IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 81 OF 2016

BETWEEN

STEPHEN MRING'A MASAMO.....1ST APPELLANT

JOSEPH MBOGHO.....2ND APPELLANT

VINCENT MASAWI.....3RD APPELLANT

ELIJAH MWANDOE.....4TH APPELLANT

FLORA MAGHANGA MTUWETA.....5TH APPELLANT

AND

THE COUNTY ASSEMBLY, TAITA-TAVETA.....1ST RESPONDENT

THE SPEAKER, COUNTY ASSEMBY, TAITA-TAVETA.....2ND RESPONDENT

THE SELECT COMMITTEE COUNTY ASSEMBLY, TAITA-TAVETA....3RD RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa, (Emukule, J.) dated 10th December 2015

in

Petition No. 83 of 2014)

****

JUDGMENT OF THE COURT

Although there are five appellants named in this appeal, the appeal in reality concerns only the ***1st appellant, Stephen Mring'a Masamo*** who ***the 1st respondent, the County Assembly of Taita-Taveta (the Assembly),*** impeached on 25th June 2015 and removed from the office of ***County Executive Committee Member*** in charge of ***Trade, Tourism, Social Affairs and Community Participation***. Initially the Assembly had passed a resolution on 22nd December 2014 for the removal of all the five appellants from

their offices as County Executive Committee Members, but after they were heard by ***the 3rd respondent (the select committee)***, it recommended and the Assembly accepted, the removal from office of only the 1st appellant.

The background to the appeal is as follows. After receiving a petition signed by members of the Assembly seeking to discuss and remove the six appellants from their respective offices as County Executive Committee Members, ***the 2nd respondent, the Speaker of the County Assembly of Taita-Taveta (the speaker)***, gave notice of a special motion to be discussed by the Assembly on 19th December 2014 at 2.30 pm. On the appointed day, ***Cromwel Mwariga Baridi***, leader of majority party, moved a motion to require the Taita-Taveta County Governor to dismiss the appellants from office for incompetence and abuse of office. The 1st appellant was in addition accused of gross misconduct. After debating the motion, the Assembly voted in favour of it and, pursuant to ***section 40(3)*** of the ***County Government Act,*** constituted a five-person select committee to investigate the matter further, make recommendations and report to the Assembly. The following members of the Assembly were appointed to the select committee:

i) Godwin Kilele - Chairperson

ii) Rachel Dawai - Vice Chairperson

iii) Raymond Mwangola - Member

iv) Crispus Tondoo - Member

v) Judah Mulwa - Member

On 29th December 2014 the speaker wrote to the Governor informing him of the appointment of the select committee and copied the letter to appellants. The next day he wrote to each of the appellants, inviting them to appear before the select committee on specified dates and also forwarded to each of them details of the allegations against them. The 1st appellant was required to appear before the Select Committee on 3rd January 2015.

By a petition dated 31st December 2014, the appellants commenced proceedings in the High Court at Mombasa seeking declarations that the process initiated by the respondents for their removal from office was in violation of the rules of natural justice, unconstitutional, null and void; an order of *certiorari* to quash the decision of the Assembly to impeach them; and an order of *prohibition* stopping the select committee from convening or conducting its hearings. Together with the petition they filed an application for conservatory orders to stay the summons to appear before the select committee and to restrain it from hearing the allegations against them. On 31st December 2014 the High Court issued the conservatory orders *ex parte* and thereafter matters took a long lull until 8th May 2015, when the respondents moved the High Court to vacate the conservatory orders on the grounds that the appellants had gone to sleep and failed to prosecute their application *inter partes*. By a ruling dated 29th May 2015, the High Court vacated the conservatory orders and directed the appellants to get on with the hearing of the petition urgently.

With the vacation of the conservatory orders, the select committee resumed its work. On 9th June 2015, it served upon the 1st appellant summons to appear before it on 16th June 2015 to answer the allegations against him. It also forwarded to him the details of the incompetence, abuse of office and gross misconduct alleged against him. The 1st appellant did not appear before the select committee as required, but instead sent his advocate to apply for an adjournment on the ground that he was attending a meeting of the World Bank in Nairobi. The application for adjournment was denied but the select committee nevertheless heard his advocate.

On 24th June 2015, the select committee prepared its report and recommended the removal of the 1st

appellant from office. The next day the Assembly adopted the report and recommendations of the select committee and resolved that the Governor must dismiss the 1st appellant from office. On 30th June 2015 the 1st appellant went back to the High Court and successfully applied for a conservatory order staying the resolution for his dismissal. Subsequently, on 21st July 2015 the 1st appellant applied and was allowed to amend the petition to seek, in addition to declarations, orders of *certiorari* to quash the report of the select committee and the resolution of the Assembly of 25th June 2015, calling for his dismissal.

Emukule J. heard the petition and identified only one issue for determination, namely whether the appellant was denied the right to be heard, contrary to Article 50 of the Constitution. He concluded in the judgment impugned in this appeal that none of the appellant's rights were breached by the respondents and dismissed the petition with costs, thus provoking this appeal.

The 1st appellant put forth four grounds of appeal, contending that the learned judge erred by failing to follow an earlier decision of the High Court which had declared ***section 40(3)*** of the County Government Act unconstitutional; by holding that the 1st appellant's right to fair trial was not violated; by finding that the 1st appellant's impeachment met the threshold set by ***section 40(2)*** of the County Government Act; and by holding that the right procedure was followed in the impeachment.

On the first ground, the 1st appellant's learned counsel, ***Mr. Kithi*** submitted that on 7th October 2014, ***Mabeya, J***. declared section 40(3) of the County Government Act unconstitutional, null and void for inconsistency with Art 50 of the Constitution in ***Stephen Nendela v. The County Assembly of Bungoma & 4 Others, Const. Pet. No. 4 of 2014***. It was submitted that since that judgment had not been appealed or set aside, it was binding and Emukule, J. was bound to follow and apply it.

It was also argued that the Assembly, having resolved to impeach the 1st appellant on 22nd December 2014, could not constitute a select committee made up of the same members who had voted in favour of his impeachment, to investigate him. In the 1st appellant's view, the proceedings of the select committee were tainted by bias and the learned judge erred by failing to hold as such. Relying on ***Martin Nyaga Wambora & 4 Others v. Speaker of the Senate & 6 Others***, ***HC Pet No. 3 of 2014,*** the appellant submitted that the test as regards bias was not whether there was actual bias but rather whether there was reasonable apprehension of bias. For good measure the 1st appellant contended that the fact that the other four appellants, who were facing similar allegations as himself, were absolved from blame, was evidence of differential treatment and discrimination against him.

Mr. Kithi next submitted that the rules of natural justice were violated in relation to the 1st appellant when he was denied an adjournment by the select committee. He submitted that under both the Constitution and the standing orders of the Assembly, the appellant was entitled to appear before the select committee and to make representations. Denying him the adjournment, it was submitted, amounted to denying him the right to a hearing in view of the serious allegations that he was facing. The appellant added that the select committee irregularly introduced new charges against him at its sitting on 16th June 2015 which were different in material respects from the charges that were referred to the select committee for investigation.

Next the appellant argued that his impeachment was unprocedural, illegal, null and void because it was conducted in breach of ***standing order No. 63*** of the Assembly's standing orders. That standing order, it was urged, demands that a person who it is intended to impeach must be furnished with a copy of the report of the select committee at least three days before the debate of the motion for his impeachment by the Assembly. In this case, it was contended, the respondents acted in utter violation of that standing order. Citing ***County Government of Nyeri & Another v. Cecilia Wangechi Ndungu, CA No 2 of 2015***, the 1st appellant submitted that the respondents were required to act reasonably and fairly when exercising their powers.

On the same point the 1st appellant contended that the respondents also violated ***standing order No. 64*** that entitled him to an opportunity to be heard and to respond to issues raised during the debate of the motion to remove him from office. It was argued that the 1st appellant was denied that opportunity.

Accordingly the 1st appellant urged us to find that his impeachment was unprocedural, illegal, null and void and to allow the appeal and quash the impeachment.

Opposing the appeal, the respondents submitted through their learned counsel that the appellant's impeachment was regular and within the law. It was submitted that there was nothing irregular or amiss in a select committee of the County Assembly undertaking further investigations pertaining to the allegations against the appellants and reporting back to the Assembly because that is the *modus operandi* of all legislative bodies, including the National Assembly and the Senate. In such circumstances, it was submitted, the 1st appellant cannot sustain the claim of bias by the select committee.

Regarding the 1st appellant's right to be heard, the respondents submitted that they fully observed the same by notifying him of the allegations against him in advance. They also urged that they notified the appellant of the sittings of the select committee and his right to be heard either in person or by advocate. They therefore contended that although he was offered the opportunity to be heard before the select committee, he elected to be heard through his advocate and that his submissions were duly considered and taken into account when the select committee prepared its report.

Accordingly the respondents urged us to find that the impeachment of the 1st appellants was within the law, procedurally carried out in accordance with the Assembly's oversight role, and to dismiss the appeal.

We have carefully considered the record of appeal, the judgment of the High Court, the grounds of appeal, the written and oral submissions by counsel and the authorities on which they relied. In our view the real dispute in this appeal is whether the impeachment of the 1st appellant was procedural and lawful, with the other issues raised by the 1st appellant converging on that main issue.

The procedure for impeaching and removing a County Executive Committee Member is provided in section 40(1) of the County Government Act. Because of the importance that provision has assumed in this appeal, it is necessary to set out the entire provision, which provides thus:

> ***"Removal of member of executive committee.***
>
> ***40. (1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—***
>
> > ***(a) incompetence;***
> >
> > ***(b) abuse of office;***
> >
> > ***(c) gross misconduct;***
> >
> > ***(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;***
> >
> > ***(e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or***
> >
> > ***(f) gross violation of the Constitution or any other law.***
>
> ***(2) A member of the county assembly, supported by at least one third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).***
>
> ***(3) If a motion under subsection (2) is supported by at least one third of the members of the county assembly —***

(a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

(b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

(4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.

(5) If the select committee reports that it finds the allegations—

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) If a resolution under subsection (5)(b) is supported by a majority of the members of the county assembly —

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and

(b) the governor shall dismiss the county executive committee member."

In ***Stephen Nendela v. The County Assembly of Bungoma & 4 Others (supra)*** which the 1st appellant heavily relied upon, Mabeya, J. was confronted with an application by a county executive committee member seeking to quash a decision of a county assembly that had impeached him. It was contended, among others, that the proceedings leading to the removal of the applicant from office were in violation of the right to fair hearing under Article 50 of the Constitution and that section 40 (3) of the County Government Act was unconstitutional because it allowed partisan members of the County Assembly to serve as members of the select committee, thus violating the constitutional guarantee of hearing by an independent and impartial body.

Regarding the right to fair hearing, Mabeya J. found that the removal of the applicant from office was in violation of Article 50 and in particular Article 50(2) which guarantees an accused person the right to fair hearing. In his view, the applicant before him was in the same position as an accused person in a criminal trial because of the consequences that he stood to suffer. Of course that was a fundamental misdirection because, as this Court stated in ***Judicial Service Commission v. Gladys Boss Shollei & Another, CA No. 50 of 2014***, whereas a person in the 1st appellant's position may invoke Article 50 of the Constitution and Article 47 which guarantee the right to fair administrative action, Article 50(2) applies only to persons who are charged with a criminal offence. ***Okwengu, JA*** stated the position thus:

***"[68] Article 50(2) of the Constitution provides for a right to a fair trial to an accused person in criminal trials. That sub-article was not applicable in the disciplinary proceedings against the respondent, which as already noted, were neither criminal proceedings nor quasi-criminal proceedings. The respondent was entitled to a right to a fair hearing as provided under Article 50(1) of the Constitution that deals with "any dispute that can be resolved by application of law*."

