



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, GBM KARIUKI, & MOHAMED JJA)

CIVIL APPEAL NO. 194 OF 2015

BETWEEN

MARTIN NYAGA WAMBORA.....APPELLANT

AND

COUNTY ASSEMBLY OF EMBU.....1ST RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY OF EMBU.....2ND RESPONDENT

THE SPEAKER OF THE SENATE.....3RD RESPONDENT

THE SENATE.....4TH RESPONDENT

PARLIAMENTARY SERVICE COMMISSION.....5TH RESPONDENT

COMMISSION ON ADMINISTRATION OF JUSTICE.....6TH RESPONDENT

ANDREW IRERI NJERU & 31 OTHERS.....7TH RESPONDENT

(Being an appeal from the Judgment and Decree of the of the High Court of Kenya at Nairobi delivered on 12th February 2015 by Hon Mwongo PJ, Korir and Odunga JJ

in

Embu Constitutional Petition Nos. 7 & 8 of 2014 (Consolidated)

JUDGMENT OF OKWENGU JA

Introduction

[1] This is an appeal from the Judgment and Decree of a three judge bench of the High Court (*Mwongo PJ, Korir & Odunga, JJ*) delivered on 12th February 201. The judgment was in regard to two petitions that were consolidated. That is **Embu H.C. Constitutional Petition No. 7 of 2014** that was lodged by **Martin Nyaga Wambora**, the Governor of Embu County (*hereinafter referred to as the appellant*); and **Embu H. C. Constitutional Petition No. 8 of 2014** that was lodged by Andrew Ileri Njeru and 31 others who described themselves in the petition as citizens of Kenya who reside, vote and work for gain within

the Embu County. The latter that are the 7th respondent in this appeal have also cross-appealed and shall therefore hereafter be referred to as the cross-appellants.

The Background

[2] The facts leading to this appeal are substantially not in dispute. On 29th January, 2014 the County Assembly of Embu (now the 1st respondent) passed a motion for removal of the appellant from the office of Governor of Embu County on the grounds that he had refused and/or neglected to act on the recommendations of the County Assembly of Embu, and that this amounted to gross violation of the Constitution and abuse of office. An appropriate resolution for the removal of the appellant was thereafter forwarded to the Speaker of the Senate in accordance with section 33 of the County Government Act. That motion was tabled before the Senate and a Special Committee of the Senate was mandated to look into the allegations. The Special Committee reported back to the Senate, and the Senate having considered the report unanimously voted that the appellant be removed from office and an appropriate Gazette Notice No. 1052 of 17th February 2014 was published. In the meantime, the appellant had moved to court and obtained interlocutory orders restraining the Speaker of the Senate and the Senate from proceeding with the removal proceedings. By a judgment dated 16th April 2014, the High Court sitting in Kerugoya ruled that the removal proceedings against the appellant were null and void, and consequently the appellant was restored to office.

[3] On the same day of the judgment the County Assembly of Embu again commenced removal process against the appellant, and on 29th April, 2014 passed another resolution for removal of the appellant which resolution was forwarded to the Senate for a second round of removal proceedings against the appellant. The Senate mandated a Special Committee made up of the same members that had earlier investigated the allegations during the first removal process, to investigate the allegations in regard to the second removal process. On the 13th May 2014, the Senate having received and debated the report of the Special Committee passed a resolution to remove the appellant from the office of Governor of Embu. In the meantime, the appellant and the cross-appellants who had separately moved to the High Court seeking to stop discussions of the second removal motion in the County Assembly, filed an amended consolidated petition dated 23rd May 2014. This amended petition was the subject of the judgment of the High Court now subject of this appeal.

The Orders sought in the Amended Petition

[4] The prayers sought in the amended consolidated petition were of three categories. Those seeking interpretation of constitutional and statutory provisions concerning removal of a County Governor, Declaratory orders regarding the removal and impeachment of the Embu County Governor, and orders of Certiorari with regard to the impeachment of the Governor. The prayers may be paraphrased as follows:

First, the interpretation of constitutional and statutory provisions regarding:

- i. the threshold of the number of members of public who should participate in the removal process under Article 118(1)(b), 174 (a)(c) and 196 (1)(b);
- ii. the criteria that should be applied in determining the threshold;
- iii. whether the removal of the Governor without involvement of the public and the petitioners was a violation of the Constitution;
- iv. whether section 33 of the County Government Act is unconstitutional for being in conflict with Articles 1, 2(1)&(2); 10, 118(1)(b), 174(a)&(c) and 196(1)(b); and 259 of the Constitution;
- v. whether the petitioner's right to information under Article 35 has been violated.

Secondly, declaratory orders that:

- a. the petitioners and members of the public are entitled to the right to participate in the process of removing the Governor of Embu County from office and the same has been violated;
 - b. the court be pleased to establish the required threshold of the members of public who should participate under Article 118 (1) (b), Article 174 (a) and (c) and Article 196 (1) (b).
- c. public participation is a pre-condition to proceedings for removal of a governor under Article 181 of the Constitution.
- d. the act of removing a county Governor is not an exclusive affair of the county assembly and the senate.
- e. the resolution passed by the County Assembly on 29th April 2014 is null and void for having been passed by the County Assembly in contravention of County Assembly of Embu Standing Order No. 86 and the Senate in total contravention of Standing order No. 92 of the Senate Standing Orders.
- f. the impeachment passed by the Senate pursuant to a resolution passed by the County Assembly of Embu on 29th April 2014 is null and void
 - g. Section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of Article 1, Article 2(1) and (2), Article 10, Article 118(1) (b), Article 174 (a) and (c) and Article 196 (1) (b) for failing to allow public participation and involvement in the removal of a county Governor.
- h. the petitioners herein are entitled to the full protection of their right to information and the same right has been violated.

[5] Thirdly orders of certiorari:

- i. to remove to the High Court and quash the resolution passed by the County Assembly of Embu dated 29th April 2014 and the Senate on the 13th May 2014 to remove 1st respondent as the Governor of Embu County.
- ii. to remove to the High Court and quash the resolution passed by the Senate on the 13th May 2014 to impeach the Governor of Embu County.

The Decision of the High Court

[6] Upon hearing the amended petition the High Court dismissed the Petition, holding *inter alia* as follows:

- i. ***that the petition was not incompetent;***
- ii. ***that the proceedings to impeach the Governor were not sub judice as the motion before the County Assembly was instituted when there was no pending matter in court;***
- iii. ***that the power of self governance and participation of the people provided for by Article 174 (c) of the Constitution must be read together with Article 1 to the effect that people may also indirectly exercise sovereignty. This they do through electing their representatives at the county level who make decisions on their behalf. To this extent the mandate of impeachment has been placed on the peoples' representatives;***
- iv. ***that the Constitution obligated Parliament to enact a Law to operationalize the removal procedures of Governor; that the purpose of the County Government Act 2012 and in particular***

section 33 was to operationalize Chapter 11 of the Constitution on Devolution and Article 181 of the Constitution; and that section 33 was therefore not unconstitutional;

- v. that Article 196(1)(b) of the Constitution requires the County Assembly to facilitate public participation and involvement in the Legislative and other business of the Assembly and its committee; and that the removal of the Governor was one of the business statutorily assigned to the County Assembly; thus some level of public participation had to be injected in the process and an opportunity availed to voters to air their views on the process of the removal of the Governor before a decision was arrived at;**
- vi. that the allegations made by the petitioners, that they were not afforded an opportunity to participate in the removal proceedings were not proved;**
- vii. that there was no bias in the hearing of the matter against the Governor by the special committee that had previously considered similar complaints against the Governor as the report of the special committee was adopted by an overwhelming majority of the whole house;**
- viii. that due process was followed in the removal of the Governor, several opportunities having been provided for the Governor to be heard and the principles and rules of national justice complied with.**

The Appeal

[7] The appellant who was aggrieved by the judgment of the High Court lodged an appeal raising 17 grounds. He was represented by a team of advocates led by Mr. Paul Muite (SC) who was assisted by Mr. Peter Wanyama, Mr. Wilfred Nyamu and Mr. Issa Mansur. The cross-appellants who were represented by Mr Ndegwa Njiru also filed a cross appeal with a Memorandum of Appeal that was a near replica to the one filed by the appellant. Professor Tom Ojienda (SC), and Mr Njenga appeared for the Speaker of the County Assembly of Embu and the County Assembly of Embu, the 1st and 2nd respondent respectively, whilst Ms. Thanji appeared for the Parliamentary Service Commission that was the 5th respondent. The Speaker of the Senate and the Senate who were the 3rd and 4th respondent respectively neither participated in the proceedings in the High Court nor in the appeal before us. The Commission on Administration of Justice who were the 6th respondent appeared in the High Court but was by leave of the Court excused from participating in the appeal proceedings. Following an agreement between the parties' advocate's and directions given by the court, written submissions were duly filed and orally highlighted before the Court.

Appellant's Submissions in support of the Appeal

[8] In the written and oral submissions, the appellant's grounds of appeal were collapsed into four categories. These were; the principle of *stare decisis*; the threshold for removal of Governor under Article 181 of the Constitution; public participation in the impeachment process; and lack of fair hearing and bias in the Senate proceedings.

[9] As regards the principle of *stare decisis*, it was argued that the learned Judges of the High Court erred by failing to apply the decision of this Court in **Nyeri Civil Appeal No. 21 of 2014, Martin Wambora & 3 others v Speaker of the Senate & 6 others**, (herein referred to as **Nyeri Civil Appeal No. 21 of 2014**), in which this court found that the High Court erred in failing to exercise its constitutional mandate under Article 165 (3) (d), (ii) and (iii) of the Constitution to determine whether the removal of the appellant as Governor of Embu County was inconsistent with or in contravention of the Constitution; and further erred in failing to exercise its supervisory jurisdiction under Article 165 (6) to determine the specific question whether the constitutional threshold for removal of the Governor had been proved and if there was any nexus between the allegations in the motion tabled in the County Assembly and the appellant.

[10] Counsel for the appellant further submitted that because the motion before the County Assembly

and the Senate was premised on the same facts as the first impugned removal process, the High Court was duty bound to consider whether the Senate had found any nexus established between the applicant and the allegations of misconduct. The Appellant's counsel cited the case of **Mwai Kibaki v. Daniel Toroitich Arap Moi [2000] 1 EA 115**, in support of the contention that the principle of *stare decisis* is a fundamental aspect of our legal system meant to ensure uniformity in judicial decisions. Counsel argued that because the first and second impeachment process was identical, the learned judges of the High Court were bound by the precedent set in **Nyeri Civil Appeal No. 21 of 2014**. In addition that the High Court adopted a narrow and restrictive interpretation of its role by holding that it could only review the proceedings relating to the removal process in disregard of the mandate conferred by Article 165 (3) (d) (ii) and (iii).

[11] On the threshold for removal under Article 181 of the Constitution, it was argued that the removal of a Governor is a quasi-judicial process, governed by the Constitution and the threshold is provided under Article 181 of the Constitution; that in removing the appellant from the office of Governor, the County Assembly of Embu and the Senate were exercising powers donated to them by the Constitution and were therefore bound by the provisions of Article 181. As to what constitutes gross violation, Counsel for the appellant relied on a Nigerian case **Hon. Muyiwa Inakoju & others v. Hon. Abraham Adeolu Adekele S.C.272/2006 (unreported)**; and **Nyeri Civil Appeal No. 21 of 2014 (supra)**.

[12] It was submitted that the High Court failed in its supervisory jurisdiction and duty to determine whether the appellant's removal was in accord with the Constitution; That the High Court having held that there was no material provided to enable it determine the issue of nexus and threshold; and it being the duty of the County Assembly of Embu and the Senate to provide the said material in order to validate the removal of the appellant and satisfy the court that the removal process was in accordance with the Constitution. It was perplexing that the High Court went ahead and found that the Report of the Committee did not contain in it anything that could invite the review powers of the High Court.

[13] It was asserted that the High Court failed to determine whether there was any nexus between the acts complained of and the conduct of the appellant to warrant his removal. This Court's decision in **Mumo Matemu v. Trusted Society of Human Rights Alliance & others Civil Appeal No. 290 of 2012** was relied on for the submission that the High Court ought to have considered whether there was a nexus between the appellant and the acts complained of. Further, it was contended that the charges against the appellant related to the tendering process for refurbishment of the Embu Stadium as well as the procurement of maize seeds, which process the appellant was not involved in. The learned Judges of the High Court were faulted for failing to consider whether the appellant had personal liability for the alleged violations. Finally it was reiterated that the High Court having already confirmed that no evidence had been placed before it to validate the removal of the appellant, the High Court could not make a determination as to whether there was a nexus between the appellant and the gross violations.

[14] On public participation in the impeachment process, it was argued that the High Court failed to properly interpret and consider the role of the public and residents of a County in the impeachment process; that the democracy enshrined in the Constitution is partly representative and partly participative and this required the court to give effect to the principles of democracy; that public participation plays a key role in governance; that the new constitutional dispensation had been brought closer to the people through devolution; that under Article 196(1)(b) public participation is a mandatory requirement in the legislative and/or any other business of the county; and that similarly Article 118 (1)(b) requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. It was maintained that the removal of a governor is part of the business of the County Assembly and as such there must be both qualitative and quantitative public participation as a condition precedent to constitutional impeachment, and thus the removal of the appellant from office without participation of the people who voted him into office was a derogation of their rights.

[15] On lack of fair hearing and bias in the Senate proceedings, it was submitted that the removal of a governor from office is a constitutional and political process in the nature of quasi-judicial process and therefore the Rules of natural justice and fair administrative action must be observed. In this regard **Nyeri Civil Appeal No. 21 of 2014** was relied upon. Further it was submitted that the appellant was entitled to a

fair hearing before the special committee of the Senate; and that given that the Special Committee of the Senate that was constituted to investigate the charges in the appellant's second impeachment was the same one selected to investigate the charges in the first impeachment process, and that the second impeachment was based on the same facts, the committee could not possibly evaluate the same allegations objectively and was biased from the outset; that the High Court failed to appreciate that the impeachment process before the Senate did not meet the constitutional standard of fairness; that the appellant was not accorded a fair hearing by the Special Committee despite raising the issue of bias before the committee; and that the High Court erred by failing to apply the correct test of bias and failing to find that there was prejudice occasioned to the appellant.

Submissions by the Speaker and County Assembly of Embu

[16] The County Assembly of Embu and the Speaker of the County Assembly of Embu opposed the appeal through written and oral submissions, in which the Court was urged to be alive to the fact that the process of removal of the appellant from office was based on his established actions of flouting relevant law and procedure and therefore causing loss of public funds that ought to have been applied to further public interest; and that in interpreting the Constitution the court should favour a determination that contributes to good governance and public interest.

[17] In response to the issues raised by the appellant, it was submitted that on the issue of *stare decisis* the High Court considered and applied *Nyeri Civil Appeal No. 21 of 2014; and* in particular that the following interpretation by the Court of Article 181 of the Constitution as read with section 33 of the County Government Act:

“that removal of a Governor is a constitutional and political process. It is a *sui generis* process that is *quasi judicial* in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility”.

[18] It was argued that the High Court appreciated that it had to interrogate the facts to establish the question of nexus between the appellant and the allegations made against him; that the failure to do so was explained by the inadequacy of the available facts and evidence; that it was not enough for the appellant to merely plead violations of rights and their particulars and not avail to the court all the necessary material and evidence; that the burden of proof on all material facts arising in the petition lay with the petitioners; and that where they fail to discharge this burden neither the Senate nor the High Court could be faulted.

[19] On lack of fair hearing and bias it was submitted that the appellant had not demonstrated any actual or apparent bias sufficient to vitiate the impeachment process; that the appellant had conceded that no evidence of actual prejudice was availed to the court, but that he was simply relying on prejudice arising from apparent bias. Relying on the case of *Judicial Service Commission v. Gladys Boss Shollei & another* [2014] eKLR it was submitted that no circumstances had been pleaded to give the impression of bias on the part of the Senate; that according to the test given in the **Judicial Service Commission** (*supra*) case the impression or perception of bias has to be evaluated with reference to a reasonable person who is fair minded and informed about all the circumstances of the case; and that in the mind of an objective citizen conscious that the process of impeachment concerned loss of public resources and being aware of all the facts, there would be no apparent bias arising from the process.

[20] As regards public participation, it was maintained that the appellant had not demonstrated any failure on the part of the County Assembly of Embu, to undertake public participation of the process of removal of the appellant using the forum and infrastructure provided under Chapter VIII of the County Government Act that provides for citizen participation in the business of the County and the County Assembly; that the appellant and the cross-appellants only claim that there was no public participation because the result of the process did not match their expectations; that there was no error demonstrated on the part of the High Court in its finding that there was public participation; that there was no basis in law

or any judicial authority for the contention that public participation must only be direct participation; and that it would be practically impossible to hold a public referendum on all decisions made by the County Assembly.

[21] On the issue of constitutionality of Section 33 of the County Government Act, it was asserted that the section was not unconstitutional; that the High Court gave detailed reasons for its finding that the section was consistent with the Constitution; and that no specific error had been identified that could fault that finding. Further that section 33 of the County Government Act provides the procedure for the operation of Article 181 of the Constitution; that the section is not a substantive provision of law but a procedural provision that provides for the forum and process of raising charges against a Governor; the hearing of such a charge and determination thereof; that although section 33 is not intended to give effect to Article 196 of the Constitution, Chapter VIII of the County Government Act provides extensively for the requirement of the County Assembly to facilitate public participation and therefore there is a deliberate and mandatory imperative obligation imposed by Article 196 of the Constitution for the County Assembly to facilitate public participation.

[22] On nexus and threshold it was pointed out that the functions of a Governor are clear in the Constitution and the Statute, and that he is enjoined to perform these functions as a matter of legal obligation; that where there was a failure to perform such legal obligations a manifest breach of the law could be inferred; that the Senate considered how each of the charges against the appellant related to his functions and found that there was sufficient link to him making him culpable of breach of the various laws and the constitution; that the appellant as the Chief Executive of the County is responsible for all executive functions including the outlay of expenses and use of funds; that under **Article 73** and **179(3)** of the **Constitution** as read with **section 30(3)** of the County Government Act, the Governor provides leadership in the County governance and is accountable for the management and use of the County resources; that there was sufficient nexus established between the governance functions and the impugned procurement process; and that the threshold was anchored on accountability, good governance and political management, and not criminal culpability.

Submission for 5th Respondent

[23] On her part Ms. Thanji counsel for the 5th respondent addressed the role of the court on impeachment, the issue of bias, rules of natural justice and the extent of public participation. In a nutshell, the submissions were that the role of the court in impeachment proceedings is limited to review and the court should not delve into the merits of the case; that impeachment is a quasi-judicial and quasi-political process; that the courts lack the tools to delve into political matters and its role is limited to review of the procedure only; and that the procedure contained in Section 33 of the County Government Act was properly followed. On bias it was submitted that the committee of the Senate deliberated on the issues and warned themselves; that in any event the Senate through an overwhelming majority took the final decision; that the procedure was open to the public and that the Court of Appeal decision in ***Nyeri Civil Appeal No. 21 of 2014*** was followed.

Submissions for the Cross-Appellants

[24] In support of the appeal and the cross-appeal, Mr. Ndegwa Njiru counsel for the cross-appellant addressed the court on the issue of public participation, bias and unconstitutionality of section 33 of the County Government Act. On public participation it was submitted that the High Court only took into account delegated democracy through the people's representatives, but ignored the other limb of Article 1(2) that provides for direct participation in the exercise of the people's sovereignty; that Article 196(1) (b) of the Constitution obligates the County Assembly to provide for public participation in its business and this should be direct participation; that in interpreting the Constitution, the High Court should have applied the principle of harmonization and Article 259 of the Constitution. On the question of bias, it was submitted that this need not be actual as mere apprehension was sufficient; that the committee of the Senate was not constituted as a political committee but was vested with a quasi-judicial function of determining whether or not the charges against the appellant were substantiated; that the role of such a committee is crucial as it can stop the impeachment process and must therefore be devoid of bias. On the

constitutionality of Section 33 it was submitted that the High Court misapplied the law on constitutionality; that the cross appellants' complaint was the lack of public participation in the impeachment process; that the court had to look at Section 33 in light of removal of the Governor *vis-a-vis* the required public participation in the County Assembly business; and that the High Court failed to consider whether public participation was a condition precedent to impeachment.

The Issues for Determination

[25] This is a first appeal in a matter in which the High Court was called upon to exercise its supervisory and constitutional powers under Article 165(3)(b) &(d) of the Constitution. The obligation of this Court is to appraise and evaluate the High Court's interpretation of the Constitution and the County Government Act (the Statute), the findings of facts, and the conclusions arrived at by the High Court, with a view to drawing our own conclusions in regard to the issues raised by the appellant.

[26] Having considered the record of appeal, the respective submissions by learned counsel and the authorities cited I discern the main issue for determination to be the jurisdiction of the High Court in the impeachment process of the Governor of Embu in regard to the petition that was before the High Court, and whether the High Court properly understood and discharged its mandate. In addressing this main issue the answer to the ancillary issue posed regarding whether the learned High Court Judges failed to follow the principle of *stare decisis* by not applying the decision of the Court of Appeal in ***Nyeri Civil Appeal No. 21 of 2014*** will emerge. Addressing the main issue will also lead to the interpretation of the various constitutional and statutory provisions regarding the removal of a County Governor; the constitutionality of section 33 of the County Government Act; and the question of the extent of public participation and threshold of removal of a County Governor. Finally, the interpretation of the constitutional provisions will lead to a conclusion regarding the propriety of the process of removal of the appellant including the fairness of the process.

Jurisdiction of the High Court and The Doctrine of *Stare Decisis*

[27] *Stare decisis* is defined in Black's Law Dictionary 9th Edition as

“the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”

The same Black's Law Dictionary defines “precedent” as

“the making of law by a court in recognizing and applying new rules while administering justice... A decided case that furnishes the basis for determining later cases involving similar facts or issues.”

[28] In further explanation of “precedent,” Black's Law Dictionary cites **William M Lile et al** in “**Brief Making and Use of Law Books**” 288 (3rd Edition, 1914) wherein it is stated as follows:

“In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts.”

[29] *Stare decisis* is a common law doctrine that has been applicable in Kenya by virtue of the nation's common law heritage. The doctrine now enjoys constitutional protection by dint of Article 163 (7) of the Constitution. Although that provision only recognizes the doctrine in regard to the Supreme Court, the doctrine must of necessity be extended to the Court of Appeal in relation to courts lower in rank to it. This is particularly so since the Court of Appeal is in many cases the court of last resort. Indeed the following holding by a 5 Judge Bench of this Court in ***Mwai Kibaki vs Daniel Toroitich Arap Moi [1999] eKLR***, though decided before the establishment of the Supreme Court in Kenya, still holds true:

- a. *that the High Court has no power to over-rule the Court of Appeal;*
- b. *the High Court has no jurisdiction to flout the first principles of precedent and stare decisis; and*
- c. *that the High Court, while it has the right and indeed the duty to critically examine the decisions of this Court must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that of obiter dictum if applicable.*

[30] In *Jasbir Singh Rai & 3 Others v Tarlochan Singh & 4 Others*, [2013] eKLR, the Supreme Court identified the rationale for the doctrine of *stare decisis* as the need for stability, predictability, consistency, reliability, integrity, coherence and flexibility. This calls for horizontal application of the principle to the extent that the Court of Appeal will ordinarily not depart from a precedent it has set, unless it has come to the conclusion for reasons stated, that the decision was made *per incuriam* or that there are other compelling reasons for it to depart from that precedent. This was reiterated in *P. H. R. Poole vs R* [1960] E.A. 62 by a full bench of the Court of Appeal as follows:

“Prior to the hearing of the appeal counsel for the appellant intimated that he intended to ask the court to depart from one of its own previous decisions and, in accordance with the dictum of the court in *Joseph Kabui v. R. (1)*[1954], 21 E.A.C.A. 260, applied that a bench of five judges should be assembled to hear the appeal. This court adheres to the principle of *stare decisis*, unless it is of opinion that to follow its earlier decision which is considered to be erroneous involves supporting an improper conviction (*Joseph Kabui v. R. (1)*; *Kiriri Cotton Co. v. R. K. Dewani (2)*, [1958] E.A. 239 (C.A.) at p. 245). A full Court of Appeal has no greater powers than a division of the court (*Commissioner for Lands v. Sheikh Mohamed Bashir (3)*, [1958] E.A. 45 (C.A.) at p. 50; *Young v. Bristol Aeroplane Co., Ltd. (4)*, [1944] 2 All E.R. 293); but if it is to be contended that there are grounds, upon which the court can act, for departing from a previous decision of the court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five judges.”

[31] The much-cited *Nyeri Civil Appeal No. 21 of 2014* was an appeal against part of the judgment of the Kerugoya High Court in regard to the first removal process against the appellant. The Court in that appeal identified the issues for determination as follows:

- i. *Did the learned judges err in law in holding that the County Assembly and the Senate (as opposed to the courts), were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution?*
- ii. *Did the learned judges err in law by failing to exercise their constitutional mandate under Article 165(3)(d)(iii) and (iv) of the Constitution to determine whether the grounds for removal of the 1st appellant met the constitutional threshold under Article 181 of the Constitution?*
- iii. *Must there be a nexus between the allegations in the motion tabled in the County Assembly and the 1st appellant? And*
- iv. *Was impeachment and removal of the 1st appellant as Governor in accord with the Constitution and the County Governments Act?*

[32] The issues raised in that appeal are in many regards similar to those raised in this appeal not to mention that the parties are also the same. For instance in *Nyeri Civil appeal No 21 of 2014*, the court dealt with the question of the interpretation of Article 181 of the Constitution and section 33 of the County Government Act and expressed itself succinctly as follows:

“ 31. Our reading and interpretation of Article 181 of the Constitution as read with section 33 of the County Government’s Act shows that removal of a Governor is a constitutional and political

process; it is a sui generis process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility. Section 33 of the County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate's constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor. Upon receipt of such a resolution, the Senate shall convene a meeting to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There are three sequential steps to be followed: first is initiation of a motion to remove the Governor by a member of the County Assembly; second there is consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly's resolution to the Senate for hearing of the charges against the Governor.”

[33] In my view the above is a clear exposition of the law in regard to the application of Article 181 and section 33 of the County Government Act in the removal of a County Governor. The process of removal lies entirely with the County Assembly wherein it is initiated, and the Senate wherein it is concluded. The court may only come in where necessary to confirm that the process has been properly followed as laid down in the Constitution and the Statute. By implication the learned judges found section 33 of the County Government Act to be in harmony with Article 181 of the Constitution that provides for the removal of a County Governor on specified grounds such as gross violation of the Constitution, abuse of office or gross misconduct.

Right to Public Participation in the Removal of a Governor

[34] In this appeal apart from the focus on Article 181 that deals with grounds for removal of the Governor, the appellant has also shown the spotlight on **Articles 1, 2(1)&(2), 10, 118(1)(b), 174(a)&(c), 196(1)(b)** and **259** of the Constitution in regard to public participation in the removal of a County Governor *vis a vis* **section 33** of the County Government Act that only provides for the participation of the County Assembly and the Senate in the removal of the Governor. The appellant and the cross-appellants are aggrieved that **section 33** of the County Government Act does not provide an inclusive and participatory process such that their right to public participation has been violated. In this regard, the High Court in its judgment appreciated the right to public participation stating as follows:

193. The right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in Article 1 of the Constitution. Because the government is derived from the people, all citizens have the right to influence governmental decisions; and the government should respond to them. Therefore, participation must certainly entail citizens' direct involvement in the affairs of their community, as the people must take part in political affairs.

194. Article 196(1)(b) of the Constitution enjoins a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Whereas the Constitution does not expressly task the County Assembly with the role of removal of a Governor, Article 181(2) of the Constitution empowers Parliament to enact legislation providing for the procedure of removal of a county governor on the grounds specified under the said Article. Pursuant to the said provision Parliament enacted the County Governments Act and in section 33 the procedure for removal of a Governor is to be initiated in the County Assembly. Accordingly, the removal of a governor is one of the businesses statutorily assigned to the County Assembly. In our view the question is not whether the public ought to participate in the process of the removal of a governor but to what extent should that

participation go. In our view, some level of public participation must be injected into the process in order to appreciate the fact that a governor is elected by the County, and in order to avoid situations where an otherwise popular governor is removed from office due to malice, ill will and vendetta on the part of the Members of the County Assemblies.

[35] The learned Judges' position on the right to public participation in the removal of the Governor is further discerned from the following paragraph:

196. In our view an opportunity must be availed to the voters in a County to air their views on the process of the removal of their Governor before a decision is arrived at either way. To completely lock out the voters from being heard on such important matter as the removal of their Governor would be contrary to the spirit of Article 1(2) of the Constitution. Whereas it may not be possible that each and every person in the County be heard on the issue, those who wish to put across their views on the impeachment ought to be allowed to do so though the ultimate decision rests with the County Assembly.

[36] Further the following paragraph reflects the learned judges' appreciation of the limitation placed on the right to public participation in the removal of the Governor of Embu County through the application of the County Assembly Standing Order 61.

200. In our view public participation ought to commence from the time of the notification of the motion to remove the Governor by a member to the Clerk which notification in our view is the mandate of the Assembly. This is when the removal process crystalizes. However, it is clear that the period provided between the notification and the time for debating and the determination of the motion by the Assembly in the Standing Orders is very limited. It is therefore not plausible to expect that the mode of public participation in such circumstances would be commensurate with that of the enactment of legislation.

[37] In coming to its final conclusion regarding the issue of public participation, the learned judges considered the affidavit evidence. In a nutshell the appellant and cross-appellants had asserted in the supporting affidavit that removal of the appellant was a business of the County Assembly in which the appellants and cross-appellants had a right to directly participate, and that this right was infringed by their exclusion. On the other hand the respondents had asserted through their replying affidavit that there was public participation in the removal process as the committee and plenary proceedings of the Assembly were open to the public; and that the County Assembly had established public contact offices in the County Assembly wards through which notices of its business were disseminated to the public, and the appellants therefore had opportunity to participate in the removal process.

[38] On the above the learned judges concluded as follows:

213. The averments above made by the Respondents were not rebutted by a further affidavit of the Petitioners.

214. We have taken into account the period provided within which public participation may be conducted and the statutory structures for citizens participation, as well as the mode of notification formulated by the County Assembly. According to the respondents these included establishment of public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation. They also contended that the County Assembly through the office of the Clerk disseminates notices of its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose.

215. From the averments by the parties which are before the Court, we are not satisfied that the allegation made by the Petitioners that they were not afforded an opportunity to participate in the removal proceedings has been proved. We are unable to stretch the averments in the supporting affidavit set out hereinabove to mean that the respondent's infrastructure stated in

paragraph 32 of the replying affidavit was not adhered to in this case. It must be emphasized that in matters such as this evidence is contained in the affidavit rather than in submissions.

[39] I have quoted extensively from the judgment of the High Court because in my view, the quotations demonstrate that the conclusion arrived at by the learned judges was not consistent with their exposition and findings on the right to public participation. In coming to their conclusion, the learned judges did not take into account Standing Order No. 61 that they had noted was an impediment to the exercise of public participation. In order to appreciate this impediment, I reproduce herein County Assembly of Embu Standing Order No. 61 which was also quoted in the impuned High Court judgment:

“(1) Before giving notice of Motion under, section 33 of the County Governments Act, No. 17 of 2012 the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.

- 2. The Clerk shall submit the proposed Motion to the Speaker for approval.**
- 3. A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days’ notice calling for impeachment of the Governor.**
- 4. Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given.**
- 5. When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is supported by at least a third of all Members of the County Assembly to move the motion; Provided that within the seven days’ notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled “SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF GOVERNOR BY IMPEACHMENT”**
- 6. Any signature appended to the list as provided under paragraph (5) shall not be withdrawn.**
- 7. When the Motion has been passed by two-thirds of all members of the County Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days.”(Underlining added)**

[40] As observed by the learned judges, the timeline set in the Standing Order No. 61 provides a stricture that did not allow for effective public participation. Moreover, in the affidavit the appellant maintained that their right to public participation was compromised and much as the respondents denied that allegation, the Constitution and the Statute place an obligation on the County Assembly of Embu to facilitate public participation in the removal process of the Governor. This placed the burden upon the Speaker and the County Assembly of Embu to demonstrate compliance with the Constitution and the Statute in regard to the right to public participation in the removal of the appellant. The averments made in the replying affidavits were general averments regarding the structures put in place for public participation. No specific averments or confirmation has been made that in regard to the removal of the appellant appropriate information and or opportunity for public participation was given either before the

motion was debated or during the debate of the motion. The fact that the proceedings of the County Assembly are public only provides an opportunity for members of the public who are interested to go and witness the County Assembly proceedings. It does not provide an opportunity for a member of the public to participate in those proceedings. Therefore it is misleading to conclude that there was public participation merely because the proceedings in the County Assembly were public.

[41] In particular **Article 196(1)(b)** of the Constitution obligates a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees; while **section 91** of the County Government Act requires a County Government to establish particular structures for information, communication technology based platforms, town hall meetings, notice boards for announcements of matters for public interest, avenues for the participation of people's representatives and establishment of citizens fora at county and decentralized units. The respondents did not demonstrate use or availability of such structures in regard to the motion for removal of the appellant.

[42] I am in agreement with the dicta in the South African case *Doctors for Life International vs. Speaker of the National Assembly and Others* (supra) that:

“According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process therefore means taking steps to ensure that the public participates in the legislative process.”

[43] Therefore it was for the County Assembly of Embu to show the steps that it had taken to ensure the public involvement and participation in the removal process of the Governor, and for the High Court to determine whether the steps taken provided adequate facilitation of public involvement in the removal process. While I am mindful of the fact that what was before the County Assembly was not a legislative process, the removal of the Governor was not just any other business of the County Assembly, but a matter in which the electorate in the County Assembly were deeply interested, the Governor having been directly elected by the electorate. The matter was weighty and of great interest to the people of Embu whose only opportunity to participate effectively in the removal process, was from the time of communication of the motion to the Speaker of the County Assembly to the time the motion was debated in the County Assembly.

[44] With the greatest respect to the learned judges of the High Court their brief included making an inquiry and a finding whether the infrastructure stated by the appellant as available for general public participation was adhered to in the appellant's removal process, and if so whether the same provided adequate opportunity for public participation in the removal process. The information relating to the public participation was a matter within the special knowledge of the County Assembly. Given the constitutional and statutory obligation placed on the County Assembly of Embu in regard to public participation, the appellant and cross appellants having established that the appellant was removed from the position of County Governor of Embu following a process carried out by the County Council of Embu and the Senate, the evidentiary burden shifted to the County Assembly of Embu and the Senate to show that it followed the required process. For instance, that the County Assembly of Embu had indeed discharged the obligation of facilitating public participation in the process by not only providing ample opportunity for public participation in the removal process (including providing Standing Orders that could facilitate such public participation), but also evidence of dissemination of specific information relating to the removal motion.

[45] The High Court appears to have lost focus of what it had earlier set out to do as set out in paragraph 203 of its judgment:

In making a determination whether the County Assembly complied with its duty to facilitate public participation, the Court will consider what the County Assembly has done and in this case the question will be whether what the County Assembly has done is reasonable in all the circumstances. The factors that would determine reasonableness would include the nature of the business conducted by the County Assembly and whether there are timelines to be met as set by

the law. This will be the ultimate determination on the method of facilitating public participation (underlining added)

[46] Having found that the period provided in the Standing Order 61 was not sufficient for public participation, coupled with the absence of evidence of dissemination of specific information relating to the removal of the appellant, the learned judges ought to have come to the conclusion that the cross-appellants and the people of Embu County were not afforded a reasonable opportunity to participate in the removal of the County Governor.

Threshold in the Establishment of Grounds for Removal of Governor

[47] In Nyeri Civil Appeal No 21 of 2014, the Court stated as follows:

“52. In our view, in addition to the supervisory jurisdiction of the High Court under Article 165 (6) of the Constitution, the High Court has a specific constitutional jurisdiction under Article 165 (3) (d) (ii) and (iii) of the Constitution. These paragraphs vest upon the High Court jurisdiction to hear any question on whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of this Constitution; and to hear and determine any matter relating to constitutional powers of state organs in respect of county government. It is not contestable that removal of a Governor from office is a thing done under the authority of the Constitution and it is the duty of the High Court to determine if such removal is inconsistent with or in contravention to the Constitution.

53. It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove the threshold in Article 181 of the Constitution. ...”

[48] In my view the above is a clear pronouncement of the law by this Court in regard to the jurisdiction of the High Court. In accordance with the doctrine of *stare decisis* the High Court was obliged to follow the precedent as set in Nyeri Civil Appeal No 21 of 2014. Thus in determining the petition before it, the High Court had to go beyond its supervisory mandate, by invoking its constitutional mandate to determine whether the removal of the appellant was done in accordance with the Constitution, and in particular whether the facts laid before the Senate in support of the allegations made against the appellant had met the threshold in Article 181 of the Constitution that lays down the grounds upon which a Governor can be removed.

[49] In regard to the determination of the constitutionality of the removal process in accordance with the above stated precedent, the following extract from the judgment of the High Court is pertinent:

“247. In Wambora 1 Appeal (supra) the Court of Appeal was of the opinion that this Court has to interrogate the facts in order to determine whether there was nexus between the Governor and the alleged gross violations. That would call for a substantive interrogation of the charges and evidence leading to the removal in order for the Court to make any meaningful and legitimate intervention.

248. However in this case we were not supplied with material which would enable us to conduct interrogation, and there is the danger of the Court speculating as to whether what led to removal of the Governor met the threshold. For example, the evidence which was tabled before the investigations committees, was not availed to this Court. In addition, evidence such as was availed to the Senate and which is referred to in the Hansard was not availed before the Court. This is the nature of evidence which might have enabled the Court to deal with the issues of nexus and threshold.

249. We now consider whether there was a nexus between the 1st Petitioner and the alleged gross violation of the Constitution and the relevant laws. The summary of the findings of the Special Committee of the Senate is found at page 68 of the Report where it is stated ...”

[50] Upon perusing the report of the Special Committee, the High Court noted that the Senate analyzed the evidence put forward in regard to each allegation and also properly directed itself in regard to the standard of proof. The High Court concluded as follows:

“258. From the foregoing it is apparent that the Senate understood the constitutional threshold that had to be met. We have no reason to fault the Senate in its conclusion.

259. In line with our power to consider the reasonableness of the decision of the Senate, we have looked at the Report and find nothing in it that would invite the review powers of this Court.

260. In summary, our view is that this Court can only review proceedings relating to the removal of a governor. We have nevertheless subjected to scrutiny the Report of the Special Committee on the removal of the 1st Petitioner and we have found the same to be satisfactory. We find no reason for disturbing the decision of the Senate. Whether or not we agree with it is another thing altogether.”

[51] It is evident from the above that the High Court only exercised its supervisory jurisdiction by reviewing the exercise of the Senate’s powers in so far as the report of the Special committee was concerned. The High Court failed to discharge its constitutional mandate that required it to go beyond mere review, and determine whether the charges levelled against the appellant had met the threshold of Article 181 of the Constitution. Article 165(3)(d)(iii) of the Constitution gives the High Court jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of any matter relating to constitutional powers or state organs in respect of County Governments and any matter relating to the constitutional levels relating to the constitutional relationships between the levels of Government.

[52] The High Court put a caveat to the exercise of its constitutional mandate by stating that it did not have the facts which it could interrogate to enable it determine the issue of nexus and threshold with regard to the exercise of the Senate’s power in the removal of the appellant as Governor. In undertaking the process of removal of the appellant as Governor of Embu County, the 1st and 2nd respondent, and the Senate, were exercising constitutional and statutory powers. A question having arisen regarding the exercise of those powers, the High Court was obligated to make a determination whether what was done was consistent with the Constitution.

[53] In that regard, it was material that the nexus and threshold regarding the allegations upon which the appellant was being impeached be established. As already noted the evidentiary burden was upon the 1st and 2nd respondent whom it was not disputed, caused the motion for removal of the appellant to be debated in the County Assembly and its resolution carried to the Senate. That burden was also upon the Senate that passed the resolution for removal to satisfy the Court that there was nexus and threshold to meet the constitutional standard required for removal of the appellant as County Governor. This is information that was especially within the knowledge of the 1st and 2nd 3rd and 4th respondents. Interestingly, the 3rd and 4th respondents did not even challenge the petition! Again in this regard, the learned judges not only misdirected themselves in regard to the burden of proof, but also failed to discharge its constitutional mandate of determining whether nexus between the appellant’s governance function and the impugned procurement process was established such as to meet the threshold of Article 181 of the Constitution. I would therefore concur with the submissions made by the appellant and the cross appellant that the learned judges erred in failing to discharge its constitutional powers and also failing to apply the precedent set in Nyeri Civil Appeal No 21 of 2014.

Lack of Fair Hearing and Bias

[54] On the issue of lack of fairness and bias, the appellant contended that there was likelihood of bias on the part of the Special Committee of the Senate tasked with investigating the allegations against the appellant. This was because it was the same Committee that had investigated the allegations against the appellant in regard to the first process of removal wherein they had found the appellant culpable; and that

the allegations made in the second process of removal was based on the same allegations that they had earlier investigated.

[55] In this regard the following finding in the judgment of the High Court is pertinent:

***“Although we do not find anything untoward in the filling of the Special Committee with members who had dealt with the first removal, we share the petitioners’ concerns that the decision by the Senate did not give the impression that justice would be seen to have been done. We would therefore strongly advice against such course of action in future. The Court in Wambora 1 did indeed declare the first removal null and void, but that order did not disabuse the minds of the members of the Special Committee of the information gathered during the first hearing. Human beings are prone to prejudices and biases and any independent observer may easily reach the conclusion that the 1st Petitioner was not treated fairly by being subjected to the same people who had dealt with him before over the same matter.*”**

***188. In the circumstances, there ought to have been no difficulty in appointing different members of the Senate to the second Special Committee. In any case, a special committee is formed as and when the need arises. It should be remembered that under Section 33(6)(a) of the Act a special committee can report that particulars of any allegation against the governor have not been substantiated and that would be the end of the matter. The special committee therefore has a critical role to play in the removal proceedings. The fate of a governor may well depend on the report of the special committee.*”**

***189. Having said so, we find that no prejudice was occasioned to the 1st Petitioner as the report of the Special Committee was adopted by an overwhelming majority of the whole House. We, however, agree with those opposed to this petition that the Senate has a fixed membership, save for any vacancies, during its lifetime, and where a matter is supposed to be handled by the House then nobody should be heard to say that the matter ought to have been handled by different people for there can only be one Senate at a time. Nothing however, turns on this issue.”*”**

[56] With respect, while the learned Judges made a clear finding that there was likelihood of bias in the appointment of the same members of the committee that had earlier investigated similar allegations against the appellant, as members of the Special Committee in the second removal process, the Judges erred in overlooking that likelihood because in their opinion there was no prejudice caused to the appellant. The test that the Judges were obliged to apply was not whether there was actual bias or prejudice, but simply likelihood of bias. I reiterate what this Court stated in ***Attorney-General v. Anyang’ Nyong’o & Others*** [2007] 1E.A. 12;

***“The objective test of ‘reasonable apprehension of bias’ is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially [?]..... The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case...”*”**

[57] The test that the High Court was obliged to apply was the impression of a reasonable and fair-minded member of the public, in regard to the impartiality of the Special Committee of the Senate in the circumstances obtaining before them. In that regard having found that a reasonable member of the public would form the impression that there was likelihood of bias, the issue of actual prejudice was irrelevant. In any case, the deliberations and the motion by the Senate on the removal of the appellant were guided by the report of the Special Committee of the Senate, and if the Committee that produced that report was made up of members whose impartiality was in issue, then it cannot be truly said that there was no actual prejudice caused to the appellant.

Conclusion and Final Orders

[58] I come to the conclusion that although the High Court carried out its supervisory jurisdiction and reviewed the exercise of power by the 1st to 4th respondents in the removal process of the appellant, the conclusions arrived at by the learned judges that the process was flawless was inconsistent with the findings made by the learned judges which findings revealed that there was no public participation in the process; and that there was appearance of bias on the part of the Special Committee of the Senate that carried out investigations into the allegations upon which the process was anchored. Further, the High Court failed to carry out its constitutional mandate, as it did not address the issue of nexus and threshold in regard to the grounds upon which the removal was made. Therefore the judgment of the High Court cannot stand. I would allow the appeal. As my brother and sister Judges are in agreement, final orders shall issue setting aside the orders made by the High Court on 12th February, 2014, and substituting thereof an order allowing the amended petition and issuing orders as follows:

- i. A declaration that section 33 of the County Government Act is not inconsistent with Article 1, 2(1), 10, 118 (1)(b), 174, 196 (1)(b) of the Constitution in regard to public participation in the removal of a County Governor rather it is the Embu Standing Orders that are inconsistent with the constitutional requirement of public participation because of the stringent timelines;
- ii. A declaration that the cross-appellants and members of the public are entitled to participate in the process of removing the Governor of Embu County from office and that the process of removal of the appellant from office as Governor of Embu County was vitiated by lack of public participation;
- iii. A declaration that the resolution of impeachment passed by the Senate pursuant to the report of the Special Committee of the Senate was vitiated by the appearance of bias on the part of the Special Committee of the Senate;
- iv. A declaration that Article 181 of the Constitution was not complied with as the threshold for the impeachment of a Governor envisaged under Article 181 was not met no nexus having been established between the conduct of the appellant and the allegations subject of the grounds for removal;
- v. That orders of certiorari do issue to remove to the High Court and quash the resolutions passed by the County Assembly of Embu dated 29th April 2014 and the Senate on the 13th May 2014 to remove the appellant as the Governor of Embu County;
- vi. That an order of certiorari do issue to remove to the High Court and quash the resolution passed by the Senate on the 13th May 2014 to impeach the Governor of Embu County.
- vii. That in light of the public interest element and the jurisprudence emerging from this matter, each party shall bear their own costs in the High Court and this appeal.

Those shall be the orders of the Court

Dated, Signed and delivered this 11th day of December, 2015

H. M OKWENGU

.....

JUDGE OF APPEAL

JUDGMENT BY G.B.M. KARIUKI SC

1. This judgment springs from the decision of the High Court (Mwongo PJ, Korir & Odunga JJ) delivered on 12th February 2015 dismissing consolidated Petitions Numbers 7 and 8 both of 2014. Petition

No.7/2014 was by Governor Martin Nyaga Wambora (who is hereinafter referred to as “the appellant”) and Petition No 8 of 2014 was by 32 registered voters in the County of Embu, who contended that their rights to participate in the process of removal of the appellant from office as governor of Embu County had been violated and they sought a declaration to that effect. In both petitions, it was contended that the required threshold for participation by members of the public entitled to participate pursuant to Articles 118 (1) (b), 174 (a), and (c) and 196 (1) (b) of the Constitution had not been attained. Declarations were sought to the effect that –

“public participation is a Pre-condition to proceedings for removal of a governor under article 181 of the Constitution; the act of removing a County Governor is not an exclusive affair of the county assembly and the Senate; the resolution passed by the County Assembly on 29th April, 2014 is null and void for having been passed by the County Assembly in contravention of County Assembly of Embu Standing Order No.86 and the Senate in toto contravention of Standing Order No.92 of the Senate Standing Orders; that the impeachment passed by the Senate pursuant to a resolution passed by the County Assembly of Embu on 29th April, 2014 is null and void; that Section 33 of the County Government Act is unconstitutional for being in conflict with the flying over the face of Article 1, Article 2(1) and (2), Article 10, Article 118 (1)(b), Article 174 (a) and (c) and Article 196(1)(b) for failing to allow public participation and involvement in the removal of a county Governor; that the threshold of the impeachment of a Governor as envisaged (sic) under Article 181 of the Constitution were read together with other provisions (sic); that the petitioners herein are entitled to the full protection of their right to information and the same right has been violated;”

2. The petitioners in both Petitions sought an order of certiorari to remove to the High Court for the purpose of quashing the resolution passed by the county assembly of Embu dated 29th April 2014 to remove the appellant from office as Governor of Embu County. Also sought were orders of certiorari to remove into the High Court for quashing the resolution passed by the Senate dated 13th May 2014 to impeach the appellant as Governor of Embu County.

3. When the appeal came up for hearing before us on 22nd October 2010, the appellant was represented by learned Senior Counsel Mr. Paul Muite who led Messrs Issa Mansur, Mr. Wilfred Nyamu and Mr. Peter Wanyama. The 1st and 2nd respondents were represented by learned Senior Counsel Mr. Tom Ojienda who led Mr. Njenga. Learned counsel Mr. Thanji appeared for the 5th respondent. There was no representation for the Speaker of the Senate and the Commission on Administration of Justice who were named as the 3rd and 6th respondents respectively. The 7th respondent was represented by learned counsel Mr. Ndegwa. The parties had filed written submissions which the learned counsel highlighted as shown in the lead judgment by the presiding judge, Okwengu JA.

4. The brief background to the petitions that resulted in the impugned judgment of the High Court in this; the appellant was first governor to be elected in the County of Embu after the promulgation of the 2010 Constitution. He became the first governor to be impeached under the Constitution which introduced devolution as a new structure of governance and also brought power to the people at the grassroots on how they are to be governed. The appellant survived the first impeachment in January 2014 when the High Court invalidated it. But no sooner had the High Court invalidated the impeachment of the appellant than the Embu County Assembly initiated on 16th April 2014 another motion for his removal from office which the appellant and 32 voters of the County of Embu challenged in Petitions Nos. 7 of 2014 and 8 of 2014 respectively.

5. The appellant’s impeachments in January 2014 and 29th April 2014 were based on the same grounds. That the High Court was alive to this fact is reflected in paragraph 4 of its impugned judgment which states, correctly in my view, that –

“4. The basis of the impeachment presently complained about, is a replication of the first impeachment process. The substance of the facts giving rise to the complaints allegedly occurred in 2013. The County Government of Embu had advertised tenders for the supply of maize, and

had procured services to face-lift Embu stadium. According to the complaint in the County Assembly, the maize was allegedly below quality and did not germinate. Where it did grow, such growth did not exceed more than 20 percent. As for Embu Stadium, it was alleged that the amount spent on it far exceeded what had been budgeted for, and the refurbishment was unsatisfactory. The Members of the County Assembly found this inexplicable as the project had been taken over from the Ministry of Works which had done some of the works.

6. It seems the appellant declined to act on the recommendation of the County Assembly as a result of which the latter tabled an impeachment motion in the County Assembly for his removal from office.

7. The record of appeal shows that the appellant did not appear in the County Assembly to respond to the motion and consequently, on 29th April 2014, the Embu County Assembly debated it and 23 out of 33 members constituting two-thirds supported it and ostensibly the threshold was met. The speaker of the Senate was notified pursuant to Section 33 (2) of the County Governments Act who in turn constituted a Special Committee of the Senate pursuant to Section 33(3)(b) of the County Governments Act which found merit in the allegations against the appellant.

8. The High Court (Mwongo PJ, Korir and Odungu, JJ) heard the parties through written submissions and oral hearing on 6th November 2014. After perusing and examining the amended petition, and the affidavits and annexures thereto, including the reports in the record of appeal and after examining questions for interpretation put forward by the appellant in the context of the respective cases for the appellant and the respondents, and after considering the submissions and the law including **The Constitution, The County Governments Act (Chapter 265), The Public Procurement and Disposal Act, 2005, The Public Finance Management Act 2012, (Chapter 412), International Convention on Civil and Political Rights of 1996, The African (Banjul) Charter on Human and Peoples' Rights, Government Proceedings Act Chapter 40**, the High Court found that the Special Committee of the Senate in execution of its mandate under Section 33 of the County Governments Act and Standing Order 68 of the Senate Standing Orders had found as proved the charges against the Appellant on gross violation of the Public Procurement and Disposal Act, Chapter 412A, and Public Finance Management Act, Chapter 412C, and The Constitution of Kenya (2010) and upheld the decision (by the Senate Special Committee). At paragraph 250 of its judgment, the High Court observed that –

“a perusal of the report clearly shows that the Senate analysed the evidence put forward in support of each allegation. The Senate also considered the 1st Petitioner’s (i.e. the appellant’s) written answer to the charges before making its determination ...”

9. In paragraph 254, 255, and 258 of its judgment the High Court stated –

“254. The allegation of gross violation of the Constitution was considered by the special Committee which made several observations one of them being at pages 66-67 as follows:

“150. The Special Committee further observed that the standard response by the Governor to all the allegations set out by the County Assembly has been “it was not me”. This response by the Governor does little to “promote public confidence” in the office of the Governor as required under Article 73(1)(a)(iv) of the Constitution. The Governor seems to have abdicated from taking any responsibility for the goings on in his office and in his County, despite being the elected chief executive of the County. This is in violation of Article (sic) 73(2)(d) of the Constitution which requires that State officers be guided by the principle of “accountability to the public for decisions and actions”.

“255. In Wambora 1 Appeal the Court stated that the standard of proof in such proceedings is;

“...neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves “gross violation of the Constitution”, we hold

that the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt.”

If that be so, then we do not hesitate to hold that the Senate attained this standard.

“258. From the foregoing it is apparent that the Senate understood the constitutional threshold that had to be met. We have no reason to fault the Senate in its conclusion.”

10. The High Court in paragraphs 260 and 259 of its judgment made the following findings –

“259. In line with our power to consider the reasonableness of the decision of the Senate, we have looked at the Report and find nothing in it that would invite the review powers of this Court.

260. In summary, our view is that this Court can only review proceedings relating to the removal of a governor. We have nevertheless subjected to scrutiny the Report of the Special Committee on the removal of the 1st Petitioner and we have found the same to be satisfactory. We find no reason for disturbing the decision of the Senate. Whether or not we agree with it is another thing altogether.”

11. The High Court disposed the petitions before it in paragraph 262 of its judgment in which it held, inter alia, that “*the due process for the removal of a governor was followed in the removal of the governor of Embu County, Hon. Martin Nyaga Wambora*” and “*the removal process of the governor requires that an opportunity be afforded to the public to participate therein which opportunity was afforded in the instant case*” and that “*the courts can intervene where constitutional issues are raised and that the petition failed and was therefore dismissed.*

12. The Memorandum of Appeal contains 17 grounds of appeal which raise the issues whether the High Court failed to observe stare decisis by not upholding and applying the binding decision in C. A. Civil Appeal No.21 of 2014 (**Martin Wambora & 3Others V. Speaker of the Senate and 6 Others**; **whether** the High Court failed to determine the threshold in Article 181 of the Constitution in light of Civil Appeal No.121 of 2014; **whether** the alleged gross violations of the Constitution were proved; **whether** there was any nexus between the acts complained of and the conduct of the appellant qua governor to warrant removal; **whether** Section 33 of the County Governments Act is constitutional; **whether** the special committee of the Senate was impartial and **whether** the High Court should have found that it was not; **whether** the right test on bias in relation to the special committee of the Senate was applied; **whether** there was public participation in the removal of the appellant from office and **whether** the High Court erred in law in holding that it was not possible in the case of the appellant due to strict time lines; **whether** the court contradicted itself in holding that there was compliance with Article 196(1)(b) of the Constitution; **whether** the Speaker of the Senate and the Senate had controverted the appellant’s case; **whether** the due process envisaged by the Constitution in removal of a governor from office was followed; **whether** the High Court applied correct principles in interpreting the Constitution.

13. The appellant prays in his memorandum of appeal that (a) the appeal be allowed and the judgment of the High Court be set aside and in its place an order be made allowing the Petition dated 30th April 2014 and (b) the removal of the appellant from office pursuant to resolutions passed by the County Assembly of Embu on the 29th of April 2014 and the Senate be set aside and declared null and void and (c) that costs of the appeal be granted to the appellant and be borne by the 1st, 2nd, 3rd, 4th and 5th respondents.

14. I have perused in draft the lead judgment by the presiding judge, Lady Justice Okwengu JA. I am in agreement with it. It renders it unnecessary for me to repeat all the facts or to delve into all the issues raised in this appeal. I therefore propose to focus my comments only on some of the issues.

15. The issues that emerge for determination in this appeal in relation to the removal of the appellant from office and public participation relate to the questions **whether** the appellant qua governor bore personal

responsibility for the charges relating to procurement on which his removal was predicated and/or was vicariously liable for the actions of the officers under him; **whether** the special committee of the Senate which comprised the same members who found the appellant guilty in the first impeachment could escape the charge of bias in the circumstances of the second impeachment; **whether** there was public participation as required by law in the removal of the appellant from office; **and whether** the threshold of impeachment was attained in the appellant's case.

16. Removal of a governor under Article 181 of the Constitution for gross violation of the Constitution must be in harmony with the Constitution and in considering the threshold must have regard to, first, the objects of the devolved government set out in Article 174 of the Constitution which include promotion of democratic and accountable exercise of power; giving powers of self-governance to the people and enhancing the participation of the people in the exercise of the powers of the State and in making decisions affecting them. Secondly, the principles of devolved government which are required by Article 174 of the Constitution to reflect democratic principles and the separation of powers. Thirdly by dint of Article 179 (1) of the Constitution, the fact that the executive authority of a county is vested in and exercisable by a county executive committee headed by the governor to whom members of the county executive committee are accountable for the performance of their functions and exercise of their powers by virtue of Article 179 (6) of the Constitution.

17. Article 181(1) of the Constitution provides that a county governor may be removed from office on, inter alia, ground of gross violation of the constitution or any other law; or for abuse of office or gross misconduct.

18. The procedure for removal of a county governor from office is provided in Section 33 of the County Governments Act. The process is triggered by a motion of the county assembly supported by two thirds of all the members of the County Assembly presented to the Speaker of the Senate who in turn convenes a meeting of the Senate to hear the charges against the governor. The Senate by resolution may appoint a special committee as was the case in this appeal comprising eleven members to investigate the matter and report to the Senate on whether it finds the allegations substantiated.

19. Gross violation of the Constitution which the appellant was accused of is a serious charge. Where, as in this appeal, the acts constituting the charge involve a member of the county executive, a nexus must be established between the governor and such member and the alleged violation. If complicity or collusion is alleged on the part of the governor in illegal procurement of goods or services, the court must be satisfied that evidence was tendered to prove it for a charge of gross violation of the Constitution to hold.

20. It is common knowledge that Kenya is besotted with politics. Is there growing polarity between county governors and members of County Assemblies, and might this undermine the object of the Constitution on devolution which is in its nascent stages? Might this in turn polarize public opinion? Do powers of County Assemblies to impeach governors constitute a sword of Damocles that might undermine democratic governance and emasculate devolution? Do Governors have to look over their shoulders all the time to ensure they do not rub the County Assembly members the wrong way least they incur their wrath through impeachment? If so, is this healthy for devolution; how will the expectations of the Constitution be better safeguarded and met?

21. The Judiciary as an independent arm of the government has the unique responsibility of ensuring proper interpretation and enforcement of the Constitution. Gross constitutional violations were alleged in the removal from office of the appellant as governor of Embu County.

22. On the issue of the appellant's responsibility for the acts constituting the charges; there is no dispute that the acts related to procurement of goods and services by the Tender Committee. There was no evidence on the basis of which complicity or collusion on the appellant's part could in law be justified. Without such evidence, the necessary nexus was nonexistent. The governor could not carry personal responsibility for the acts of the junior officers in the county executive committee and the doctrine of vicarious liability has no application. The fact that a county governor is accountable for the management and use of the county resources by dint of Section 30(3) of the County Governments Act as the High

Court correctly found, did not provide a nexus. A nexus had to be established between the alleged gross violation and the conduct of the governor. For that reason, it behoved the High Court to interrogate the facts to see if there was a connection. It did not. The court however lamented that there was no evidence supplied to enable it interrogate whether the governor was personally involved. Yet the court went ahead and analysed the report of the Senate Special Committee on the allegations against the appellant and held –

“we have nevertheless subjected to scrutiny the Report of the Special Committee on the removal of the 1st Petitioner (the appellant) and we have found the same satisfactory. We find no reason for disturbing the decision of the Senate. Whether or not we agree with it is another matter altogether.”

23. Here, on the one hand, the court acknowledged that there was no material placed before the Special Committee of the Senate to assist in determining whether there was a connection between the conduct of the appellant as governor and the alleged gross violation. On the other hand, the court “scrutinized” the Senate Special Committee Report to its satisfaction. Even more startling is the court’s decision that “*whether or not the court agrees with it*” it was satisfactory. Allegations of gross violation of the Constitution against a public officer are serious. They call for high standard of proof as stated in the Nyeri C.A. Civil Appeal No.21 of 2014 (Martin Wambora & 3 Others Vs Speaker of the Senate. In the instant appeal, there was nothing to show the nexus and therefore the charge against the appellant could not hold.

24. On the **issue of bias**, the facts are clear. The charges were the same in the 2nd impeachment as they were in the first impeachment. The issues were also the same in the first impeachment as they were in the second. They related to procurement of goods and services. The composition of the Senate Special Committee that found the appellant responsible in the first impeachment was the same as the one in the second impeachment. Could the members of the Senate Special Committee fairly investigate the charges having already done so earlier and arrived at a decision to impeach? Were the minds of the members not tainted? The High Court on the one hand expressed the view that it was not proper for the same committee in the first impeachment to deal with the second impeachment. It agreed with the appellant’s concerns and in their own words stated –

“we share the petitioner’s (appellant’s) concerns that the decision by the Senate did not give the impression that justice would be seen to have been done. We would therefore strongly advise against such course of action in future.... Human beings are prone to prejudices and biases and any independent observer may easily reach the conclusion that the 1st petitioner (the governor) was not treated fairly by being subjected to the same people who had dealt with him before over the same matter.”

25. It is plain to see that the High Court found that there was a perception of bias in the composition of the Special Committee of the Senate. In spite of this, they went ahead to find that all was well. In its view, no prejudice would be occasioned to the appellant. That smacked of indecision if not also of contradiction.

26. On the basis of the facts before the Court, it was clear that reasonable apprehension of bias was shown. The appellant could not expect fairness. Accordingly, the decision by the Senate Special Committee could not stand as fair. It was clearly in breach of the appellant’s right to a fair administrative action under Article 47 of the Constitution.

27. In **Committee for Justice and Liberty et al. V. National Energy Board et al [1978] 1 SCR 369, 1976 Can L 112 (SCC)**, the Supreme Court of Canada (per Laskin C.J. and Ritchie, Spence, Pigeon and Dickson JJ) where objection was taken to the participation of one Mr. Crowe in the National Energy Board which considered applications under S.44 of the National Energy Board Act because he had in a representative capacity participated in a Study Group and where the Board was quasi-judicial and was enjoined to observe the rules of national justice, the Court held –

“a reasonable apprehension of bias arises where there exists a reasonable probability that the

judge might not act in an entirely impartial manner...

The test of probability or reasoned suspicion of bias, unintended though the bias may be, is grounded in the concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and emphasis is added to this concern in this case by the fact that the Board is to have regard to the public interest.”

28. Yet in another decision by the Supreme Court of Canada in the case of Ontario Labour Relations Board, (**International Brotherhood of Electrical Workers, local 894 Versus Ellis – don Limited** [1990] 1 SCR 282 –) the question of breach of rules of natural justice arose when the appellant learnt that a first draft of the decision would have dismissed the grievance and that a full Board meeting had been held during which this draft was discussed. The Court held –

“in the case of bias, the state of mind of the decision-maker, evidence of bias is often difficult to apprehend directly. Therefore, the test adopted had to be usually limited to the demonstration of a reasonable apprehension that the mind of the adjudicator might be biased. If a requirement to establish actual bias had been adopted as a general principle, judicial review for bias would be a rare event indeed.”

29. On the ground of reasonable apprehension of bias, the report of the Special Committee of the Senate could not stand.

30. The issue of **public participation** has been elaborately dealt with in the lead judgment of the presiding judge. I need only add a few comments. People’s participation is not only one of the national values and principles under Article 10 of the Constitution. It is also a requirement in legislative and other businesses of the County Assembly vide Article 196 of the Constitution. One of the issues raised in the petition was whether public participation is a requirement in impeachment of a governor. The High Court correctly held that there ought to be public participation in the removal of a governor. The court expressed the view that some level of participation is necessary to avoid situations where a popular governor is removed from office due to malice, ill-will and vendetta of the members of the County Assembly. (But more often it is due to rivalry and turf political wars.) The problem however lies on the extent of public participation as in the case in this appeal. The litany of activities presented by the County Assembly as constituting public participation were general in nature and were not specific enough as to the event of removal of the governor, the Appellant. The High Court was persuaded that that was enough public participation.

31. While public participation is not cast in stone and while there are no hard and fast rules on how it should be conducted, the extent of public participation conducted by the Embu County Assembly was clearly far too inadequate. In his decision in **Nairobi Petition No.532 of 2013 Peter N. Gakuru & Others V. Governor of Kiambu County & Others**, Odunga J provided useful guidelines. The learned judge correctly expressed himself as follows on the matter –

“... it is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention... I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

32. The decision of the High Court on public participation is not supportable. The court was in error.

33. On the issue relating to **“gross violation of the Constitution or any other law”** under Article 181 (1) (a) of the Constitution, the court rightly held that gross violation has to be intentional and persistent violation of the Constitution and that the standard proof must be above the balance of probabilities and

not necessarily beyond reasonable doubt.

34. The court pronounced itself correctly on the law, but drifted away from determining whether the impeachment met the **threshold** or whether the alleged facts and evidence supported the impeachment charge. In skirting around the issue, it consoled itself that the court ought to be careful not to determine what amounts to gross violation in the circumstance under the guise of separation of powers. In the face of the serious charge of gross violation of the Constitution, it behoved the High Court to examine the basis on which the charge was pegged. The High Court should have upheld and applied this court's decision in Nyeri Civil Appeal No.21 of 2014. It did not. The High Court erred in its decision in this regard.

35. This appeal reflects the dire need to better safeguard devolution and good governance at both the County government level as well as the National government level. Governors who are popularly elected by the majority voters, who discharge their duties satisfactorily and adhere to the Constitution and the law, ought not to be in office at the mercy of the County Assembly. That is not what is intended by the Constitution.

36. In the result, I allow the appeal and set aside the High Court judgment and the order dated 12th February 2014 dismissing the petition and in its place, I concur with the orders proposed by the presiding judge in her lead judgment.

Dated and made at Nairobi this 11th day of December, 2015.

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF J. MOHAMMED, J.A.

I have had the advantage of reading in draft the lead judgment of Okwengu, J. A. and agree with her entirely.

Dated and delivered this 11th day of December, 2015.

J. MOHAMMED

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JUDGE OF APPEAL