 21st December 2020 as acting Governor for Nairobi City County was conducted in violation of articles 1, 2, 3, 10, 159 and 259 of the Constitution and sections 11 and 15 of the Assumption of Office of Governor Act, 2019 and hence unconstitutional, illegal, null and void;
 - h. an order of *certiorari* to issue quashing the Nairobi City County Appropriation Act, 2020 signed by the 2nd respondent on 21st December 2020;
 - i. an order of *certiorari* to issue to bring into court and quash Gazette Notice Vol CXXII No. 227 dated 18th December 2020 signed by the 5th respondent;
 - j. any other relief that the court may deem just and expedient in the circumstances; and



- k. that the costs of the petition be borne by the respondents.
4. In addition to Hon Sonko’s petition aforesaid, the 12th respondent (Okiya Omtata) filed in the High Court of Kenya at Nairobi (Constitutional and Human Rights Division) Petition No E014 of 2021 dated 12th January 2021 against the 3rd, 5th, 6th, 7th and 8th respondents, and naming Hon Sonko as interested party, seeking the following orders:
- a. a declaration that Hon Sonko’s rights and fundamental rights and freedoms guaranteed under articles 25(1), 38(3), 47 and 50 of *the Constitution* have been denied, infringed, violated and/or threatened;
 - b. a declaration that the fundamental rights and freedoms under article 38 of *the Constitution* of the voters to continue to have their validly elected County Governor in office until validly removed has been denied, infringed, violated and/or threatened;
 - c. a declaration that the resolutions passed by the 1st respondent on 3rd December 2020 and by the 6th respondent on 17th December 2020 relating to the removal of Hon Sonko from office as Governor of Nairobi City County, were in violation of *the Constitution* and legal process, hence null, void and invalid;
 - d. a declaration that the impeachment process undertaken by the 1st and 6th respondents was invalidated by the deliberate breaches of articles 10, 47, 50 and 196(1) of *the Constitution*, and of Order 67 of the Nairobi City County Assembly Standing Order;
 - e. a permanent injunction to issue restraining the 8th respondent from publishing in the Kenya Gazette, electronic and the print media of national circulation a notice of holding elections of gubernatorial seat for Nairobi City County as a consequence of the resolutions passed by the 6th respondent on 17th December 2020 and published in the Kenya Gazette on 17th December 2020 and/or from taking any steps towards the replacement of Hon Sonko as Governor of Nairobi City County;
 - f. an order of certiorari to bring into court and quash Gazette Notice Vol CXXII No 227 dated 18th December 2020 signed by the 5th respondent;
 - g. any other relief that the court may deem just and expedient in the circumstances; and
 - h. that the costs of the petition be borne by the respondents.
5. The two petitions were consolidated by order of the court (Makau, J) given on 20th January 2021. The learned Judge certified the petitions as raising substantial questions of law and, accordingly, referred them to the Chief Justice for empanelment of a bench of an uneven number of Judges to hear and determine them. The two petitions were heard and determined on 24th June 2021 when the High Court (Saidi Chitembwe, W Korir and Okwany, JJ) delivered its judgment dismissing the two petitions and upholding Hon Sonko’s impeachment.



6. Aggrieved by the judgment delivered on 24th June 2021 and decree issued on 29th July 2021 by the High Court (Saidi Chitembwe, W Korir and Okwany, JJ) in Petition Nos E425 of 2020 and E014 of 2021 (consolidated), Hon Sonko lodged this appeal praying that –
 - a. the appeal be allowed;
 - b. the decision of the High Court in Petition No E425 of 2020 (as consolidated with Petition No E014 of 2021) be set aside in its entirety;
 - c. the honourable court be pleased to quash the resolution of the Nairobi City County Assembly dated 3rd December 2020 and the Senate resolution on 17th December 2020;
 - d. the honourable court be please to issue an order declaring that the superior court had no power to extend or shrink timelines contemplated by article 182(4) and (5) of *the Constitution*;
 - e. this honourable court be pleased to allow the prayers sought in the consolidated petitions; and
 - f. Hon Sonko be awarded costs in the High Court and in this court.
7. Hon Sonko’s appeal is made on 58 grounds set out in his Memorandum of Appeal dated 30th July 2021, which we need not reproduce here. Suffice it to observe that the salient import of the 58 grounds relate to Hon Sonko’s grievance relating to –
 - a. the impugned process adopted by the County Assembly leading to the removal of Hon Sonko from the office of Governor of Nairobi City County;
 - b. alleged want of public participation;
 - c. the alleged unfairness of the process adopted at the Senate; and
 - d. the alleged want of substantiation or lack of proof to the required standard of the charges levelled at Hon Sonko.
8. Having considered the impugned judgment and decree of the High Court in determination of the two petitions as consolidated, the record of appeal herein, the written submissions of learned counsel for Hon Sonko dated 12th November 2021, the written submissions of the learned counsel for the 1st respondent dated 29th November 2021, the written submissions of learned counsel for the 2nd and 10th respondents dated 18th November 2021, the written submissions of learned counsel for the 3rd respondent dated 30th November 2021, and those of the learned counsel for the 8th respondent dated 30th November 2021; and having heard learned counsel for Hon Sonko, learned counsel for the respondents, the 12th respondent in person, and the Hon Attorney-General, in the absence of the 9th respondent which was not represented at the hearing of the appeal, and having considered the various constitutional and statutory provisions cited before us, we form the considered view that the appeal stands or falls on nine main issues of law, on which learned counsel submitted, and which may be summarized as follows:
 - a. whether the procedure adopted by the County Assembly in the impeachment of Hon Sonko was in accordance with *the Constitution*, the *County Governments Act*, and the Standing Orders of the Nairobi City County Assembly and of the Senate;



- b. whether there was quorum in the County Assembly to pass a resolution for the removal of Hon Sonko from office by way of impeachment;
 - c. whether there was adequate public participation;
 - d. whether there was in force a court order given on 25th November 2020 in ELRC Petition No 35 of 2020 barring debate on the Notice of Motion for removal from office of Hon Sonko by way of impeachment;
 - e. whether the proceedings at the County Assembly and the Senate for the impeachment of Hon Sonko were procedurally fair, or whether his right to fair hearing was violated;
 - f. whether the charges levelled against Hon Sonko were substantiated, and whether the same were proved to the required standard;
 - g. whether the 8th respondent complied with the relevant statutory requirements in publishing Gazette Notice No 232/10914 of 2020 declaring its intention to hold a by-election for County Governor, Nairobi City County on the 18th day of February 2021;
 - h. whether the timelines set in article 182(4) and (5) of *the Constitution* for the conduct of a by-election for the office of County Governor may be shortened or extended by order of the court; and
 - i. who bears the costs of this appeal?
9. It goes without saying that an appeal to this court from a trial by the High Court is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. This being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusion in the matters in controversy as mandated by rule 29(1) (a) of this *Court's Rules*. This approach was adopted by this court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co* [1968] EA p 123 where the court held that "... being a first appeal, it is also our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter."
10. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence. In effect, we are called upon to "... re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge[s] are to stand or not and give reasons either way." (See *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR).
11. In discharge of our mandate, we now turn to the first main issue as to whether due process was adopted in the County Assembly for the impeachment of Hon Sonko. To answer this question in the affirmative, this court has to be satisfied that the impugned procedure was in compliance with *the Constitution*, the *County Governments Act*, and with the relevant Standing Orders of the Nairobi City County Assembly. If not, Hon Sonko will have established his claim for the alleged procedural impropriety or breach of due process in his impeachment, and the alleged violation of his right to fair hearing as guaranteed by Article 50 of *the Constitution*.



12. Article 50 of *the Constitution* lays the foundation for the protection of the fundamental right to fair hearing. The relevant parts of this article provide:

“ 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 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);
 - (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);
 - (n);
 - (o);
 - (p); and



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

13. In the spirit of article 50, Standing Order No 72 of the Nairobi City County Standing Orders prescribe the procedure for hearing of a petition or proposal for the removal of a person from office. It provides:

“72.

- (1) Whenever *the Constitution*, any written law or these Standing Orders –
 - (a) requires the County Assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the County Assembly considering the matter and shall be entitled to legal representation;
 - (b) requires the County Assembly to hear a person on grounds of removal from office, or in such similar circumstances, the County Assembly shall hear the person –
 - i. at the date and time to be determined by the Speaker;
 - ii. for a duration of not more than two hours or such further time as the Speaker may, in each case determine; and
 - iii. in such other manner and order as the Speaker shall, in each case, determine.
- (2) The person being removed from office shall be availed with the report of the select Committee, together with any other evidence adduced and such note or papers presented to the Committee at least three days before the debate on the Motion.”

14. The main issue pertaining to the procedure adopted at the County Assembly for the hearing of the impeachment Motion is whether Hon Sonko was accorded a fair hearing in compliance with article 50 of *the Constitution* and Order 72 of the Nairobi City County Standing Orders. While our mandate as the first appellate court is to re-examine and re-evaluate the evidence on record to ascertain the veracity of Hon Sonko’s claims, our findings must be made in the context of the grounds advanced on appeal to this court, and to which we will shortly return. Suffice it for the moment to observe that, upon scrutiny of the evidence put to us and the respective submissions of the parties, we are satisfied that there is nothing to suggest that Hon Sonko was not accorded a fair hearing. In our considered judgment, we find as a fact that Hon Sonko was given a fair and public hearing, but chose not to participate in the proceedings before the County Assembly; that he had the right to legal representation, but failed to formally instruct one; that he was informed of the charges and given the opportunity to prepare his defence, adduce evidence, or challenge the evidence adduced in support of the Motion; that he was presented with the report/resolution of the County Assembly to enable him prepare his response



- before the Senate; and that the hearing and determination of the impeachment Motion was without delay.
15. In reaching our considered judgment, we take to mind the decision in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR where this court applied the landmark decision of the House of Lords in *Ridge v Baldwin* [1964] AC p 40 which clarified the law, that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:
 - (a) the right to be heard by an unbiased tribunal;
 - (b) the right to have notice of charges of misconduct; and
 - (c) the right to be heard in answer to those charges.
 16. As was the case here, when dealing with the class of cases of dismissal from office “where there must be something against a man to warrant his dismissal,” Lord Reid observed at page 66:

“There, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation.”
 17. In the same vein, Lord Denning MR in *Selvarajan v Race Relations Board* [1976] 1 All ER p 12, which dealt with the procedure of bodies required to make investigation. Observed at p 19:

“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigations and the consequence which it may have on the person affected by it.”
 18. It is on the basis of these findings and the afore-cited authorities that we hold, as the trial court did, that Hon Sonko was accorded a fair hearing within the meaning of article 50 of *the Constitution* and Standing Order No 72 of the Nairobi City County Assembly Standing Orders. Accordingly, we uphold the decision of the trial court in this respect. We now turn to issues related to the procedure in moving, hearing and determination of the impeachment Motion by the County Assembly.
 19. Closely linked to the procedure adopted at the County Assembly for the impugned impeachment of Hon Sonko are issues relating to public participation and the requisite quorum in the County Assembly for the passing of a resolution to impeach a Governor. With regard to the impugned procedure adopted in the County Assembly and the requirement for verification of the Motion, Hon Sonko’s case is that the Assembly failed to comply with the mandatory provisions of Order 67 of the Nairobi City County Standing Orders, which requires verification of the particulars contained in the Motion for impeachment.
 20. In paragraphs 6, 7, 9, 12, 16 and 19 of his affidavit sworn on 18th December 2020 and filed in support of his High Court petition, Hon Sonko alleges inter alia that a copy of the Motion served upon him on 26th November 2020 was not accompanied by affirmations and supporting documents; that he did not see any communication of confirmation from the 1st respondent or any verification forms filled by the members of the 3rd respondent allegedly supporting the Motion; and that it is not enough that signatures from the Members of the County Assembly (MCAs) are purported to have been appended in some unconfirmed list of MCAs, but that each member must verify individually by way of a deposition confirming and authenticating that each individual MCA who was purported to have signed indeed appended their signature to the list.



21. It is on the basis of the foregoing averments by Hon Sonko that, in his written submissions dated 18th November 2021, learned counsel for Hon Sonko submitted that the impugned Motion, which was received by the Speaker of the Assembly on 26th November 2020 and tabled before the Assembly on 3rd December 2020 was not verified. According to him, “this important step was bypassed and no affirmation and/or verification was conducted as prescribed by the Standing Orders.” In his view, the term “verify” denotes a requirement “to confirm or substantiate by oath or affidavit; to swear to the truth.” Counsel submitted that the members of the Assembly were bound to swear affidavits verifying the contents of the Motion, but that no affidavits were tabled with the Motion.
22. In his replying affidavit sworn on 31st March 2021, the 1st respondent (clerk to County Assembly) deposed that “in compliance with Standing Order 67(1), Hon. Michael Ogada delivered [to his office] a copy of the proposed Motion stating the grounds and particulars for removal of Hon Sonko The Motion signed by Hon. Michael Ogada was accompanied by a list of one-third of the members who were supporting it.” According to the 1st respondent, the Motion complied with the law before submission to the 2nd respondent on 26th November 2020. In concurrence with the 1st respondent, the 2nd respondent deposed in his replying affidavit sworn on 21st January 2021 that “... the mover of the Motion of impeachment complied with the provisions of County Assembly Standing Order 67(1), which does not require a deposition by at least one-third of the MCAs verifying their signatures and the grounds for the impeachment.” According to him, “... there is no requirement for affirmation under oath by the mover of the Motion.” The 1st and 2nd respondents’ averments on verification of the Motion were also confirmed by the 10th respondent in his replying affidavit filed in Hon Sonko’s petition.
23. Order 67(1) of the Nairobi City County Standing Orders provides:

“67.

- (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.”

24. In their considered judgment, the learned Judges observed that “... by signing the Motion, a member confirms its veracity.” In their finding on perusal of the Motion and the list containing 86 names and signatures of the MCAs who supported it, none of the signatories thereto came forward to dispute the



same. According to the learned Judges, verification of a valid Motion pursuant to Standing Order No 67(1) did not require an affidavit, deposition or other declaration on oath. According to them,

“it would be absurd to expect an MCA to go and swear an affidavit before a Commissioner for Oaths in support of a motion he or she intends to move before the County Assembly.” Accordingly, the members’ signatures were sufficient to verify the authenticity of the Motion as required by Order 67(1).

25. The word “verify” is defined in *Black’s Law Dictionary* to mean “1. To prove to be true; to confirm or establish the truth or truthfulness of; to authenticate.” This is the ordinary meaning contemplated by the framers of Order 67(1) of the Assembly’s Standing Orders. We hasten to observe that if verification by affidavit or other statements on oath were required to authenticate a Motion under the Order, nothing would have been easier than to make express provision requiring submission of such affidavits or statements on oath. In view of the foregoing, we find nothing to fault the learned trial Judges’ finding that the Motion for impeachment of Hon Sonko was duly verified in accordance with Order 67(1) of the Nairobi City County Assembly Standing Orders, which does not require verification by anything beyond the signatures of at least one-third of members in support thereof. Accordingly, Hon Sonko’s contention that the particulars set out in the Motion for his impeachment were not verified by those members of the Assembly who were in support thereof fails.
26. With regard to quorum, Hon Sonko faults the judgment of the trial court on the ground that the process of impeachment was not in compliance with Standing Order 67(7) in the absence of proof that a two-third majority of the members supported the resolution to impeach him. In paragraph 59 of his affidavit filed in support of the petition in the trial court, Hon Sonko stated that “on 3rd December 2020, 57 members of the County Assembly were with [him] outside the gazetted precincts of County Assembly in Kwale County and all of them swore depositions that they were not logged on to the Zoom platform in the Nairobi County Assembly Zoom facility so there was no quorum within the meaning of the Standing Orders of the Nairobi City County Assembly required to impeach a Governor.”
27. In response, the 1st respondent deposed in his replying affidavit sworn on 31st March 2021 dismissing Hon Sonko’s claim that some of the MCAs were absent from the Chamber and did not therefore participate in the impeachment proceedings. According to him, the absence of members from the Chamber was of no consequence in view of the fact that the County Assembly had amended Order 231D of its Standing Orders to permit virtual proceedings in the face of the COVID-19 pandemic. Accordingly, Order 231D (3) allowed members to vote virtually and, therefore, there was no requirement for all the MCAs to be physically present in the Chamber in order to vote on the Motion.
28. In further reply to Hon Sonko’s claim, the 2nd respondent stated in his replying affidavit sworn on 21st January 2021 that the County Assembly proceedings were at the time conducted both physically and virtually because of the COVID-19 pandemic, which called for social distancing; that on 3rd December 2020 when the impeachment Motion was debated, 26 MCAs participated in the proceedings virtually while 65 were physically present in the Chamber; and that 88 MCAs out of the total of 122 voted in support of the Motion thereby meeting the two-thirds threshold set out in Standing Order 75(5) of the County Assembly Standing Orders and section 33(1) of the County Government Act. This factual position was also confirmed by the 10th respondent.
29. In view of the foregoing, the only question falling to be determined with regard to quorum at the taking of the vote for the resolution to impeach Hon Sonko was whether, as a fact, 57 members of the Assembly swore affidavits stating that they did not vote virtually. The findings of fact by the learned Judges contradict Hon Sonko’s allegations in this respect.



30. Having considered the documentary evidence adduced at the hearing of Hon Sonko’s petition, including the Hansard, the trial court was satisfied that the requisite quorum had been met. The court found that Hon Sonko had failed to establish that the two-thirds statutory requirement for impeachment of a Governor was not met.
31. According to the learned Judges, even though Hon Sonko averred that he had annexed affidavits of 57 MCAs who claimed that they did not vote virtually, the court record revealed that he had attached only 39 of such affidavits sworn by the members, who are listed in paragraph 167 of its judgment. In his replying affidavit, the 2nd respondent annexed 24 affidavits out of the 39 alluded to by Hon Sonko, clearly showing that the 24 had voted on the Motion virtually. In the circumstances, the trial court correctly concluded that Hon Sonko had failed to prove that the requisite statutory quorum for a resolution to impeach a Governor had not been met. The court found as a fact that the Hansard, which is the official record of the County Assembly showed that 90 MCAs (out of 122, constituting more than 2/3 of the membership) voted on the Motion. Accordingly, we find that Hon Sonko’s appeal on this account fails.
32. On the claim that he was denied a fair hearing by the County assembly, Hon Sonko deposed, in paragraphs 51, 52 and 53 of his affidavit sworn on 18th December 2021 and filed in support of his petition in the trial court, that he instructed Mr. Evans Ondieki (advocate) to “... proceed to the County Assembly to present [his] opposition to the allegations and evidence in proof of the false and fictitious nature of the said allegations.” According to Hon Sonko, his advocate was denied access to the proceedings on 3rd December 2020. Consequently, he (Hon Sonko) was denied a fair hearing and, in his view, “... the process of impeachment was fatally flawed and tainted with illegality.”
33. In his replying affidavit sworn on 31st March 2021, the 1st respondent explains that Hon Sonko having admitted that he was invited to appear before the committee of the whole house renders his allegation of lack of personal service baseless and without merit; that Hon Sonko had the option of attending the proceedings physically, through his duly appointed advocate or virtually; and that there was no evidence that the advocate allegedly sent by Hon Sonko to the County Assembly had express instructions from him. In his replying affidavit sworn on 21st January 2021, the 2nd respondent made the same observations and pointed out that the learned counsel alleged to have represented Hon Sonko did not present any written evidence of authority to act for Hon Sonko. In view of the foregoing, the trial court held, as we hereby do, that Hon Sonko was not by any means denied a fair hearing at the County Assembly. Likewise, we are satisfied that the impeachment process complied with the constitutional and statutory requirements for fair hearing.
34. As regards Hon Sonko’s contention that there was no sufficient public participation in the process of his impeachment, we find no reason to interfere with the trial court’s finding to the contrary. Hon Sonko’s case is that the resolution made by the 3rd respondent was in contravention of article 196 of *the Constitution* and in breach of sections 91 (b) and 20 of the *County Governments Act* in that the petitioners were not accorded reasonable time to consult with their electorates on the matters raised in the Motion; that the petitioners were denied the opportunity to present to the 1st respondent the views, opinions and proposals of the electorates, thereby locking out public participation; that the Motion could not have been freely and legally debated or processed by the 1st respondent or by members of the Assembly “in view of the existence in force of an injunctive order of a competent court barring the debate.” 34. article 196(1) of *the Constitution* reads:

“ 196.

- (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.”

35. Section 91 of the *County Governments Act* makes provision for facilitation of public participation at the county level and in the decentralised units. The section reads:

“91. Establishment of modalities and platforms for citizen participation

The county government shall facilitate the establishment of structures for citizen participation including—

- (a) information communication technology based platforms;
- (b) town hall meetings;
- (c) budget preparation and validation fora;
- (d) notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;
- (e) development project sites;
- (f) deleted by Act No. 13 of 2014, s. 3;
- (g) establishment of citizen fora at county and decentralized units.”

36. Section 87 of the Act sets out the principles of citizen participation in counties, which include (a) timely access to information, data, documents, and other information; (b) reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight; and recognition and promotion of the reciprocal roles of non-state actors’ participation and governmental facilitation and oversight.

37. The foregoing constitutional and statutory provisions are suitably designed to give effect to the national values and principles of governance, which include “participation of the people,” enshrined in article 10 of *the Constitution*. In this regard, three pertinent questions beg for answers: (a) whether the Nairobi City County Assembly complied with the requirements of article 196(1) of *the Constitution* by conducting its business in relation to the impugned process of Hon Sonko’s impeachment in an open manner, and whether its sittings could be said to have been held in public; (b) whether, as required by section 91 of the Act, the Assembly facilitated sufficient public participation and involvement in the process, such as information communication technology based platforms or town hall meetings; and (c) whether the Assembly observed the principles of citizen participation set out in section 87 of the Act.

38. Hon Sonko’s contention in denial of citizen participation was based on an affidavit sworn on 30th December 2020 by one Newton Munene Njiru (a member of the Nairobi County Executive Committee) in support of Hon Sonko’s petition. In his affidavit, Munene averred that public participation was not undertaken. According to him, there was no online platform that could enable the residents to participate in the impeachment process. He stated that there was no committee report



evidencing that there was any public participation at the committee level; that there was no single FM radio or TV station advert inviting the public to engage in the impeachment proceedings; and that the charges against Hon Sonko were not uploaded in the County Assembly website. Munene further affirmed that he had been informed by counsel for Hon Sonko that 40,000 memoranda had been received by his (the counsel's) law firm opposing the impeachment, but that none of the memoranda was acknowledged or canvassed during the impeachment proceedings. Suffice it to observe that it was incumbent upon Hon Sonko to submit the memoranda in defence of the Motion to impeach him if indeed his counsel had received them.

39. In response, the 3rd respondent contended that adequate notice of the impeachment was issued to Nairobi residents; that questionnaires were circulated to the residents and a report dated 3rd December 2020 was prepared. According to the report, a majority of the residents were aware of the impeachment Motion, the reasons for the removal of the Governor, and they supported it. The 1st respondent also told the trial court that he published a notice of the impending impeachment in the Daily Newspapers of 27th November 2020, and that online platforms were opened to enable residents air their views on the issues raised in the Motion.
40. In their considered judgment, the learned Judges took note of the representations made by the 3rd respondent affirming that there was sufficient public participation in the process. Its position was supported by the 2nd respondent. Likewise, the 4th, 5th and 6th respondents were also of the view that the statutory requirement for public participation had been complied with by virtue of the fact that the impeachment proceedings were open to the public. We agree with the trial court that, in the circumstances prevailing at the time of the impeachment process on account of restrictions placed on in-person public engagement due to the COVID-19 pandemic, sufficient public participation had been conducted. The Assembly had, through print media, invited submission of memoranda in response to which 40,000 submissions had been made directly to learned counsel for Hon Sonko. We also take note of the 1st respondent's averment that online platforms were also opened to enable residents air their views on the issues raised in the Motion. In addition, questionnaires had been circulated to the public for their response, which was documented in the report of 3rd December 2020, a copy of which was annexed to the 2nd respondent's affidavit filed in reply to Hon Sonko's petition. In view of the foregoing, we are at a loss as to what more could be done to enhance the Assembly's efforts to ensure sufficient public participation. Suffice it to observe that neither *the Constitution* nor statute law prescribe the threshold or any particular means by which State organs ensure meaningful public participation. Indeed, the choice of such means remains the prerogative of the State organ concerned.
41. In principle, facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. With regard to the threshold and means of public participation, this Court in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR cited with approval the High Court decision in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR where the learned Judges stated:
- “the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.”
42. While there is no statutory prescription of the quantity or quality of citizen participation, we must emphasise the need to ensure that public participation is meaningful and not merely a gesture



innovatively designed to gloss over the requirements of article 196 of *the Constitution* and sections 87 and 91 of the *County Governments Act*. In this regard, we affirm the High Court decision in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR where the court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation:

- (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.
- (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.”

43. The importance of public participation, in cases of this nature cannot be overemphasized. The South African Constitutional Court in *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5 had this to say on the importance of public participation:

“...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”

44. In view of the foregoing, we agree with the learned Judges conclusion that there was sufficient evidence to show that the County Assembly conducted a survey in Nairobi County seeking the views of its residents on the matter. A report to that effect was prepared and tabled before the Assembly. On 27th November 2020, the 1st respondent published the impending impeachment Motion in the daily newspapers and called on the residents to deliver their representations to the Assembly either physically or through the provided postal and email addresses. The trial court took note of Munene’s averment that at least 40,000 residents had provided their views of the impeachment to Hon Sonko’s advocates. The learned Judges also observed that the impeachment took place during the COVID-19 pandemic, which restricted in-person interactions thereby limiting the avenues for public participation that otherwise require personal interaction, such as public Barazas or townhall meetings. In conclusion, the trial court correctly found that the constitutional and statutory requirements for public participation were duly met. Having considered the record of appeal, the evidential documents before us, the constitutional and statutory requirements for public participation, and the corresponding submissions of the parties, we are satisfied that the statutory requirements for, and the principles of, public participation were met and, accordingly, find nothing to warrant interference with the findings of the trial court in this regard. Consequently, Hon Sonko’s appeal on this ground fails.
45. As to whether there was a court order given on 25th November 2020 in ELRC Petition No. 35 of 2020 barring debate on the Motion for Hon Sonko’s removal from office by way of impeachment, we take cognisance of, and agree with, the trial court’s finding that the conservatory orders in issue, which were granted by the ELRC (James Rika, J) on 30th November 2020 were suspended by the same court on 3rd December 2020 at 11.30 am when the ELRC determined and delivered its ruling on Hon Sonko’s Notice of Motion dated 30th November 2020 in which he sought inter alia conservatory orders barring debate on the Motion to impeach him. Consequently, there were no conservatory orders in force barring debate on the impeachment Motion when the same was moved in the Assembly on 3rd December 2020 at 3.00 pm.
46. In view of the foregoing, we find nothing to fault the trial court’s finding that the 3rd respondent was not barred from moving, debating and passing a resolution on, the Motion to impeach Hon Sonko from 3.00 pm on 3rd December 2020. Having considered the record of appeal and the written and oral submissions made to us, we find no reason to interfere with the High Court’s finding that the process undertaken by the Nairobi City County Assembly leading to Hon Sonko’s impeachment was procedurally fair and in accord with statute law, and with its Standing Orders of the Nairobi County Assembly.
47. A resolution having been passed by the 3rd respondent to impeach Hon Sonko on 3rd December 2020 as notified to the Speaker of the Senate by the Speaker of the County Assembly on 4th December



2020 in accordance with section 33(2)(a) of the *County Governments Act*, it remained for the Senate to convene to hear charges against Hon Sonko pursuant to section 33(3) (a) of the Act. The grounds on which the County Assembly resolved to impeach Hon Sonko accord with the provisions of article 181(1) of *the Constitution*. The grounds on which the 3rd respondent sought to impeach Hon Sonko were –

- (a) gross violation of *the Constitution* or any other law, including the *County Governments Act*, 2012; the Public Procurement and Disposal Act, 2015; and the *Public Finance Management Act*, 2012;
- (b) abuse of office; and
- (c) crimes under the national law.

48. Article 181(1) of *the Constitution* provides:

“ 181.

- (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.”

49. A Select Committee of the Senate was established on 9th December 2020 to investigate the proposed impeachment of Hon Sonko and resolved to have the impeachment heard and determined by way of plenary pursuant to Standing Order 75 of the Senate Standing Orders which, in effect, dispensed with the need for a Committee Report. The 5th respondent then gazetted 16th and 17th December 2020 for the special sitting of the Senate and, on 10th December 2020, Hon Sonko and the 3rd respondent were notified to appear before the Senate in plenary on 16th December 2020. They were required to submit to the Senate, and serve on the other party, relevant documents in support of, or response to, the impeachment Motion. They did.

50. By a letter dated 14th December 2020, the 3rd respondent wrote to the 4th respondent confirming that they would appear in person and by advocates and that they would call witnesses. They also requested the 4th respondent to issue summons to its witnesses to aid in the prosecution of Hon Sonko. On his part, Hon Sonko filed with the 6th respondent his written Response to Allegations dated 15th December 2020 together with a Preliminary Objection to the proceedings on the grounds inter alia that there were pending 4 related cases in various courts, and that the proceedings in the Senate were sub-judice. These cases were –

- (a) Nairobi CMACEC No 1 of 2020 – Republic v Mike Mbuvi Sonko & 20 Others;



- (b) Nairobi CMACEC No 31 of 2020 – Republic v Mike Mbuvi Sonko & 16 Others;
- (c) Nairobi ELRC Petition No. 35 of 2020 – HE Governor Mike Mbuvi Sonko v the Nairobi City County Assembly, 4 Others & the Speaker, Senate; and
- (d) Nairobi High Court (Constitutional and Human Rights Division) Petition No E348 of 2020 – Nairobi City County Government v the National Metropolitan Services & 13 Others.

51. On 15th December 2020, the 4th respondent supplied each party with copies of the documents filed by the other party in preparation for the hearing, which took place as scheduled on 16th and 17th December 2020. At the hearing, learned counsel for Hon Sonko submitted on the preliminary objection whereupon the 5th respondent adjourned the House to consider the objection and render his ruling, which he delivered in the afternoon directing that the preliminary objection “... be subsumed in the evidence of either party and presented at the time allocated to that party” for the hearing of the Motion for impeachment. On the issue of the alleged sub-judice, the 5th respondent ruled that –

- “(1) sub-judice is a rule of the Senate itself, for its own convenience;
- (2) it is also a rule requiring evidence for it to be invoked; and
- (3) it is not an absolute rule as Standing Order No 98(5) of the Senate Standing Orders provides that notwithstanding that Standing Order, the Speaker may allow reference to any matter before the Senate or a Committee of the Senate, and following the precedents. It is quite clear that the competence and jurisdiction of the Senate to hear a proposed removal from office is a constitutional mandate of the Senate independent of the mandate of the Judiciary or any other organ.”

52. The Motion for impeachment proceeded to hearing and, at the conclusion thereof, the 6th respondent voted and resolved to remove Hon Sonko from office. By a Gazette Notice published on 18th December 2020, the 5th respondent published the 6th respondent’s resolution to remove Hon Sonko from office by impeachment whereupon Hon Sonko petitioned the High Court faulting the 6th respondent for the manner in which it conducted the proceedings leading to its resolution to impeach him. He claims that he was served with evidential documents on short notice and, accordingly, was not given adequate time to go through them and prepare for a comprehensive response.

53. It is noteworthy, though, that in addition to his comprehensively canvassed Preliminary Objection, Hon Sonko had, on 15th December 2020, filed a 118-page written Response Allegations Made in the Motion, which included various annexures in support of his case. Suffice it to say that the Motion proceeded to hearing and determination in accordance with Standing Order No 75 of the Senate Standing Orders. Hon Sonko’s appeal on the ground that he was not accorded a fair hearing, and that the Senate acted in breach of his right to fair hearing on account of the expedited procedure, turns upon our reading of Standing Order No. 75.

54. Order 75 prescribes the maximum time limits within which the Senate, either by a special committee or in plenary, should convene to hear the charges leveled against a Governor (ie within 7 days), and to make a determination within 10 days from the date on which it convenes. The Order reads:

- “75. 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—
5. have not been substantiated, no further action shall be taken under this section in respect of that allegation; or
6. have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the charges.
7. The provisions of paragraph (4) shall apply with necessary modifications to the findings of the Senate, while investigating the matter in plenary.
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 after the expiry of three months from the date of such vote.”

55. It is noteworthy that Standing Order No 75 of the Senate Standing Orders does not prescribe the minimum period within which the House may convene to hear and determine a Motion for impeachment of a Governor: provided that it convenes within 7 days of the receipt of the County Assembly’s resolution and, thereafter, hear and determine the charges in issue within 10 days. In our considered judgment, nothing prevents the 6th respondent from convening any time before expiry of the prescribed 7 days or from reaching its determination any period not exceeding 10 days after so convening. In any event, Hon Sonko had 7 days (between 10th to 16th December 2020) to prepare his



response. At the very least, he had 15th, 16 and 17th December 2020 (the last day of the hearing) to peruse and acquaint himself with what he claimed to be a voluminous bundle of evidential documents filed in support of the charges against him. We need to point out, though, that his submission at the Senate to the effect that the hearing was sub-judice on account of various pending suits on related charges suggest that Hon Sonko was at all times familiar with the nature of charges levelled against him. That might probably explain his ability to present a 118-page written response prior to the hearing.

In any event, nothing stood in the way of Hon Sonko to cross-examine the 3rd respondent on the contents of the impugned evidential documents to ascertain the truth or otherwise of their contents. Accordingly, we agree with the trial court that the alleged late service of “voluminous” documents did not infringe on Hon Sonko’s right to fair administrative action and hearing.

56. On the issue of the alleged introduction of new evidence during the hearing before the Senate, we find no evidence to confirm Hon Sonko’s claim. Having considered the record and the written submissions of the parties, we are satisfied that no new evidence or charges were presented before the Senate other than those contained in the impeachment Motion moved by Hon. Ogada in the County Assembly. Accordingly, we find nothing that would have taken Hon Sonko by surprise during the hearing in the Senate. In particular –

- (a) with regard to charges relating to crimes under national law, we take to mind that these are the offences with which Hon Sonko is charged in the Anti-Corruption and Economic Crimes Court;
- (b) on the charge of gross misconduct, these relate to issues of alleged intoxication, absence from office, and use of abusive and unbecoming language, all of which were documented in video clips and extracts from social media posts of which he was personally aware; and
- (c) with regard to abuse of office, Hon Sonko was at all times acquainted with the allegations of failure to renew contracts for Chief Officers and use of public funds to pay for his daughter’s travel to the United States of America.

57. As to whether the foregoing charges levelled against Hon Sonko were substantiated, and whether the same were proved to the required standard, it was Hon Sonko’s contention in paragraph 93 of his affidavit sworn on 18th December 2020 that –

“... the charges and documents presented at the Senate, including those presented on 15th December 2020, did not directly link the [appellant] with any acts, omissions or commissions and the same were at best an [attempt] to render [him] vicariously liable in respect of matters falling within the responsibilities and roles bestowed on County Departmental Heads by statute and *the Constitution* of Kenya, 2010.”

58. Hon Sonko further contended in paragraph 95 of his affidavit that –

“... the Senate sitting as a Plenary to consider the charges did not exercise the duty to investigate charges as mandated by *the Constitution* and section 33 of the *County Governments Act*, but only voted without debating ... which ... vitiates the [County Assembly’s] resolution of 3rd December 2020.”



59. In paragraph 96 of his affidavit, Hon Sonko continues to say that –
- “... the Senate made the decision to impeach [him] without giving written reasons, and no report reflecting any deliberations and considerations has been served upon [him], and the Senators only voted in respect of the different charges without assigning any reasons.”
60. In paragraph 98, Hon Sonko states that the Senate had taken a pre-determined position while conducting a quasi-judicial function as opposed to a legislative function, and the same pointed at bias on the part of the Senators in the eyes of Hon Sonko and of the public. According to him, “... the Senators voted generally without evaluating evidence against each count in the context of law and evidence without applying their minds to the substance of the allegations on the scales of merit.” It is on this basis that he urged the trial court to find that the charges against him had not been substantiated or proved on the required balance.
61. In reply to Hon Sonko’s allegations, the 4th respondent, on his own behalf and on behalf of the 5th and 6th respondents, stated in his affidavit sworn on 22nd April 2020 that the Hon. Members of the Senate considered the documents, evidence presented and the circumstances of the case and were satisfied that Hon Sonko had willfully violated the law in a manner sufficient to warrant removal from office pursuant to article 181 of *the Constitution* and section 33 of the *County Governments Act* – paragraph 47; that the Hon. Members of the Senate heard both Hon Sonko and the County Assembly for two days, extensively deliberated on the issues raised and subsequently retreated to an in-camera session to deliberate on the issues raised in accordance with Rule 26 of the Fifth Schedule to the Senate Standing Orders – paragraph 51; that Hon Sonko’s request for time to file supplementary documents in response to the charges was declined by the 5th respondent in view of the fact that the rules of procedure in the Fifth Schedule to the Senate Standing Orders sets out the process and timelines for filing and exchange of documents, which did not favour Hon Sonko’s request – paragraph 54; that the Hansard of 16th and 17 December 2020 is a record of clear evidence that the Senate interrogated the evidence in this matter – paragraph 55; and that Standing Order 75 of the Senate Standing Orders permits the Senate to proceed with removal proceedings in plenary and, where a matter is heard in plenary, voting thereon is carried out pursuant to articles 122 and 123 of *the Constitution* and Standing Order 80 of the Senate Standing Orders and, in this regard, lack of a Committee Report does not violate Hon Sonko’s rights as claimed.
62. Having examined the record, including the Hansard on the Senate proceedings, the affidavits in support of the petition and in reply to the petition in the trial court, we are satisfied that the charges on which Hon Sonko was impeached were the subject of deliberations by the Senate and, contrary to Hon Sonko’s contention, the Senators had not pre-determined the outcome of the Motion to impeach him. Neither was their voting influenced by bias. Accordingly, we agree with the learned Judges’ finding that the Senate’s deliberations are part and parcel of its evaluation of evidence in the impeachment proceedings before the County Assembly; that in voting on the impeachment Motion, whether as a committee or in plenary, the Senators make a decision on all the issues touching on the proceedings, including the lawfulness of the proceedings; that there was a debate in the Senate in which each Senator was entitled to voice his/her own views; that the Senate Hansard report does not indicate that the Senators had previously met and reached a decision to impeach Hon Sonko so as to justify his claim that the vote was pre-determined; and that, since each Senator was exercising his/her quasi-judicial role as an umpire in the matter, this court cannot question their decision to consistently and uniformly vote in support of or against each of the charges. In conclusion, the learned Judges correctly observed that proof of even one of the charges was sufficient to warrant Hon Sonko’s impeachment.



63. With regard to Hon Sonko's complaint that he was not supplied with the committee report of the Senate, the trial court correctly found that –
- “when the Senate proceeds through plenary, there is no provision for the preparation of a report. It is only when the Senate proceeds by way of a special committee that the committee's report is presented to the plenary.”
64. On Hon Sonko's claim that the charges against him had not been proved on the required standard, the learned Judges were of the considered view that the allegations made were directly connected to Hon Sonko and were substantiated to the required standard. Hon Sonko has faulted the trial court's decision on this score. The question then is: what is the required standard of proof of the charges set out in article 181 of *the Constitution* for the removal from office of Governor by way of impeachment?
65. In answer to the question as to what standard should be applied in implementing the threshold for removal of a Governor, this Court agreed with the decision of the learned Judges of the High Court in *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR where the court observed that there is need to maintain a high threshold for removal of a Governor and the need to ensure that the law is strictly followed. We concur with the learned Judges and add that the standard of proof is neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves “gross violation of *the Constitution*”, we hold that the standard of proof required for removal of a Governor is above a balance of probability, but below reasonable doubt, and therefore in between the two standards.
66. To determine whether this standard of proof had been achieved in Hon Sonko's case, the trial court grappled with the question as to whether the charges in issue were substantiated, and whether there was a nexus between those charges and Hon Sonko. The learned Judges concluded that it had been. The charges levelled against Hon Sonko were directly connected with him. The evidential documents, reports and the Senate Hansard demonstrate that those charges were substantiated to justify impeachment.
67. With regard to the charge that Hon Sonko acted in violation of *the Constitution* or any other written law (Article 181(1) (a)), there was sufficient proof at the County Assembly, Senate and the trial court that the charge had been proved against Hon Sonko on the required standard. Hon Sonko had signed a Deed of Transfer of certain functions of the Nairobi City County Government to Nairobi Metropolitan Services (NMS), but subsequently refused to facilitate NMS with relevant documents to complete the process of transfer thereby hampering the delivery of services to the people of Nairobi City County. We agree with the holding of the learned Judges that Hon Sonko's conduct did not meet the high standards expected of a Governor.
68. In view of the foregoing, the trial court found, as we hereby do, that this amounted to violation of the trust bestowed upon the office of Governor by the electorate. Such conduct was against the basic principles of good governance, accountability and integrity expected of state officers under article 10 of *the Constitution*.
69. On the charge of abuse of office, there was sufficient evidence of high turnover of Chief Executive Committee members and Chief Officers, which was occasioned by Hon Sonko's unjustified refusal to renew their contracts. In addition, the office of CEC for Finance and that of the Chief Officer Finance were held by the same person during the period between 2018 and early 2019. The fact that the holder of the two offices was an appointee of Hon Sonko, offended the principle of good governance on the part of Hon Sonko in breach of Article 10 of *the Constitution*.



70. In addition to the foregoing, the County Assembly, the Senate and the trial court were satisfied that Hon Sonko grossly misconducted himself by repeatedly using abusive, embarrassing, inappropriate and unprintable language, which undermined the office of Governor; and that he published abusive and unbecoming words in social media posts, which he did not deny. Having considered the record and the judgment of the trial court, we agree with the learned Judges that the office of Governor represents the aspirations of the residents. It is a seat of honour and respect, and the holder of such office is expected to carry himself with dignity, humility, integrity, and respect for others. Hon Sonko did not. Accordingly, we reach the inescapable conclusion that the charges levelled against Hon Sonko were substantiated and proved to the required standard, and that the County Assembly and the Senate could not be faulted for impeaching him. In effect, his appeal on this ground fails.
71. Having found that Hon Sonko's impeachment was lawful and procedurally fair, we find no fault in the 8th respondent's publication on 21st December 2020 of the Gazette Notice No 232/10914 of 2020 Issuing a Notice of a By-Election for County Governor, Nairobi City County, which was scheduled to be held on 18th February 2021 in accordance with article 182 of *the Constitution*. Hon Sonko's appeal on the ground that the learned Judges erred in law and misdirected themselves to the application of strict constitutional timelines for the conduct of by-elections in the circumstances of his case as prescribed in article 182(4) and (5) of *the Constitution* and thereby arriving at an unconstitutional decision does not stand. Furthermore, the Notice in issue was overtaken by events following the order given by the High Court in Constitutional Petition No E425 of 2020 by consent of the parties on 4th January 2021 suspending the special Gazette Notice in issue.
72. Article 182(4) and (5) of *the Constitution* provides:
- “ 182.
- (4) If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.
- (5) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.”
73. Hon Sonko's impeachment resulted in vacancy in the office of Governor at a time when there was also vacancy in the office of Deputy Governor. It became necessary, therefore, for the 2nd respondent to assume office as Acting Governor pursuant to article 182(4) of *the Constitution*. In the circumstances, the 8th respondent was mandated to hold elections for the office of Governor within 60 days from 21st December 2020 when the 2nd respondent assumed office in an acting capacity as County Governor. But, as events unfolded, the elections were never conducted for reasons which we will shortly explain.
74. On 4th January 2021, by consent of the parties in Constitutional Petition No E425 of 2020, the High Court granted orders suspending the special Gazette Notice No 232/10914 by which the 8th respondent had set in motion the process of holding a by-election as contemplated by article 182(5) of *the Constitution*. This paved way for vetting of the 11th respondent for the office of Deputy Governor on 15th January 2020 whereupon she assumed office as Deputy Governor on the same day.
75. On 18th January 2021, the 10th respondent resigned from office as Acting Governor whereupon the High Court (AC Mrima, J) in Constitutional Petition No E019 of 2021 issued conservatory orders



on 18th January 2021 restraining the swearing in of the 11th respondent as Governor of Nairobi City County. Further restraining orders were given on 24th June 2021 in Constitutional Petition No E425 of 2020, which remained in force until 6th July 2021 when they were intended to lapse. It was not until 16th November 2021 when the 11th respondent was eventually sworn in and assumed office as Governor. In our considered judgment, the belated assumption of office of Governor by the 11th respondent long after the 60 days contemplated by article 182(5) of *the Constitution* cannot be attributed to the respondents or either of them. Indeed, this Court cannot ignore the 12 or so constitutional petitions and conservatory orders that, for a long time, stood in the way of assumption of office of the then Deputy Governor as Governor of Nairobi City County. The long and short of it is that Hon Sonko was properly impeached and that there is now a substantive Governor in office.

76. Being cognisant of the legal and procedural technicalities for, and the emotive nature of proceedings for the impeachment and removal from the office of Governor, and having carefully considered the record of appeal and the specific grounds advanced in support thereof, the evidential documents on record, the impugned judgment and decree of the High Court (Constitutional and Human Rights Division) Petition No E425 of 2020 (as consolidated with High Court Petition No E014 of 2021), the written submissions of learned counsel for Hon Sonko together with the accompanying Case Digest and List of Authorities, the 1st respondent's written submissions, the 2nd and 10th respondents' written submissions, the 3rd respondent's written submissions and digest of authorities, the 8th respondent's written submissions, digest of cases and list of authorities, and having heard learned counsel for Hon Sonko and learned counsel for the respondents, we find and hold that Hon Sonko's appeal fails on all grounds. Accordingly, we hereby order and direct that—

- (a) Hon Sonko's appeal be and is hereby dismissed;
- (b) the judgment and decree of the High Court (J Chitembwe, W Korir and W Okwany, JJ) are hereby upheld; and
- (c) in light of the fact that Hon Sonko's appeal raises substantive issues of law involving interpretation of *the Constitution* and statute law relating to the impeachment and removal from office of Governor, and matters of profound public interest, we order and direct that parties bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH M. OKWENGU

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