Kiage, JA was of the same mind. After quoting Article 50(2), he added:

"The elements of a fair trial that are then enumerated, running to nearly a score all, without exception, relate to a criminal trial before a court. The language is straight out of criminal jurisprudence: it speaks of an accused person; the presumption of innocence; the right to remain silent; a public trial before a court established under the Constitution; the right to be present when being tried; the prosecution as the other party; refusal to give self-incriminating evidence; conviction for offences and crimes; reference or allusion to the concepts of autrofois

acquit or autrofois convict; the benefit of least severe sentence; the right of appeal or review to a higher court on conviction and the exclusion of tainted evidence. This paraphrase I have penned is all indicative that Article 50(2) spells out the right to a fair trial as one that is enjoyed by persons charged with criminal offences in courts of law within the criminal justice system. It has absolutely no application to the proceedings the subject of this litigation and the learned Judge's attempt to christen them as 'criminal' or 'quasi criminal' was a grave and reversible error and misdirection."(emphasis added).

We agree with those sentiments that Article 50(2) of the Constitution addresses itself and must be restricted to a person facing a criminal trial.

As regards the constitutionality of section 40(3) of the County Government Act, Mabeya, J. found the provision to be unconstitutional. This is how he expressed himself:

"In the case of Section 40 (3) of the CGA, the procedure for removal of a County Executive Committee commences with the County Assembly, by way of an allegation being laid before it in the form of a motion, if passed, a Select Committee, whose membership is drawn from the assembly, is formed to carry out investigations. That Committee then reports back to the County Assembly which votes on the report. In my view, this is a perfect example of the complainant or accuser being both the investigator, the prosecutor and the Judge. All the members of the assembly are interested in the outcome of the proceedings in that, having passed the motion to investigate the County Executive Committee Member, it is difficult to disabuse their minds when carrying out their investigations as to the intention of the assembly. To my mind, the Select Committee cannot be the independent and impartial body or tribunal envisaged by Article 50 (1) of the Constitution. The Select Committee is not only part of the assembly that sanctions the motion for investigation, but its members are part of the assembly that will vote for or against the recommendations for removal of the County Executive Committee Member."

Emukule, J. was of a different mind. In his view, the County Assembly, just like the National Assembly, works through committees and that in the case before him, the Assembly, rather than the committee made the ultimate decision on impeachment. Accordingly, in his view, it was erroneous to say that the select committee was a judge in its own cause.

Article 185(3) of the Constitution specifically vests in the County Assembly the power of oversight over the County Executive Committee and other county executive organs. It cannot be gainsaid that the Constitution vests this power in the County Assembly to the exclusion of any other person or institutions, meaning that this function must be discharged by the Assembly, and the Assembly alone. ***Section 14(1)(b)*** of the County Government Act empowers the County Assembly to make standing orders consistent with the Constitution and the Act to regulate its procedure and to establish committees in such manner and for such general purposes as it considers fit. In that respect, the Assembly is not any different from the National Assembly or the Senate, which, by ***Article 124*** of the Constitution are empowered to establish committees for the orderly discharge and conduct of their business. Consequently a large part of the work of legislative bodies is undertaken in committees, while select committees undertake the work of the legislative institutions that require investigations and collection of evidence. Writing on Kenya's Parliamentary Practice, which draws heavily from the Westminster model, ***H. B. Ndoria Gicheru***, a long serving Clerk-Assistant in the National Assembly states as follows regarding select committees:

"All committees which are composed of a certain number of members may be appositely designated "select committees" as distinguished from those comprising the whole House. These Committees are used for two fundamentally different purposes; first, there are debating committees which supplement the House in its task of considering new legislation in detail; secondly, there are investigating committees appointed for tasks which the House itself is not suited to do, for example, the finding out of facts of a case, the examination of witnesses and sifting of evidence, and the drawing up of reasoned conclusions".

Later on he adds:

> ***"Committees exist not to take the initiative and rule the House, but to carry out the task imposed on them; they are creatures of the House with no independent existence. The House gives specific terms of reference which must be adhered to, and it may also issue an "instruction", which is a motion directing the committee to do some particular thing within its orders of reference."***

(See H. B. Ndoria Gicheru, Parliamentary Practice in Kenya, Transafrica, 1976, pages 137 and 144).

Without the committees therefore, it is patently clear that legislative bodies, like the County Assembly in question in this appeal, would be seriously hampered in the discharge of their constitutional mandates, as they would be required to do all their work in plenary, which is not practical.

The crux of the matter is whether Article 50(1) of the Constitution and the rules of natural justice, particularly the *nemo iudex in causa sua* limb, preclude a select committee of the Assembly from considering a matter committed to it by the Assembly. The 1st appellant submits it does, because the members of the committee are also members of the Assembly, which voted in support of the motion to impeach the appellants, before committing the investigation to the select committee.

In our view, a proper reading of the Constitution cannot sustain the 1st appellant's submission. The oversight mandate in question in this case is expressly vested by the Constitution in the Assembly and it cannot therefore be delegated or "outsourced" to another institution, as the 1st appellant tends to think. The Assembly, and no one else, must discharge that constitutional role. The appointment of a select committee by the Assembly to investigate the matter does not constitute delegation of duty by the Assembly or make the select committee the decision maker. The select committee is merely an organ of the Assembly whose role is to investigate and report back to the Assembly, to the intent that the final decision is taken by the Assembly itself. The final decision cannot be a decision of the select committee because the Assembly has the power, by vote, to accept or reject the report and recommendation of the committee.

How does the rule against bias operate in such cases? Mabeya, J. relied on, among others, a passage in ***Halsbury's Laws of England, Vol. 1. 4th Ed. Para 67*** to conclude that the proceedings of the select committee were vitiated by the rule against bias. However, he totally ignored the opening words of the passage, which qualified the rest of the passage as follows:

> ***"It is a fundamental principle that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man can be a judge in his own cause. Hence, where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted." (Emphasis added).***

In the appeal before us, the oversight role of the Assembly is vested by no less an instrument than the Constitution and reinforced by statute. That the bias alleged on the part of the select committee in this case had no basis is perhaps best demonstrated by the fact that after investigating the allegations against the five appellants and hearing them, the select committee found that the allegations against four of them were not proved and recommended against their impeachment.

In ***Brosseau v. Alberta Securities Commission [1989] 1 SCR 301***, the Supreme Court of Canada considered the question whether participation by the same members of the Alberta Securities Commission in both investigative and adjudicatory functions raised a reasonable apprehension of bias, precluding the Commission from conducting the hearing. Holding that it did not, the Court stated that while the principle that no one should be a judge in his own cause underlines the doctrine of reasonable apprehension of bias, an exception must be made where an overlap is made by statute and that the courts must be sensitive to the nature of the institution that is involved. We are persuaded by that reasoning and note that in this appeal the oversight function of the Assembly is created by the Constitution itself.

Again in ***Stephen Munga v. Republic, CA No 1 of 2016,*** we rejected the argument that police orderly room proceedings were *ipso facto* null and void merely because the appellant's superior, who had earlier

complained against him, was in charge of the proceedings. We stated thus:

> ***"Turning now to the merits of this appeal, one of the issues raised by the appellant is that the orderly room proceedings were not conducted impartially. While one of the rules of natural justice, that of nemo iudex in causa sua, the touchstone of fair administrative action, require that no person should be a judge in his own cause, nevertheless it has long been accepted that in some proceedings, particularly disciplinary proceedings, a senior officer may be called upon to determine whether his junior has acted unprofessionally or in breach of the applicable regulations. That is notwithstanding that the junior officer ordinarily reports to the senior officer, thus technically making the senior officer an interested party in the outcome. In our view therefore, in those kinds of proceedings, as in the appeal before us, the decisive issue is not merely whether the appellant's boss presided over the proceedings, it is whether, on the evidence presented, a reasonable and fair-minded person would have concluded that the presiding officer was biased." (Emphasis added).***

The late ***Professor, H. W. R. Wade*** in his tome, ***Administrative Law, Fifth Edition, 1985,*** page ***490*** posits that in a scenario like the one in this appeal, there is no breach of the rules of natural justice. In his view:

> ***"There is no breach of natural justice if the deciding authority appoints a committee to investigate and report, then discloses the report to the person affected and gives him a fair hearing before itself. There is here no delegation of any of the authority's power or duties."***

Accordingly, in our view, there is no basis for presuming bias, as Mabeya, J. did, merely because the select committee is made up of members of the Assembly and appointed by the Assembly. To accept that view would have debilitating consequences, for example, for the National Assembly and the Senate as pertains to their ability to discharge their constitutional obligations. Of course that does not preclude a member subject to investigations by a select committee from alleging and proving bias against individual members of the select committee. In our view, each case must be considered on its own merit.

In this appeal, we are satisfied that Emukule, J. did not err in holding that there was no violation of the right to a hearing by an independent and impartial body, guaranteed to the 1st appellant by the Constitution. As a postscript to the judgment of Mabeya, J., on 24th March 2017, this Court sitting at Kisumu allowed an appeal against that judgment and set it aside after finding that the learned judge had erroneously applied Article 50(2) of the Constitution to the proceedings before the select committee, whereas that Article applies to criminal proceedings. (See ***County Assembly of Bungoma & 2 Others v Stephen Nendela & 2 Others, CA No. 336 of 2014***).

The next question is whether the 1st appellant was denied the right to a fair hearing before the select committee. The 1st appellant's complaint in this regard is founded on the refusal by the select committee to grant him an adjournment on the date scheduled for the hearing. We must first recap the relevant facts before considering whether in the circumstances the 1st appellant was denied the right to be heard.

After the Assembly passed the impeachment motion and appointed the select committee, the Governor was notified of those developments through a letter dated 29th December 2014, which was copied to all the appellants. From that day the appellants were aware of the appointment of the select committee to investigate the allegations against them. On 30th December 2014, letters were dispatched to each of the appellants inviting them to appear before the select committee on specified date and they were furnished with details of the allegations against them. None of the appellant alleges not to have received that notification. As we noted earlier, on 31st December 2014 the appellants obtained a conservatory order from the High Court, which halted the proceedings of the select committee. After the High Court vacated the conservatory order on 29th May 2015, the select committee, on 9th June 2015 served upon the appellants summons to appear before it on 15th and 16th June 2015. Again, the select committee forwarded to the appellants the details of the allegations against him. The 1st appellant was requested to

appear on 16th June 2015, but did not, opting to attend a meeting in Nairobi instead. The other appellants appeared and were duly heard.

The 1st appellant's application for adjournment was denied but the select committee heard representations by his advocate. In the circumstances, we would find no basis for disagreeing with the select committee. The 1st appellant was aware of the appointment of the select committee and the allegations against him way back from 30th December 2014. He was again notified on 9th June 2014 of the hearing scheduled on 16th June 2015. He had reasonable notice and was given in advance the allegations against him. He opted not to appear before the select committee. It was for the committee to decide whether or not to adjourn the hearing. It decided, in the circumstances of this case, to deny the application for adjournment. We think that was perfectly justified and we do not see any basis for concluding that the 1st appellant was denied the right to a fair hearing.

There is also no basis for the claim that the select committee considered allegations against the 1st appellant that were different from those upon which the motion of impeachment was passed. Having carefully considered the proceedings and report of the select committee, we are satisfied that the allegations against the appellant remained incompetence, abuse of office and misconduct and that what the appellant calls new allegations is nothing more than evidence substantiating the grounds of impeachment. The appellant was presented with the substance of that evidence the select committee commenced its hearings.

In our view the only ground upon which the impeachment of the 1st appellant can be faulted is the manner in which the respondents dealt with the report of the select committee, in utter disregard of the standing orders of the Assembly. Standing order ***No. 62 (9)*** entitled the appellant to a hearing by the County Assembly in the following terms:

> ***"(9) If the select committee reports that it finds the allegations substantiated, <u>the County Assembly shall afford the member of the County Executive Committee an opportunity to be heard</u> and vote whether to approve the resolution requiring the member of the County Executive Committee to be dismissed."*** (Emphasis added).

Further, standing order ***No. 63(1) (b)*** provides that whenever the Constitution, any written law or the standing orders requires the County Assembly to hear a person on grounds of removal from office, or in such similar circumstances, "***<u>the Assembly shall hear the person</u>"*** at the date and time determined by the Speaker, for a duration of not more than two hours or such further time as the Speaker may determine, and in such manner and order as the Speaker may determine. Lastly standing order ***No. 63 (2***) entitles the person being removed from office to a copy of the report of the select committee together with any evidence adduced and such notes or papers presented to the committee ***<u>at least three days</u>*** before the debate by the Assembly of the motion for his removal.

The record indicates that the report of the select committee was finalized on 24th June 2015. There is no evidence on record that the 1st appellant was ever served with that report. Instead, the record shows that the Assembly considered the report the next day, that is 25th June 2015, and voted to remove the 1st appellant from office. In so proceeding, the Assembly violated standing order No. 63 (2) which entitled the appellant to a copy of the report for at least three days before it was discussed. The clear purpose of standing order No 63 (2) is to afford a County Executive Committee member who it is proposed to remove from office, an opportunity to study the report and prepare his defence before the Assembly. The record too shows that the Assembly did not afford the 1st appellant an opportunity to be heard before it voted for his removal on 25th June 2015. This was in violation of standing order Nos. 62(9) and 63(1)(b).

A decision that is reached in violation of the rules of natural justice cannot be allowed to stand and it matters not that the Assembly could still have recommended the removal of the 1st appellant had it complied with Standing Orders Nos. 63 and 64. In ***<u>General Medical Council v. Spackman</u> [1943] 2 All E.R. 337*** the effect of violation of the rules of natural justice was explained as follows:

> ***"If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision."***

See also, ***Onyango Oloo v. Attorney General (supra), Pashito Holdings Ltd. & Another v. Paul Nderitu Ndun'gu & Others [1997] 1 KLR (E&L)*** and ***Mbaki & Others v. Macharia & Another (2005) 2 EA 206.***

At the hearing of this appeal, the appellant confirmed that after his impeachment, he was reassigned other duties in the County Government. A new county executive committee member was appointed in his place and is now substantively in office. As we write this judgment, it is barely two months to the next general elections after which all the county governments will have to be reconstituted. In these circumstances, an order of *certiorari* to quash the decision of the Assembly to impeach the 1st appellant is not the most appropriate or efficacious order to issue as it will negatively affect the work of the County Government for the remaining period before the general elections. The order that best commends itself to us is to issue a declaration only, being one of the prayers sought by the appellants in their petition. In the event, we issue a declaration that the impeachment of the 1st appellant was unlawful to the extent only that he was not served with the report of the select committee as required by Standing Order No. 63 and was not afforded an opportunity to be heard by the Assembly on 25th June 2015 as required by Standing Order No. 64. The 1st appellant will have costs of this appeal. It is so ordered.

Dated and delivered at Mombasa this 22nd day of June, 2017

ASIKE-MAKHANDIA

……

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR