IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, NAMBUYE, KARANJA, MWERA & OUKO, JJ.A.)

CIVIL APPEAL NO. 52 OF 2014

BETWEEN

THE JUDICIAL SERVICE COMISSION.....APPELLANT

AND

HON. MR. JUSTICE MBALU MUTAVA……...…..……..1ST RESPONDENT

THE ATTORNEY GENERAL..…… ……..…….2ND RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nairobi (**Nyamweya, Ngugi & Odunga, JJ.**) dated 17th February, 2014*

in

High Court Petition No. 337 of 2013)

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JUDGMENT OF GITHINJI, JA.

[**1**] This appeal raises primarily two constitutional questions, firstly whether the **Judicial Service Commission** (**JSC**) in initiating the process of removal of a judge under article 168(2) of the Constitution is bound to afford a judge a fair administrative action under article 47(2) of the Constitution and if so, to what extent, and, secondly, whether the President upon receipt of a petition from JSC for removal of a judge is bound by article 168(5) of the Constitution to both suspend the judge and appoint a tribunal to inquire into the matter within 14 days of the receipt of the petition.

CHRONOLOGY

[**2**] The first respondent is a judge of the High Court appointed under article 166(5) and holds office until he has attained the age of 70 years. Sometime in the year 2012, the JSC received thirteen (13) complaints mainly from advocates against the judge alleging incompetence, gross misconduct and misbehaviour in the course of his work as a judge in the Commercial and Admiralty Division of the High Court. On 1st December, 2012 the JSC decided to investigate the complaints and constituted a committee comprising five of its members to consider the complaints and report its findings and recommendations to the Commission.

[**3**] By a letter dated 19th December, 2012, the JSC committee notified the 1st respondent of the decision to investigate the complaints and of the specific complaints made and sent copies of the complaints to him requesting him to respond to the complaints within 14 days. By the same letter, the committee notified the 1st respondent of the hearing dates of the complaints and further informed him that he was at liberty to appear either in person or through counsel for purposes of cross-examining the complainants. The 1st respondent duly prepared comprehensive written responses to each complaint, which he forwarded to the committee, and, by a letter dated 8th January, 2013 he informed the committee that he had retained a counsel, **Mr. Andrew Wandabwa,** to represent him at the hearing and that the schedule of hearing and other relevant communications should be forwarded to the counsel.

[**4**] In the course of the investigations, the committee heard 30 witnesses on various dates. Before the completion of the hearing, the committee by a letter dated 29th January, 2013 notified the 1st respondent partly thus:

"The process of hearing the complaints is nearing conclusion and the committee would wish to afford you an opportunity to present your response on the various complaints levelled against you" and invited him to attend on the stated dates to present his response either in person or through counsel.

The 1st respondent appeared before the committee and made oral responses to the various complaints. After the completion of the investigation, the 1st respondent was summoned before the committee on 17th March 2013 for delivery of its decision whereat, according to the judge , the vice-chairperson of JSC, handed over a handwritten piece of paper to the chairperson of the committee who in turn read over the report to the 1st respondent indicating that he had been cleared of the allegations of corruption, bias and incompetence in eight complaints but the committee had recommended that the President appoints a tribunal to investigate him in respect of three complaints. On the same day, JSC deliberated upon the report of the committee, adopted it and resolved to send a petition to the President under article 168(4) of the Constitution.

[**5**] The JSC prepared a petition dated 20th May 2013 to the President containing its full findings with a recommendation that the President suspends the 1st respondent and appoints a tribunal to inquire into the conduct of the 1st respondent and determine whether he was in breach of the specified articles of the Constitution. JSC forwarded the petition to the President under a cover letter dated the same day. By a letter dated 27th May 2013, the 1st respondent's current advocate wrote to the Chief Justice, apparently in his capacity as Chairman of JSC complaining of various malpractices by the committee of the JSC investigating the complaints and demanded that the Chief Justice commissions an inquiry with a view of quashing the decision if the process followed was found to be flawed.

The President by a letter dated 29th May 2013 to the 1st respondent through JSC notified the 1st respondent of the receipt of the petition and of the recommendations of JSC and suspended the 1st respondent with immediate effect pending the outcome of the decision of a tribunal that the President had appointed. By special Gazette of 31st May 2013 dated 2013, the President appointed a chairperson and four members to the tribunal and suspended the 1st respondent.

[**6**] By a letter dated 5th June 2013 **Mr. Francis T. Kimemia**, Permanent Secretary, Secretary to the Cabinet and Head of Public Service informed the Attorney-General that in view of article 168(5)(b) the tribunal as already constituted, lacked two members and requested the Attorney-General to appoint two more names and additional Assisting Counsel whose name he proposed. Subsequently, by a further Gazette notice of 19th June 2013, and dated 17th June 2013 the President amended the membership of the tribunal in the previous Gazette Notice by adding and appointing two new members.

THE PETITION

[**7**] On 29th June 2013 the 1st respondent lodged a petition under article 22 and 165(3) of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individual),

High Court Practice and Procedure Rules, 2006 alleging breach of his constitutional rights to fair administrative action under article 47, breach of right to fair hearing under article 50 and breach of his rights under article 168. More specifically the 1st respondent alleged that his right to fair administrative action and fair hearing had been breached by JSC by failure to provide full report and recommendation containing reasons for the decision, relying on untested evidence, releasing the report by JSC to the media before availing the report to him thereby demonstrating bad faith, malice and ulterior motives; delay of 3 months by JSC in determining the complaints; subjecting the 1st respondent to unconstitutionally constituted and incompetent tribunal; and lastly, by appointing a tribunal before the mandatory threshold for removal of a judge had been satisfied.

The petition was supported by three affidavits. The 1st respondent also relied on documentary exhibits which he stated were not annexed to the petition *per se* but were instead attached to his application for conservatory orders. He, in addition, relied on the documents annexed to his supplementary affidavit. The 2nd respondent and the appellant also filed a replying affidavit respectively.

By the petition, the 1st respondent sought various declarations including a declaration that the report of JSC does not meet the threshold of article 168(4) and therefore null and void; a declaration that the entire proceedings violated the petitioner's fundamental rights, *inter alia*, a right to fair administrative action and therefore null and void *ab initio*; a declaration that the tribunal appointed by the President on 31st May 2013 was irregular, invalid and unconstitutional for failure to meet the mandatory requirements of article 168 (5) (b) (i-iii) and the disbandment of the tribunal. It is not necessary to set out in detail the various reliefs sought.

It is sufficient to say that those declarations and the others were intended to annul the entire proceedings of the JSC, the petition to the President, the appointment of the tribunal, the suspension of the 1st respondent and to achieve the reinstatement of the respondent. The petition was heard by way of oral and written submissions.

DECISION OF THE HIGH COURT

[**8**] A three-judge bench of the High Court considered the petition and made

findings, *inter alia*, that:

i. the functions of the Commission in exercise of its powers under article 168(2) are administrative as they involved a decision making process that would affect the rights and are therefore subject to article 47 of the Constitution.
ii. The Commission is obliged and under a duty under the principles of common law and the provisions of article 47 of the Constitution to discharge its constitutional mandate and administrative functions in a procedurally fair manner.
iii. The fact that the Commission was involved in a preliminary inquiry did not absolve it from the need to comply with the procedural fairness under article 47 of the Constitution.
iv. The Commission breached its duty to provide adequate notice and disclosure of the testimony of witnesses who appeared before it to the petitioner and to give an opportunity to the 1st respondent, an opportunity to contest the evidence either by way of cross-examination or by allowing him an opportunity to comment on it.
v. The Commission had a duty to furnish the 1st respondent with the reasons for its decision and that it abdicated this constitutional duty.
vi. The fourteen days period provided in article 168(5) applied to both the suspension of a judge and to the appointment of a tribunal to investigate his conduct and the appointment of the tribunal was void *ab initio* as two of its members were appointed outside the mandatory 14 days.

The High Court ultimately granted declaration of violation of right to fair administrative action under article 47 in so far as the 1st respondent was not furnished with testimonies of witnesses who testified in

support of the complaints, and/or given an opportunity to comment thereon and for failure by JSC to give the 1st respondent written reasons for its decision. It set aside the suspension, declared the tribunal invalid and unconstitutional, quashed the two gazette notices and directed JSC to expeditiously commence *de novo* the process of investigating and determining the complaints levelled against the 1st respondent in compliance with all applicable provisions of the Constitution.

The High Court however dismissed allegations of delayed administrative action, bias, bad faith and external influence. There is no cross appeal against the dismissed allegations. The appeal is against those findings and decision.

However, the 1st respondent has cross-appealed against the order directing JSC to commence the process of investigating the complaints *de novo* on the grounds that the order was not prayed for and that it was made without jurisdiction.

PROCEDURE FOR REMOVAL OF A JUDGE OF A SUPERIOR COURT

[**9**] It is convenient to first examine the status of a judge and the procedure for removal of a judge.

According to article 166 of the Constitution, all judges are appointed by the President with the recommendation of the JSC. However, in the case of the Chief Justice and Deputy Chief Justice the appointment is subject to the approval of the National Assembly. By article 167(1), the tenure of the office of a judge is 70 years but a Judge may retire at any time after attaining the age of 65 years. By section 30 of the **Judicial Service Act** (**JS Act**) as read the with First Schedule to JS Act, the judges are selected by JSC for appointment through a transparent and rigorous process.

By article 168(1), a judge of Superior Court may be removed from office only on the grounds of –

"(a) inability to perform the functions of office arising from mental or physical incapacity;

b. ***a breach of code of conduct prescribed for judges of superior courts by an Act of Parliament.***

c. ***bankruptcy; or***

d. ***incompetence; or***

e. ***gross misconduct or misbehaviour."***

Article 168(2) stipulates that the removal of a judge may be initiated only by the JSC acting on its own motion or on the petition of any person to it. By article 168(3) a petition by a person to JSC shall be in writing, setting out the alleged facts constituting the grounds for the judge's removal. Article 168(4) and (5) provides that:

"(4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.

(5) The President shall, within fourteen days after receiving the petition, suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission

a. **….**

b. ***in case of a judge other than the Chief Justice, appoint a tribunal…"***

The stipulated members of a tribunal are seven namely – a chairman and three other members who hold or have held office as a judge of superior court, or who qualifies to be appointed as such, one advocate of 15 years standing and two other persons with experience in the public affairs.

By article 168 (6) the remuneration of a judge who is suspended from office shall be adjusted to one –half until such a time as the judge is removed from, or reinstated in office.

Article 168(7)(a) provides that the tribunal shall be responsible for regulation of its proceedings subject to any legislation contemplated in clause 10 which latter clause empowers Parliament to enact legislation for providing the procedure of a tribunal. The contemplated legislation – the JS Act – No 1 of 2011 was enacted and commenced on 22nd March 2011. Section 31 (5) of the Act as read with the Second Schedule thereto, provides for the procedure for the removal of a judge which includes the right to call witnesses, cross examine witnesses and a requirement that the decision of the tribunal should contain amongst other things, the reasons for the decision. The decision of the tribunal is by article 168(8) appealable to the Supreme Court. In contrast, under section 62(5) of the 1963 Constitution, now repealed, the process of removal of a judge was initiated by the Chief Justice. By that section the President was obliged to appoint a tribunal to investigate the question of removal of a judge, if the Chief Justice represented to the President that the question of removal should be investigated.

INTERPRETATION OF THE CONSTITUTION

[**10**] The issue in the appeal is whether the High Court correctly interpreted articles 168(4), 168(5) 47 and 50 in relation to the initiation of the process for removal of a judge. Article 259 (1) provides that the Constitution shall be interpreted in a manner that:

"a) promotes its purpose, values and principles;

b. ***advances the rule of law, the human rights and fundamental freedoms in the Bill of Rights.***

c. ***permits the development of the law; and***

d. ***contributes to good governance."***

Further article 259(3) provides that:

"Every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…"

In the matter of Advisory Opinion of the Court; In the matter of the **Interim Independent Electoral Commission - Constitutional Application No. 2 of 2011** [2011] eKLR paragraph 86, the Supreme Court of Kenya stated:

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

And in the matter of **Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of [2012] eKLR** para 26 the Supreme Court said: -

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

The current Constitution is transformative. The challenge of constitutional interpretation is to define and give life and substance to values and broad principles enunciated in the Constitution in an ever-changing

society by application of a principled theory of constitutional interpretation as articulated in article 259.

THE APPEAL

[12] I will consider the appeal in the same order that the High Court considered the petition starting with the alleged breach of the right to fair administrative action or rules of natural justice followed by a consideration of the alleged breach of article 168(5) by appointing a complete tribunal after the stipulated 14 days.

Before doing so, it is appropriate to set out the provisions of articles 47 and 50 of the Constitution.

Article 47 provides:

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

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

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

a. ***provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***
b. ***promote efficient administration."***

On the other hand article 50(1) provides that:

"Every person has a 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 a right to a fair trial which includes the right –

(k).. to adduce and challenge evidence."

BREACH OF A RIGHT TO FAIR ADMINSTRATIVE ACTION – RULES OF NATUAL JUSTICE – FAIR HEARING

[**13**] The 1st respondent alleged in the petition and in the submissions in the High Court, inter alia, that the findings of the JSC committee were in breach of his fundamental rights as they were based on untested evidence and was not allowed to cross-examine any of the witnesses and, as he was not given reasons behind the decision of the investigating committee

[**14**] The 1st respondent framed two issues for determination with regard to proceedings and findings of JSC committee thus:

a. whether the proceedings and investigations were in violation of the 1st respondent's constitutional rights and

(b) whether the findings and decision by the committee and its subsequent recommendations to the President were in violation of the 1st respondent's constitutional rights.

On the first issue the 1st respondent, in his written submissions in the High Court, relied on Article 47(2) on the right to fair administrative action and article 50(2) (e) on the right to fair trial and submitted that JSC in exercise of its functions and powers must fully abide by the provisions of Article 47 and 50

specifically regarding the right to cross-examination. The 1st respondents counsel specially submitted that:

"…the promulgation of the Constitution of Kenya 2010 meant that the right to be heard is no longer just a rule of natural

justice. The right to be heard is now a constitutional principle in Kenya which applies in equal measure to all proceedings investigations and hearings whether judicial or administrative. Indeed, the framers of the constitution couched Article 50 of the Constitution in such unambiguous/unequivocal terms as to what constitutes a right to fair trial."

On the second issue the 1st respondent submitted that although the decision of JSC was orally communicated to him, the report of the findings, decision and recommendations to the President has never been availed to the President and to him in contravention of Article 47(2).

[**15**] **Wilfrida Mokaya**, the Registrar of JSC filed a replying affidavit to the petition. In the relevant paragraphs of her affidavit, she deposed that;

"10. …the committee invited 30 witnesses to assist it in establishing the veracity of the allegations against the petitioner.

13.**…the committee was simply seeking to ascertain whether or not prima facie there was merit in the complaints warranting recommendation for setting up a tribunal subject nevertheless to the decision of the full commission.**

14.**…the committee having considered the complaints and having evaluated and deliberated on the testimony presented by the witnesses and the petitioners response, it established that the threshold had been met in the following complaints…**

15.**…the committee further established that the acts and omissions complained of on the part of the petitioner if proved could constitute a breach of the Judicial Service Code of Conduct and Ethics.**

16.**…the 2nd respondent's findings disclosed sufficient grounds to petition the President under article 168 of the Constitution. The Petitioner was not therefore cleared of all the complaints alleged.**

17.**…article 168(4) of the Constitution only allows the 2nd respondent to consider the petitions and complaints against the petitioner as the inquiry is only preliminary. To allow the petitioner to cross-examine the witness would amount to usurping the role of the tribunal.**

18.**…the report of the committee was deliberated upon and adopted by the 2nd respondent in a meeting held on 17th May 2013. The 2nd respondent further resolved to send a petition to the President.**

19.**…there is no requirement under Article 168(4) of the constitution that deliberations and findings of the 2nd respondent should be communicated to the Judge against which a complaint has been lodged. The communications envisaged by Constitution is only to the President.**

20.**…the petitioner's right to fair administrative action has therefore not been violated in any way by the 2nd respondent adhering to the constitution.**

21.**…in making the recommendations to the President, the Judicial Service Commission has discharged its constitutional mandate lawfully, fairly and impartially. There were sufficient**

grounds to petition the president as required by law."

[**16**] The submissions of the JSC in the High Court followed the path of the replying affidavit. In addition, JSC submitted that article 47 does not dilute article 168(4) and that it is a misconception to argue that when JSC is exercising its constitutional mandate and making a preliminary decision, the rules of natural justice must be applied.

I have already adverted to the specific findings of the High Court on the respective submissions.

In this appeal, the appellant faults the findings of the High Court basically on three grounds, namely; error in law by misinterpreting and misconstruing the role of JSC and purporting to confer on it the role of a tribunal contrary to provisions of article 168(4); error in law by holding that rules of natural justice are applicable to all inquiries and in particular to preliminary inquiries and in holding that JSC's constitutional mandate was subject to provisions of article 47 on fair administrative action; error in law in holding that JSC should have availed to the appellant all the evidence relied upon at the preliminary stage contrary to the letter and spirit of the Constitution.

In support of the appeal, the appellant's counsel **Mr. Muite SC** and **Mr. Issa** made substantively similar submissions to the ones they made in the High Court. They reiterated that it was never the intention of the drafters of the Constitution that there should be replicated proceedings, that it was a serious error by the High Court to transport article 47 and superimpose it on article 168; that JSC was not exercising administrative action but a constitutional mandate; that article 47 does not apply to proceedings under Article 168 although some aspects apply; that JSC did not conduct any hearing but rather the receipt of evidence of witnesses was a process of clarification.

[**17**] Similarly, the 1st respondent's counsel **Mr. Nyachoti** made substantially the same submissions as in the High Court which supported the findings of the High Court. As the 1st respondent's submissions show, he relied on Article 47 to support the breach of a right to fair administrative action by failure to give reasons and on the common law - that is rules of natural justice to support the breach of right to cross-examination of witnesses. Mr. Nyachoti reiterated that the function of JSC under article 168 are administrative in nature, which adversely affected the 1st respondent's right as the decision led to suspension of and half of the 1st respondent's remuneration. He contended that the right to fair administrative action is a fundamental right under the Bill of Rights which cannot be limited except by law (which law does not exist) and further that when JSC decided to call witnesses, it opened the inquiry and widened its parameters.

STATUS OF JSC

[**18**] The issue of the constitutional status of JSC has arisen in this appeal – more specifically whether in initiating the process or removal of a judge it is exercising administrative function or a constitutional function.

By article 1, all sovereign power belongs to the people and that power is delegated to various institutions, including the national executive, judiciary and independent tribunals. The JSC is established by article 171 and its functions are stipulated in article 172(1). Its main function is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. It is one of the independent commissions and independent offices established by article 248(2) whose members enjoy security of tenure (article 257) and which is a body corporate with a perpetual succession and a seal and capable of suing or being sued in its corporate name. The independent commissions and independent offices are however subject to the Constitution and the law.

A commission is included in the definition of a "**state organ**" in article 260. More relevantly, JSC as a state organ is bound by national values and principles of governance entrenched in article 10 and as provided by article 20(1) also bound by the Bill of Rights.

JSC is not part of the national executive as defined in article 130(1). Thus, although JSC is not a substructure of the national executive to which sovereign power is delegated, it is nevertheless subject to the Constitution and the law and like other independent commissions and independent offices, has the duty to protect the sovereignty of the people (see article 249(1)(a).

NATURAL JUSTICE

[**19**] In exercise of its powers under the Constitution or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of the Constitution or the law. The landmark decision of the **House of Lords** in **Ridge v. Baldwin [1964] AC 40** 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:

1. the right to be heard by an unbiased tribunal.

2. the right to have notice of charges of misconduct

3. the right to be heard in answer to those charges.

On his part, Lord Reid when dealing with class of cases of dismissal from office "***where there must be something against a man to warrant his dismissal***" said 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."

[**20**] The right to fair hearing as a rule of natural justice, a part of the common

law, has in modern times been variously described as "***fair play in action", justice of the common law"; "common fairness" "fairness of procedure"*** or simply as

"duty to act fairly."

As an example, in **Wiseman v Borneman [1969] 3 All ER 275** in determining, *inter alia*, the question whether the principles of natural justice (right to fair hearing) had been followed Lord Morris of Borth-y-Gest denominated the issue as to one of whether the tribunal had "***acted unfairly***".

So did Lord Denning MR in **Selvarajan v Race Relations Board [1976] 1 All ER 12** when dealing with the procedure of bodies required to make investigation where he said at page 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."

There is scholarly debate and even judicial varying opinion as to whether natural justice is synonymous with the ***duty to act fairly*** and the application of the duty to act fairly in administrative law. On that question, **Wade & CF Forsyth** in the Administrative Law, 10th edition state at page 416 last paragraph, which I believe is the correct statement of the law, thus:

"But it is now clearly settled, as is indeed self–evident, that there is no difference between natural justice and "acting fairly" but that they are alternative names for a single but flexible doctrine whose content may vary according to the nature of the power and the circumstances of the case".

[**21**] By S. 3(1) of the Judicature Act, 1967, common law is part of the law of Kenya which is saved by article 261 as read with clause 7(1) of the Sixth Schedule of the Constitution, 2010 which provides that:

"All law in force immediately before the effective date (i.e. 27th August 2010) continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

[**22**] That leads me to the consideration of articles 47 and 50 of the Constitution. The complexity of this appeal has partly been caused by the simultaneous invocation of the right to fair administrative action under article 47(1), the right to fair hearing under article 50(1) and natural justice – the right to fair hearing under the common law.

Although on the surface, the three principles appear to refer to the same thing, on deeper examination they are of different legal character and their application may not be necessarily the same. Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. "***Fair hearing***" in article 50(1) as the text stipulates applies where ***any dispute can be resolved by the application of the law*** and applies to proceedings ***before a court or, if appropriate, another independent and impartial tribunal or body***.

It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.

It was inappropriate therefore, for the 1st respondent's counsel to invoke article 50(1) in this appeal particularly article 50(2) (k) which refers to right of an accused person to adduce and challenge evidence. The right to fair hearing under article 50 does not apply to the decision of the JSC under appeal. Rather, it would apply to proceedings in the tribunal appointed by the President.

The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in **Ridge v Baldwin** (supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.

[**23**] Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with "acting fairly". The term "procedurally fair" used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action. In construing the contents and scope of fair administrative action, the justice of the common law will greatly influence the future development of the administrative law under the Constitution.

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance,

transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.

By article 47(3) Parliament is required to enact a legislation to give effect to right to fair administrative action. The Government has approved the Fair Administrative Action Bill, 2014 which, if enacted, will give substance to the right to fair administrative action including, perhaps, codifying the rules of natural justice in which case, the rules of natural justice will be transformed into statutory rights.

[**24**] By article 168(2) as read with article 168(4), the role of JSC is either to initiate the removal of a judge on its own motion or to consider a petition to JSC for removal of a judge initiated by any person. A petition by a person to JSC should be in writing setting out the alleged facts constituting the grounds for judge's removal (article 168(3) and if the JSC after considering the petition is satisfied that it discloses grounds for removal, it is required to send the petition to the President.

In this case, the removal of the Judge was initiated by JSC on its own motion based on the complaints received. By necessary implication, where the JSC has initiated the removal of a judge based on complaints received or based on information in its possession, it still has to consider the complaints or the information and satisfy itself that the complaints or the information disclose facts constituting grounds for the judge's removal. The word "***consider***" implies a mental evaluation of the facts and the phraseology "***if it is satisfied"*** although subjective and apparently giving the JSC a wide discretion, JSC must act reasonably and in good faith and on proper grounds.

In **Rees v Crane [1994] All ER 833**, a case dealing with a representation made by the Chief Justice with approval of Judicial and Legal Service Commission of Trinidad & Tobago under provision of the constitution identical to S.62(5) of the aforementioned repealed Constitution, made representation to the President that a question of a judge ought to be investigated on ground of inability to perform the function of his office without giving the judge an opportunity to make a representation. The Privy Council said at page 846 paragraph b:

"…the Commission is not intended to simply be a conduit pipe by which complaints are passed on by way of representation…

The commission before it represents must, thus, be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively, the equivalent of impeachment proceedings. Both in deciding what material it needs in order to make such decision and in deciding whether to represent to the President, the commission must act fairly.

[**25**] The role of JSC under S.62(5) of the repealed Constitution to determine whether the act complained of was of the nature and degree to qualify as sufficient to set in motion the process that may lead to adverse representation and the function to evaluate it to ascertain whether it should advance to the next stage was highlighted in **Republic v Chief Justice of Kenya and Six Others – Exparte, Moijo Mataiya Ole Keiwua – High Court Miscellaneous Application No. 1298 of 2004 – 2010 eKLR**. In that case the Chief Justice made a representation directly to the President without reference to JSC and before confronting the judge and giving him an opportunity to be heard on the allegations levelled against him.

The High Court authority of **Nancy Makhoha Baraza v Judicial Service Commission & 9 Others [2012] eKLR** was extensively quoted by the appellant. In that case following allegations of misconduct by the Deputy Chief Justice (DCJ), in a certain incident the Chief Justice appointed a sub-committee of JSC to, inter alia, investigate all aspects of the incident, interview and interrogate the parties involved, and the material witnesses and report its findings and recommendations to JSC. The sub-committee received oral and documentary evidence from 15 witnesses and afforded the DCJ an opportunity to testify before the sub-committee without affording her an opportunity to cross-examine witnesses. Thereafter, the sub-committee prepared its report and handed it over to JSC. After lengthy deliberations and evaluation of the witnesses' testimonies, JSC resolved to send a petition to the President under article 168 (2). The JSC informed the DCJ of the resolution. The DCJ filed a petition in the High Court seeking various declarations including a declaration that the process leading up to, and including the decision and recommendations of JSC was unconstitutional and *ultra vires* for reasons, amongst others, that the JSC did not conduct independent investigations; breach of rule of natural justice in that the petitioner was

never afforded an opportunity to test the veracity of the evidence either by cross-examination or otherwise, breach of right to fair administrative action under article 47 for failure to furnish the reports and findings of the sub-committee and written reasons despite request.

[**26**] The High Court held, *inter alia*, that JSC's role is not that of a conveyor belt or messenger but plays the role of a sieve, that before sending the petition to the President, either from any person or after its own investigations, it must evaluate the veracity of the allegations made against a judge to satisfy itself *prima facie* that it discloses grounds for removal of a judge and that the complaint merited forwarding to the next stage; that the JSC is not required to make definitive findings whether the allegations against the judge have been proved; failure to accord the judge an opportunity to cross-examine witnesses does not amount to a breach of rules of natural justice as that would usurp the jurisdiction of the tribunal where actual hearing takes place, and, that the judge was not entitled to a report as the sub-committee's role was limited to reporting back to JSC.

The High Court in that case distinguished the role of Judicial Service Commission of South Africa relating to proceedings for removal of a judge under the Constitution of South Africa as reported in **Van Rooyen & Others v State and Others [2003] 2 LRC 533** from the role of JSC under the Constitution of Kenya. As paragraph 169 of that report at page 588 shows, a tribunal is dispensed with and the Judicial Service Commission of South Africa makes the full investigation after which it makes a finding whether grounds exist for removal of a judge. However, its finding is subject to approval by a special resolution of the National Assembly.

[**27**] By article 252(2)(a), every independent commissions which includes JSC has power to conduct its investigations either on its own motion or on a complaint by a member of public. JSC has also power under article 252(3) to issue summons to witness to assist for purposes of such investigations.

It has been contended that when JSC in exercising its function under article 168(2) and (4) is performing a constitutional mandate and not an administrative function and thus it is not bound by rules of natural justice or by Article 47(1). It was further contended that the High Court made a fundamental error of law in superimposing article 47(1) on article 168(4).

JSC as a State Organ exercises the functions specified in article 172. However, not all its decision adversely affects the rights or legal position of any person. What is an administrative action targeted by article 47(1) will depend on a proper construction of article 47(1) in conjunction with relevant provisions of the Constitution including article 10 relating to national values, article 21, on the Bill of Rights, article 73 on leadership and integrity and the empowering provisions of the Constitution or law on the basis of which the decision is made or contemplated to be made. In other words, it will largely depend on characteristics of the decision, the nature and substance of the decision and the objective it is intended to achieve. An administrative action includes an administrative decision which adversely affects or is likely to affect any person made or contemplated to be made by certain public officers, state officers and state organs in the national and county executives pursuant to a power conferred by the Constitution or any written law.

[**28**] The act by JSC of initiating the process of removal of a judge, either on its own motion through information or through investigation; the act of receiving the petition from a member of the public, the consideration of the petition, the process by which it satisfies itself whether or not the petition discloses a ground for removal, the determination of that question; the act of formulating a petition and the recommendation, and the act of sending the petition to the President are indistinguishably a series of administrative actions which adversely affects a judge forming a single whole – an administrative action within the meaning of article 47(1).

It is true that it was performing a constitutional mandate but in performing that mandate JSC was subject to the Constitution and, in this case, subject to 1st respondent's constitutional right to fair administrative action. I have no doubt that on this aspect the High Court made a correct finding.

[**29**] There remains to consider the question whether the 1st respondent was afforded a fair administrative

action. It is not disputed that the first respondent was given notice of the specific complaints levelled against him; that he was informed of the decision to investigate the complaints; that he was given an opportunity to make representations in writing, which he did; that he was informed of the hearing dates and given an opportunity to appear in person or through counsel; that he instructed a counsel to appear for him, that JSC received oral evidence of 30 witnesses; that he was invited to make oral response which he did, that after completion of the investigations he was summoned to receive the decision of JSC; and that the sub-committee in presence of the vice-chairperson of JSC informed him that he had been exonerated in respect of eight complaints but that the sub-committee had recommended that the President appoints a tribunal to investigate three complaints.

Nevertheless, the 1st respondent complained that he was not afforded a fair administrative action because the sub-committee relied on untested evidence in that he was not given an opportunity to cross-examine witnesses and also because he was not given a full report and recommendations and reason for the decision.

[**30**] I start by quoting Tucker CJ in **Russel v Duke of Norfolk** in **[1949] 1 All ER 109 at P. 118 para D-E** where he famously said:

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth…."

That excerpt has been quoted in many decisions of the English courts, Commonwealth courts and in several decisions of the courts in this country. They stress the point that although natural justice is a principle of universal application, it is nevertheless flexible and whether it applies and to what extent depends on the circumstances of each case.

I have already quoted a portion of the passage of the judgment of **Lord Denning MR in Selvarajan's** case (supra**)** at page 19. Lord Denning continued in that passage:

"The investigating body is however, the master of its own procedure. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its

informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But in the end the investigating body itself must come to its own decision and make its own report."

[**31**] I have considered the respective submissions. In deciding whether or not JSC erred in denying the 1st respondent an opportunity to cross-examine witnesses and to furnish the 1st respondent with the report and reasons, it is imperative to consider the jurisdiction that article 168(2) and (4) gives the JSC, the procedure by which that jurisdiction is to be exercised, the objective of the process and the constitutional order relating to removal of a judge.

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

The objective of the process is to ascertain, by evaluation, whether a ground of removal has been disclosed and, if so satisfied to recommend to the President for appointment of a tribunal to make a full inquiry of the allegations. The constitutional order is that JSC has no power to inquire into the allegations and make a finding of facts or make recommendations for the removal of the judge. That is the exclusive duty of the tribunal.

It has been contended, and correctly so, that JSC at this stage is making a preliminary decision and its duty is to find out if there is a *prima facie* case. It has been held that there is no difference in principle so far as observance of rules of natural justice is concerned between decisions which are final and which are not (**Wiseman v Borneman; Evans Rees – Supra**), that there is no absolute rule and that it all depends on the circumstances of the case. Further, I have already observed that the principle of fair administrative action applies to the proceedings in question.

[**32**] On the issue of cross-examination of witnesses, JSC had already received the complaints and its role in the circumstances of the case was not strictly investigatory. It was merely to consider those complaints and satisfy itself whether or not they disclosed a ground for removal. This was a preliminary screening function. To that extent the explanation by Wilfrida Mokaya that the witnesses were to assist in establishing the veracity of the allegations levelled against the 1st respondent correctly expressed the true nature of the proceedings. Even if the role was investigatory, JSC had still administrative discretion not to allow cross-examination of the witnesses. In **University of Ceylon v Fernando [1960] 1 WLR 223**, a Commission of Inquiry under a University Statute which required, *inter alia*, the Vice-Chancellor to be "satisfied" that a student had prior knowledge of the content of any paper found that the allegations against the student was substantiated and, as required by statute, reported its findings to the relevant Board who suspended the student indefinitely from all university examinations. The student complained that the findings of the commission were contrary to the rules of natural justice in that the evidence of various witnesses, including that of the person who had made the allegations, was taken in his absence and that he was not aware of the evidence against him. He had however been questioned by the commission about the matter. The Privy Council held, *inter alia*, that in the absence of a prescribed procedure to be followed at the inquiry, the commission must comply with the elementary and essential principles of fairness applicable in the discharge of Vice-Chancellor's function and further that:

"The vice- chancellor was not bound to treat the matter as a trial but could obtain information in any way he thought best, and it was open to him if he thought fit, to question witnesses without inviting the respondent to be present but a fair opportunity must have been given to him to correct or contradict any relevant statement to his prejudice"

[**33**] In **re Pergamon Press Ltd. [1971] I Ch 388**, directors of a company under investigation by Inspectors under the provisions of the English Companies Act, 1948, refused to answer questions insisting that the investigators who were performing an investigatory function, were required by rules of natural justice to give them transcripts of the witnesses who speak adversely against them and see any documents that may be adversely used against them and to allow them to cross-examine witnesses. The English Court of Appeal while holding that the inspectors had a duty to act fairly rejected their claims.

Lord Denning MR said at page 400 paragraph B-C

"In all this the directors go too far. The investigation is ordered in public interest. It should not be impended by measures of this kind."

On his part **Buckley LJ** said at Page 407 – D-E:

"What disclosure will be necessary for this purpose must depend on the circumstances of each case. It may not, and I think often would not, in an ordinary case involve disclosing the identity of witnesses or the disclosure of transcripts. It certainly would not normally involve offering an opportunity to cross-examine any other witnesses, and, indeed, it seems that inspectors could not compel a witness to submit to cross-examination".

[**34**] All these cases including **Nancy Makhoha Baraza (Supra)** show that an investigation is not a trial and that cross-examination of witnesses, if called, is a rare occurrence. Unless the empowering law provides otherwise, the decision whether or not to summon witnesses and the decision to allow or not allow the cross-examination of witnesses, is at the sole discretion of the investigating body. Indeed, the technical rules of evidence with the attendant right to cross-examination do not form part of the natural justice rules or in this case, part of fair administrative action. It has been contended that when the JSC decided to call witnesses it opened the inquiry and widened its parameters. That cannot be correct because JSC cannot lawfully perform a function or exercise power which article 168(4) does not confer on it. By allowing cross-examination, JSC would be performing a fact-finding function which is outside the scope of its powers.

The suggestion that allowing cross-examination of witnesses in the particular circumstances of the case would usurp the functions of a tribunal and duplicate the proceedings has merit seeing that JSC is not required to make final findings of fact.

The High Court observed that JSC did not state whether it informed the 1st respondent that it was inviting the witnesses or of the content of their testimony. It further made a finding that there was no evidence that the 1st respondent was afforded an opportunity to comment on the testimony of the witnesses. The High Court further distinguished this case from **Nancy Makhoha Baraza's case** (supra) on the footing that, in the latter case, an opportunity was given to DCJ to testify and thus availed an opportunity to comment on testimonies of the witnesses.

[**35**] In all these findings the High Court misdirected itself by overlooking the correspondence and the admissions of the 1st respondent. The correspondence, some of which I have already referred to, were annexed to the application for conservatory orders and were relied on by the 1st respondent in support of the petition. They are contained in the supplementary record of appeal herein filed by 1st respondent. In any event, the 1st respondent had been supplied with copies of written complaints which disclosed the nature of the complaints and the names of the complainants. The 1st respondent was fully aware of the nature of the complaints and even stated in support of the petition that he is the one who requested for investigation in view of damage caused by the allegation to his reputation. The correspondence shows that he was given an opportunity to be represented by counsel in the proceedings and even at the stage when witnesses were giving evidence. Before the end of the investigations, he was invited to make oral representations which he admittedly did. It is clear that the case of **Nancy Makhoha Baraza** was indistinguishable on that aspect. Besides, the 1st respondent did not request for cross-examination nor is there any evidence that the witnesses were even sworn.

In the end, the cross-examination of witnesses was outside the scope of the function of JSC and had limited utility as it was not an inquiry where final finding on the credibility of witnesses or a finding of substantiation of the allegations or otherwise could lawfully have been made.

DUTY TO GIVE REASONS

[**36**] In the petition, the 1st respondent complained that JSC had failed to provide full report and recommendations and reasons for the decision. The High Court reasoned that since the consequences of the recommendations of the JSC to the President to form a tribunal is to suspend the judge and deprivation of half of his remuneration, the decision affected the rights of the Judge and therefore the JSC had a duty to give reasons under article 47(2) which provides:

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

In **Regina v Secretary of State for the Home Department Exparte Doody**

[1994] 1 AC 531, Lord Mustill expressed the duty to give reasons under common

law at p. 564 – E-F thus:

"I accept without hesitation, --- that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied."

The rest of the House of Lords unanimously agreed with Lord Mustill's entire speech.

[**37**] Apparently the High Court construed article 47(2) textually and not substantively. In my view article 47(2) has to be construed contextually with the Bill of Rights under which it falls and in harmony with article 168.

The first question is whether a "right" stipulated in the article refers to a general right of a person, howsoever, arising or is limited to the rights protected by the Bill of Rights in Chapter Four. Article 47(2) refers to a "*right or fundamental freedom*". The general heading of Part 1 of Chapter Four refers to "*Rights and fundamental freedoms*."

The right to fair administrative action under article 47(1) is one of the rights in the Bill of Rights. However, article 19(3) (b) states that the rights and fundamental freedoms:

"do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter."

That phrase means in simple terms that the Bill of Rights does not take away any other right or freedom conferred on any person which is recognised or conferred by law to the extent that the right or freedom is not inconsistent with the Bill of Rights. The phrase further raises a question whether the 1st respondent identified any other right recognised or conferred by law which had been or is likely to be affected by the administrative decision.

It can be argued that a "*right"* in article 47(2) refers generally to any right either in the Bill of Rights or recognised or conferred by law. In my view, the Bill of Rights should be construed as internally coherent. So construed, I venture to hold that the word "***right***" in article 47(2) means a right under the Bill of Rights and that the framers of the Constitution intended that reasons for the decision should only be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative decision and not otherwise.

It is also important to remember that the right to be given written reasons for the decision is not absolute as by article 24(1) it can be limited by law for a reasonable and justifiable cause. The right to full salary without suspension is not a right under the Bill of Rights nor has it been shown to be a right recognised and conferred by law in the context of Article 47(2). It is certainly a grave disadvantage to a judge to be suspended and to receive half salary as opposed to a right, but nonetheless, this action is a constitutional requirement under article 168(5)& (b) of the Constitution.

[**38**] As sections 22 and 23 of JS Act show, JSC conducts its business through meetings and resolutions. By S. 22 (7), all questions arising are to be determined by consensus but in the absence of a consensus, by a majority of members present and voting. By S.23, JSC is required to keep a record of the proceedings of every meeting of the commission and its constituent committees. There is no provision for keeping of any other official record except a record of disciplinary proceedings of judicial officers (which excludes judges) under section 23 of Part IV of the Third Schedule to the Constitution. In contrast, the Second Schedule relating to procedure of the tribunal on removal of judges sets out an elaborate procedure of the conduct of hearings before the tribunal including keeping the recording of proceedings

[**39**] It was contended by the appellant's counsel that there was no oral hearing of witnesses before JSC but rather a process of clarification of the complaints. There is no evidence either from the 1st respondent or from the appellant that any oral evidence was recorded or record of proceedings kept. The decision of the sub-committee which the 1st respondent alleges to have obtained from other sources and which is

contained in his supplementary record of appeal contains an analysis of the complaints, the material in support of the complaints, the 1st respondent's representation and the opinion of the sub-committee. If that decision exists, it is an internal report of the committee addressed to JSC from which the JSC made its resolution. The minutes of JSC and the petition dated 20th May 2013 comprise the real decision of JSC.

[**40**] The duty to give reasons and the nature and extent of the reasons envisaged by article 47(2) is dependent on the character and limits of the administrative discretion conferred on the administrator by the Constitution or law and its application to the facts of the case. So, when article 47(2) is considered together with the role of JSC under article 165(4), it is clear that JSC is not required to keep a detailed official record of the proceedings nor does it have a legal duty to provide its internal working documentation to the 1st respondent. It follows that the request for the full report, recommendations and reasons for the decision, was misconceived in the circumstances of this case.

Furthermore, the right to be given written reasons under article 47(2) arises, if the right has been or is likely to be adversely affected by the administrative action. In other words, the administrative action must have adversely affected the right or is likely to adversely affect the right.

[**41**] In this case, the administrative action in consideration is the finding that grounds for removal had been disclosed and in formulating and sending a petition to the President. That administrative decision did not suspend the judge or reduce his pay to one half. Indeed the JSC has no jurisdiction to do so.

The suspension of the judge is an imperative of the Constitution through the act of the President which is an independent act. Equally, the adjustment of salary to one-half, pending removal or reinstatement, is an imperative of article 168(6).

I am of the view that where the suspension or adjustment of salary does not comprise the decision of the administrator, and is an independent consequence of the decision by operation of the law or the Constitution pending the result of further proceedings for removal, and if such suspension or adjustment of salary be a right referred to in Article 47(2), it cannot be said that such right has been or is likely to be adversely affected by the decision of the administrator.

[**42**] In summary, the relevant Commonwealth authorities dealing with the representation to the President for removal of a judge, **Barnwell v. AG [1994] 3 LRC 30; Rees v Crane (supra)** and the local cases – **Ole Keiwua** and **Nancy Makhoha Baraza;** show that the Constitution does not exclude rules of natural justice and that the rules of fairness require that a judge be given a notice of the allegation and an opportunity to make a representation in answer to the allegations before a decision to make a representation to the President for appointment of a tribunal to inquire into the allegations is made by the JSC. These are two of the three foundational features of natural justice as identified by Lord Hodson in

Ridge v Baldwin (supra). These principles have been incorporated as right to fair administrative action by the phrase "procedurally fair" in article 47(1). The JSC has set a precedent in **Nancy Makhoha Baraza's** case and in this case of the fair procedure that it would adopt in these types of cases. The fact that JSC rejected most of the complaints other than three, is a clear indication that it afforded the 1st respondent procedurally fair administrative action.

All considered, the JSC accorded the 1st respondent a fair administrative action within the law having regard to the scope of its legal duty under article 168(2) and (4) of the Constitution and the provisions of JS Act. The High Court erred in imposing additional and more onerous duties of disclosure which were not only inappropriate to JSC's task, but which may, potentially hamper, lengthen or even frustrate its functions.

LEGALITY OF THE TRIBUNAL

[**43**] Article 168(5) provides:

"The President shall, within fourteen days after receiving the petition, suspend the Judge from office and, acting in accordance with the recommendation of the Judicial Service Commission …

(a)…

(b)…in case of a Judge other than the Chief Justice appoint a tribunal consisting of…"

In the case of the Chief Justice, as provided in clause (a), the membership of the tribunal is seven including three superior court judges from common law jurisdictions. Similarly, the membership of the tribunal in case of a Judge is seven.

By article 168(7) (b) the tribunal is required to inquire into the matter expeditiously and report on the facts and make binding recommendations to the President.

Article 258(8) provides that if a particular time is not prescribed by the Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.

By Article 259(1);

"If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise."

[**44**] It is not in dispute that after JSC forwarded the petition to the President by a letter dated 20th May 2013, the President by Gazette Notice signed on 30th May 2013, and published on 31st May 2013 appointed five members of the tribunal which was within 14 days after receipt of the petition. It is also not disputed that the President by a further Gazette Notice dated 17th June 2013 and published on 19th June 2013 appointed two additional members of the tribunal.

The Gazette Notice of 19th June 2013 refers to appointment of two additional members to the ones appointed by the Gazette Notice of 31st May 2013 and states in part:

"NOW THEREFORE, in exercise of the powers conferred by Article 165(b) of the Constitution of Kenya, I… amend the membership of the Tribunal as specified in Gazette Notice No.7492 by adding the following new members--"

[**45**] The 1st respondent's case was, in essence that, all the seven members must be appointed within 14 days of the receipt of the petition and that the appointment of members of the tribunal is illegal; that the appointment of two additional members was outside the 14 days limitation; that the Gazette Notice of 31st May 2013 being illegal cannot be amended and that the Gazette Notice of 19th June 2013 was a fresh, separate and distinct notice.

The appellant's case was that the first gazette notice was amended by the second gazette notice, that the tribunal as appointed meets the requirements of article 168(5) (b) (i) – (iii) and that the narrow interpretation of article 168(5) by the 1st respondent is contrary to the provisions and the spirit of the Constitution; that there was no time limit for the appointment of the tribunal and the President could appoint a tribunal within a reasonable time.

[**46**] The High Court interpreted Article 168(5) thus:

"The comma placed after the word "and" suggests that the appointment of the tribunal shall be made after the suspension of the Judge. The question is whether the Article also requires that the tribunal be appointed within the 14 days period from the receipt by the President of the petition from the

commission. In our view, the use of the word "and" in the provision requires a conjunctive rather than a disjunctive reading of the sub-article so that the fourteen (14) day period applies to both the suspension and the appointment of the tribunal."

The High Court gave three reasons for that finding; firstly, that the President has an obligation to suspend the judge and a suspended judge loses part of his benefits including part of the remuneration. Secondly, that the process contemplated by article 168 is intended to proceed expeditiously and thirdly, taking into account the provisions of article 73 on Leadership and Integrity, it could not have been the intention of the drafters of the Constitution that the period for appointment of tribunal be left open-ended.

[**47**] The appellant maintains that the interpretation was flawed and failed to properly interpret the Constitution. It was submitted, amongst other things, that the 14 days limitation is the time the President is required to act on the petition and was not intended to be the time within which the tribunal was to be constituted, gazetted, sworn and assumed office and, further that, to allow a judge accused of gross misconduct to avoid the tribunal merely because the members of the tribunal were not gazetted within 14 days, is to subvert the Constitution. Mr. Muiruri for the 2nd respondent contended that the 14 days time limitation should be interpreted harmoniously with articles 158(4) and article 251(4) which deal with the same subject matter, that article 168(5) provides two distinct functions of the President and that the commas in article 168(5) should not be used to restrict the intention of the drafters of the Constitution. His view is that, the drafters of the Constitution intended that the suspension of a judge should be done within 14 days and that the appointment of a tribunal should be done within a reasonable time.

[**48**] It is true as can be gleaned from clause 5 of article 168 that it invests two duties on the President. The first one is to suspend the judge, and the second one is to appoint a tribunal to inquire into the allegations made against the judge. The suspension relates to and affects the judge personally and adversely. The appointment of a tribunal to inquire into the allegations is referable to the decision of JSC that grounds of removal have been disclosed. Thus, the two functions are interrelated but distinct in their application and objective. The objective of suspension is in the public interest that a judge against whom grounds exist for removal as adjudged by JSC should not continue to exercise judicial powers which is a public trust when his conduct is subject to investigation by an independent tribunal. The objective of appointment of a tribunal is to inquire into the allegations against the judge and decide whether or not he should continue to exercise judicial power. The suspension is temporary whilst the decision of the tribunal either way is final.

[**49]** The Director of Public Prosecutions has constitutional security of tenure for eight years (article 157(5)] and the procedure for his removal is similar to that of a judge of a superior court only that a petition for removal goes to Public Service Commission (PSC) – an independent commission like the JSC. The PSC is required to consider the petition and if satisfied that it discloses a ground for removal send it to President. Article 158(4) provides:

"On receipt and examination of petition the President shall, within fourteen days, suspend the Director of Public Prosecutions from office pending action by the President in accordance with clause (5) and shall, acting in accordance with the advice of the Public Service Commission, appoint a tribunal consisting of…"

Article 251 prescribes a similar procedure for the removal of members of a commission including a member of JSC and a holder of an independent office but in such a case a petition has to be presented to the National Assembly.

The National Assembly is required to consider the petition and, if satisfied that it discloses a ground for removal send it to the President.

Article 251(4) provides:

"On receiving a petition under clause (3), the President __

a. ***may suspend the member or office holder pending the outcome of the complaint; and***

b. ***shall appoint a tribunal in accordance with clause (5) ……"***

[**50**] It is plain from the reading of articles 168(5), 158(4) and 251(4) that the framers of the Constitution intended that upon decision by the respective prescribed bodies that there exists grounds for removal of a state officer holding sensitive offices which, *inter alia,* protect the sovereignty of the people, the President should suspend such officer and appoint a tribunal to inquire into the allegations contained in a petition. In all those cases, the President is under a mandatory duty to appoint a tribunal. However, whilst the President has discretion on suspension of members of a commission and independent offices, he has no similar discretion on suspension of a judge of a superior court or Director of Public Prosecutions.

In article 158(4) the word *"shall"* is used twice referring respectively to suspension and to appointment of a tribunal leaving no doubt that the time limit of 14 days only applies to suspension of a judge.

Does the omission of the word "*shall*" after the word "*and*" in article 168(5) convey a different intention? The same commas exist in both articles, the difference being that the last comma in article 154 is placed after the word "*shall*". [**51**] Article 168(5) has to be interpreted with other provisions of the Constitution particularly article 158(4) and 251(4) which relate to the same subject matter. It has also to be interpreted, as article 259(1)(a) ordains, in a manner which promotes the purposes, values and principles of the Constitution. Article 168(5) has to be given a substantive interpretation as opposed to formalistic and positivistic interpretation. Undue preoccupation with grammatical meaning through the use of conjunctions and punctuation marks – a linguistic exercise, intended to discover the literal meaning of a sentence may distort the substantive meaning of a constitutional provision. Looking at article 165(5) closely the term "***within fourteen days after receiving the petition"*** immediately precedes the term "***suspend the judge from office***" which, without reading the sentence further, conveys the meaning that the 14 days refer to the act of suspension. The following term then follows:

"and, acting in accordance with the recommendation of Judicial Service Commission-"

An automatic act of the President of suspension is separated from appointment of a tribunal by a requirement that the latter be done in accordance with recommendation of JSC. As article 259(11) provides, the President can only lawfully appoint a tribunal with the recommendation of JSC.

Article 168(5) does not prescribe the time within which JSC should make a recommendation to the President, yet the President must await the recommendation before the appointment of the tribunal. The recommendation of JSC is an independent act for which the President has no control.

It has also been submitted that if the 14 days time limitation is applied to appointment of a tribunal, it may be impracticable in the case of appointment a tribunal to inquire into the conduct of a Chief Justice, for in such case, three superior court judges have to be sourced from common-law jurisdictions, (article 168(5) (a) (ii) which process would take time. There are also other imponderables like, if the President is temporarily incapacitated after the presentation of a petition by JSC and after the suspension of a judge. The doctrine of the interpretation of the Constitution that the law is always speaking must be given effect.

[**52**] The reason of expedition given by the High Court to justify the application of time limitation to appointment of a tribunal is not justifiable. If that was the intention of the framers of the Constitution, they would have logically provided time lines for investigation of allegations by JSC and for determination by the tribunal. In the case of the tribunal, Constitution only provides for an expedited inquiry.

Similarly, the requirement for the suspension and adjustment of remuneration and the application of article 73 applies to the Director of Public Prosecution. The framers of the Constitution could not have provided for discriminatory application of the Constitution when dealing with state officers on the same subject matter.

[**53**] The intention of the framers of the Constitution as can be gathered from article 168, was that a judge whose conduct has been found by JSC to disclose grounds for removal should be investigated by an independent tribunal and only after successfully going through that constitutional procedure, can he be reinstated to his office. In construing article 168(5) the purpose of the Constitution and its values should be promoted. It was possible, as the High Court indeed found, to construe article 168(5) in a manner that would result in the appointment of th*e* tribunal after the suspension of a judge. In that case, the 14 days time limitation would apply to suspension and not to the appointment of a tribunal. Where a sentence employed in a constitutional provision is complex and has more than one subject and more than one object, it may be a more proper construction to "render each to each" by reading the provision distributively or disjunctively and applying each object to appropriate subject to arrive at a construction which promotes rather than evades its purpose.

[**54**] Furthermore, since the Constitution should be interpreted as an integrated whole it is imperative in considering the time limitation for appointment of a tribunal to have regard to other provisions of the Constitution conferring power of appointment upon the President.

Article 132(2) empowers the President to nominate and appoint the executive and other state and public officers. There are also other provisions of the Constitution dealings specifically with the presidential nominations and appointments of other state officers for instance the Chief Justice, Attorney-General, Director of Public Prosecutions, judges and members of independent commission. In all those cases, the Constitution does not limit the time within which the President should make such nominations or appointments with the exception of nominations of a Deputy President under article 149(1) to fill a vacancy where the President is obliged to make the nomination within 14 days.

The President would be acting lawfully if the function is performed without unreasonable delay as article 259(8) provides.

A general constitutional principle emerges from the above analysis that unless the Constitution expressly prescribes a particular time, the executive function of the President to make nominations and appointments under the Constitution is limited by time only to the extent that such function should be performed without unreasonable delay.

The appointment of a tribunal by the President is a function of the same specie as the presidential appointments. As a matter of construction of article 168(5), the time for appointment of a tribunal is not expressly provided. If the time for making such important national nominations and appointments is left to the executive discretion of the President it would not be a rational construction of article 168(5) to limit the performance by the President of a comparatively mundane function of appointment of a tribunal to 14 days.

[**55**] Having considered that the suspension of a judge and the appointment of tribunal have different objectives, and the purpose of article 168 together with article 158(4), I have come to the conclusion that article 168(5) has the same meaning as article 158(4) notwithstanding that the word "shall" is not repeated. The word "and" in article 168(5) is just a conjunction joining the exercise of two distinct powers conferred on the President which have to be performed separately.

By giving linguistic or grammatical importance to the interpretation of article 168(5), the High Court, quite erroneously gave a formalistic interpretation to the Constitution and failed to consider other similar provisions as suggested by the 2nd respondent's counsel in his oral submissions in the High Court.

From the above analysis, I hold that the 14 days time limitation only applies to the suspension of a judge and not to the appointment of a tribunal and that the President had power to appoint a tribunal within a reasonable time as provided by article 259(8). Any other construction of article 168(5) may potentially render the President's power to appoint a tribunal sterile. As such power should be exercised as often as occasion arises; the appointment of two additional members was lawful, thus making the appointment of entire members of the tribunal lawful.

[**56**] The consequence of allowing the appeal is to dismiss the cross-appeal as the setting side of the order for *de novo* commencement of the process of investigation and determination of the complaints leaves the cross-appeal without any foundation. It is however important to emphasise that the remedies that the High Court can give in a petition of this kind are discretionary and the court should strive to award a remedy that is not in vain.

As I have shown above, JSC has administrative discretion whether to call witnesses or to allow cross-examination. The order cross-appealed against does not require JSC to adopt any particular procedure which means that in the *de novo Judgment-CA 52.014* process the JSC may decide not to call any witness and the remedy that the High Court gave may not achieve its intended purpose. There is also the distinct possibility that JSC as a corporate body may reach to the same decision. Further, the order is vague as it did not exclude from investigation the complaints already decided in favour of the 1st respondent. Hence, the process, if repeated, may expose the 1st respondent to prejudice.

[**57**] The appellant expressly stated that it does not seek the costs of the appeal. Although the 2nd respondent did not state its position, it is clear that the purpose of the appeal was to clarify the law. In the circumstances, it is just that no orders as to costs should be made.

For the foregoing reasons, I would allow the appeal, set aside the entire judgment and decree of the High Court with no orders as to costs. I would also dismiss the cross-appeal with no orders as to costs.

[**57**] As Nambuye, Karanja, Mwera & Ouko, JJA, agree the appeal is allowed, the entire judgment and decree of the High Court is set aside with no orders as to costs. The cross-appeal is also dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 8th day of May, 2015.

E.M. GITHINJI

Judgment-CA 52.014

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JUDGE OF APPEAL

Advocates

Mansur M. Issa of Issa & Company Advocates &

Paul K. Muite, SC of P.K. Muite Advocates ..... for the Appeallnt

Philip Nyachoti of Nyachoti & Co. Advocates …… for the 1st respondent

Mr. Muiruri Ngugi …… .....for the 2nd respondent

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF NAMBUYE,JA

I have had the honour and benefit of reading the draft judgment of ***Githinji, JA.***

I agree entirely with the learned Judge's analysis, presentation and the conclusion reached on all the issues in controversy herein. I do concur that the appeal has merit and that it be allowed with no orders as to costs.

Dated and delivered at Nairobi this 8th day of May, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

JUDGMENT OF W. KARANJA, J.A.

I have had the benefit of reading in draft the detailed, well reasoned judgment of Githinji, J.A. I agree with it in its entirety as he has covered all the important aspects of the appeal very well.

I will only seek to add one or two things on the issue of interpretation of the constitution, and the issue of fair administrative action.

In my view, the issue here is not about punctuation, or the positioning of the coma behind the conjunction "and" when interpreting Article **168(5) of the Constitution.** It all boils down to the broad issue of constitutional interpretation.

The Constitution is a living constitution, always seeking to understand the original purpose of each and every clause. The interpretation of the Constitution should not be textualist. It requires more than a formalised reading of the text, as would be the case in the interpretation of an ordinary statute. It requires a unified approach, one that seeks to read the Constitution as a whole, harmonising the component parts of the Constitution, the empowering provisions, the limiting provisions, and the entire gamut of rights created under it.

The original purpose, and safeguards can only be expanded and nurtured but not constrained by literal, instructionist, textual interpretation. This argument is buttressed by **Article 259 of the Constitution** itself. It is for that reason that, like Githinji, J.A. says, **Article 168(5)** cannot be read in isolation, and must be read together with **Article 158, 251** and any other Articles that may relate to removal of constitutional office holders.

This is why I hold the view that the fourteen days stated in **Article 168(5)** relate only to the suspension of a Judge, but not to the appointment of the tribunal by the President. Any other interpretation would create absurdity and breed disharmony in the different provisions in the Constitution that are meant to achieve the same result.

On the question of fair administrative action under **Article 47(1)** of the Constitution, I hold the view that the Judicial Service Commission (JSC) though a creature of the Constitution cannot be removed from the operation of the said Article, in the performance of both its Constitutional and administrative functions.

In that regard therefore, JSC is expected to act with expedition, efficiency, reasonableness and procedural fairness. The Article does not break down what reasonableness or procedural fairness entails. These are nonetheless attributes that are open to different interpretation depending on the circumstances of each case.

Does procedural fairness of itself mean that one must be allowed to cross-examine witnesses? Does it entail calling of witnesses in defence? In this case, my view is that the Judge was accorded a fair administrative action. He was served with the charges levelled against him and was not therefore ambushed. He was accorded an opportunity to respond in writing, and was also heard *viva voce.* Failure to cross-examine witnesses cannot be deemed to amount to procedural unfairness. Moreover, the JSC was

only carrying out investigations as part of a process whose end result did not lie with JSC. Its role was only to establish a *'primafacie'* case as it were. This is akin to a finding of a *'case to answer'* in criminal law which is actually arrived at before a person is called upon to defend himself.

The JSC's role, after satisfying itself, *prima facie* , that a reasonable ground has been established for the removal of the Judge, is to pass the baton to the tribunal which will then be required to conduct a full hearing, where cross-examination of witnesses will be the Judge's unfettered right.

The Judge, if aggrieved by the decision of the tribunal appointed to investigate his conduct has direct recourse to the Supreme Court. There are therefore sufficient safeguards in place to ensure that a Judge under investigation is protected from

arbitrariness, capriciousness or personal vendetta from persons he/she may have crossed while performing his/her duties.

I have no doubt in my mind that the 1st respondent herein will have his day at the tribunal and justice will prevail.

For these reasons, I would dismiss this appeal and the cross-appeal, with an order that each party bears its own costs.

Dated and delivered at Nairobi this 8th day of May, 2015

W. KARANJA

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF MWERA, J.A.

I have had the honour and benefit of reading the draft judgment of Githinji, JA in all the respects covering the background to this appeal, arguments for and against, the points of law raised and cases decided in this jurisdiction and outside.

I am in entire agreement with the learned judge's analysis, presentation and the conclusion in respect of the two broad grounds of appeal pertaining to whether or not the proceedings by the committee appointed by the appellant to conduct proceedings inquiring into the allegations levelled against the 1st respondent, violated his constitutional rights and whether or not the findings and decision of that committee, and the subsequent recommendation to the President also, violated the 1st respondent's constitutional rights. I have nothing more useful to add.

I, too, would and do allow the appeal herein and dismiss the cross-appeal with no orders as to costs.

Dated and delivered at Nairobi this 8th day of May, 2015.

J. W. MWERA

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JUDGE OF APPEAL

JUDGMENT OF OUKO, JA

I have had the benefit of reading in draft the judgment prepared by

Githinji, JA in this appeal. I agree with it entirely, save to say the following on the broad question of the duty of the Judicial Service Commission (the Commission) upon receipt of a petition under **Article 168 (4)** which requires it to;

"…consider the petition, and if it is satisfied that the petition discloses a ground for removal under Clause (1), send the petition to the President." (Emphasis mine)**.**

The Commission is the first port of receiving a petition seeking the removal of a judge of a superior court.

It is the duty of the Commission to satisfy itself that the petition meets the threshold of;

i. inability of the judge to perform the functions of office arising from mental or physical incapacity.

ii. violation of a code of conduct for judges

iii. bankruptcy

iv. incompetence, or

v. gross misconduct or misbehavior

In considering the petition, the Commission conducts a preliminary inquiry to satisfy itself that the complaint is not frivolous, lacking in substance, unfounded or hypothetical. That it has at least some probative value. The inquiry is not intended to lead to a final decision but is designed only for receiving information for the purpose of a recommendation on which a subsequent and final decision may be founded. While so engaged, the Commission does not conduct a formal hearing at which witnesses are called and examined. The process merely seeks to determine if the petition discloses a *prima facie* ground or grounds to warrant the presentation of the petition to the President. It is my considered view that the mere presentation of the petition to the President, cannot in itself adversely affect the 1st respondent. The Commission must, however, be guided by **Article 47** of the Constitution that enjoins it to act fairly and in good faith and to ensure expeditious, efficient and reasonable determination.

If on a preliminary inquiry the Commission finds no basis or merit in the petition, it must reject it. It is only upon being satisfied, *prima facie,* that a case has been disclosed to warrant sending the petition to the President will it take that step.

To suggest that the Commission ought to conduct a hearing, at which oral evidence is presented, tested through cross-examination and a decision reached is to render redundant the tribunal that may be appointed at the end of the spectrum and subject the judge against whom the petition has been presented to double jeopardy.

The Commission only acts as a sieve, a screening device and applies a different standard of proof (*prima facie)* from that of the tribunal.

I agree therefore that the appeal be allowed, judgment of the High Court set aside with no orders as to costs and that the cross appeal be dismissed, again with no orders as to costs.

Dated and delivered at Nairobi this 8th day of May 2015.

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR