



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A.)

CIVIL APPEAL NO. 21 OF 2014

BETWEEN

HON. MARTIN NYAGA WAMBORA1ST APPELLANT

THE COUNTY GOVERNMENT OF EMBU2ND APPELLANT

THE COUNCIL OF GOVERNORS3RD APPELLANT

MARGARET LORNA KARIUKI4TH APPELLANT

AND

THE SPEAKER OF THE SENATE1ST RESPONDENT

THE CLERK OF THE SENATE2ND RESPONDENT

THE ATTORNEY GENERAL3RD RESPONDENT

THE DEPUTY GOVERNOR OF EMBU COUNTY.....4TH RESPONDENT

THE SPEAKER OF THE COUNTY ASSEMBLY OF EMBU.....5TH RESPONDENT

THE COUNTY ASSEMBLY OF EMBU6TH RESPONDENT

THE COMMISSION FOR THE

IMPLEMENTATION OF THE CONSTITUTION.....7TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kerugoya (Ong’udi, Githua & Olao, JJ.) dated 16th April, 2014

in

Petition No. 3 of 2014 consolidated with Petition No. 4 of 2014, Judicial Review No. 6 of 2014 & Misc. Applic. No. 4 of 2014)

JUDGMENT OF THE COURT

1. The issue in this case revolves around the concepts of separation and balance of power. The terms ‘separation of power’ and ‘balance of power’ mean that the power of the three branches of a democratic government– the Legislative, Executive and Judiciary – should not be concentrated in one branch, but should be distributed such that each branch can independently carry out its own respective functions. The separation and balance of power rests on two main principles. First, the competencies of the three branches of governmental power must be clearly delimited and defined. Second, all branches of government are bound by the rule of law.

2. In this judgment, we adopt the dicta by the Supreme Court of South Africa *In the matter between The Speaker of the National Assembly and Patricia De Lille (MP) & another, Case No. 297/98* wherein it was stated:

“...No Parliament, no official and no institution is immune from judicial scrutiny...”

We further adopt and concur with the dicta expressed by Justice Karqkqra of the Uganda Supreme Court in the case of *Paul K. Semogerere & 2 others – v- The Attorney General, Constitutional Appeal No. 1 of 2002* where he opined that,

“It is the Constitution, not Parliament nor the executive nor judiciary which is supreme”.

Background:

3. This is an appeal against part of the judgment of the High Court dated 16th April, 2014. The memorandum of appeal raises the following grounds:-

- ***The learned Judges erred in law in holding that the County Assembly and the Senate were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution which is a jurisdiction exclusively vested in the High Court by Article 165 (3) (d) (iii) of the Constitution.***
- ***The learned Judges erred 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.***
- ***The learned Judges erred in law by failing to determine whether there was any nexus between the allegations in the motion tabled in the County Assembly and the 1st appellant.***
- ***The learned Judges erred in law in failing to determine whether the impeachment and removal of the 1st appellant as governor was in accord with the Constitution and the County Governments Act.***

4. In the year 2013, the County Government of Embu, the 2nd appellant herein, procured services of contractors to face lift the Embu County Stadium and advertised for tenders for supply and distribution of maize seeds to the farmers in the County. Unfortunately, the County Assembly of Embu, the 6th respondent herein, was dissatisfied with the manner in which the stadium was refurbished and the type and quality of maize seeds supplied to farmers. Consequently, on 3rd January, 2014, the 6th respondent summoned the 4th appellant, the then County Secretary, to appear on 6th January, 2014, before the joint committee on infrastructure, youth and sports and the joint committee on agriculture, livestock, fisheries and cooperatives to answer queries over the stadium and the maize seeds supplied to farmers.

5. According to the 4th appellant, the summons were delivered to her office on Friday the 3rd January,

2014, after working hours and she only received the same on Monday, 6th January, 2014, at 8:30 a.m. when she went to office. She wrote to the 6th respondent seeking an extension of 21 days to prepare comprehensively to answer the queries over the aforementioned issues. The 6th respondent did not respond and proceeded to make a recommendation to the Governor, the 1st appellant, to suspend the 4th appellant pending investigations by the Ethics and Anti- Corruption Commission (EACC).

6. On 16th January, 2014, a motion to impeach the 1st appellant from office was tabled before the 6th respondent on the grounds that the appellant had refused and/or neglected to act on the recommendation of the 6th respondent which amounted to gross violation of the **Constitution** and abuse of office. On even date, the 4th appellant filed Judicial Review proceedings being **J.R. No. 17 of 2014**, seeking an order of *certiorari* to quash the decision of the 6th respondent to have her investigated by EACC and to impeach the 1st appellant. Pursuant to the said proceedings the High Court (Odunga, J.) issued orders maintaining status quo pending the determination of the application for stay therein. The orders were served upon the 6th respondent. However, the 6th respondent continued with the impeachment proceedings.

7. The 1st appellant filed **H.C. Petition No. 1 of 2014**, seeking *inter alia* an order restraining the Speaker of the County Assembly of Embu, the 5th respondent herein and the 6th respondent from continuing with the impeachment proceedings. On 23rd January, 2014 Githua, J. in the said Petition issued conservatory orders restraining the respondents from continuing with the impeachment proceedings. Despite the said orders, the 6th respondent convened, debated and passed the motion of impeachment on 28th January, 2014. Thereafter, the 5th respondent forwarded the resolution to impeach the 1st appellant to the Speaker of the Senate, the 1st respondent herein.

8. The 1st respondent caused a notice to be published in the Kenya Gazette calling for a special meeting by the Senate to hear the charges against the 1st appellant. On 3rd February, 2014, the 1st and 2nd appellants filed another Constitutional Petition wherein a conservatory order was issued restraining the 1st respondent from introducing, discussing or otherwise deliberating the impeachment of the 1st appellant. Despite being served with the said orders, the 1st and 2nd respondents tabled the resolution to impeach the 1st appellant before the Senate. The Senate debated on the issue and unanimously agreed to remove the 1st appellant from office.

9. According to the appellants, the impeachment proceedings were contrary to the **Constitution** and the rules of natural justice; the proceedings were conducted in blatant and willful disobedience of court orders; that the impeachment proceedings were null and void. Pursuant to the actions of the Senate, the appellants filed **Petition No. 3 of 2014** wherein they sought *inter alia*:-

- ***A declaration that the proceedings of impeachment of a Governor under Article 181 of the Constitution are quasi-judicial in nature and are therefore subject to the jurisdiction of the High Court under Article 165 (3)(d) & (6) of the Constitution.***
- ***A declaration that the proceedings and resolution for removal of the 1st appellant before the Embu County Assembly that were held in violation and disregard of a court order were null and void.***
- ***A declaration that the proceedings before the Embu County Assembly for removal of the 1st appellant as Governor violated the provisions of Sections 33(1), (2) & (3)(b) of the County Governments Act No. 12 of 2012 and was therefore null and void.***

10. The aforementioned Petitions and Judicial Review proceedings were consolidated and **Petition No. 3 of 2014**, became the lead file. In the said Petition, the appellants averred that the charges which were the basis of the 1st appellant's impeachment were as follows:-

- a. *Violation of the Public Procurement & Disposal Act, 2005 & Regulations 2013.*
- b. *Violation of Public & Finance Management Act 2012.*
- c. *Violation of the Constitution of Kenya.*

The appellants argued that the 1st appellant was not the accounting officer nor was he the procuring entity and could therefore not be held liable under the principles of collective responsibility; that there was no nexus or personal conduct or wrongdoing on the part of the 1st appellant that linked him to the acts and omissions contained in the charges leveled against him.

11. The appellants in their Petition set out the following issues for determination by the trial court:-

- *Whether the 1st, 2nd, 5th and 6th respondents acted in willful disobedience and disregard of court orders and therefore contravened the principles of good governance, integrity, rule of law, transparency and accountability under Article 10 of the Constitution;*
- *Whether by purporting to pass a resolution to impeach the 1st appellant in disobedience of court orders the 1st, 2nd, 5th & 6th respondents violated the Constitution;*
- *Whether the Senate could receive a resolution that had been discussed and passed by a County Assembly in defiance and in willful disobedience of court orders;*
- *Whether the 1st and 2nd respondents' decision to impeach the 1st appellant despite being served with a court order undermines the authority of the honourable court as provided under Article 159 & 160 of the Constitution;*
- *Whether the impeachment of the 1st appellant by the 1st respondent met the constitutional threshold required under Article 181 of the Constitution and the County Government Act, 2012;*
- *Whether the accounting officer of a County Government is answerable to the Senate or County Assembly in the financial management of county funds;*
- *What is the meaning, extent and scope of power to call for evidence as provided for under Article 125 of the Constitution and does the Article confer the Senate with oversight authority over County Governments and Governors?*
- *Whether a Deputy Governor can assume office under Article 182 (2) of the Constitution through a process of impeachment that was in violation of the Constitution.*

With the exception of the 1st and 2nd respondents, the other respondents entered appearance and filed their respective responses.

12. After considering the matter on its merits, the trial court vide a judgment dated 16th April, 2014, issued declarations that the County Assembly and the Senate were best placed to determine whether a motion for the removal of a Governor was in accordance with the **Constitution**. The trial court held that the proceedings conducted by the County Assembly and the Senate and the resolutions, consequential gazette notices, actions and any communications with regard to removal of the 1st appellant were held in violation and in disregard of court orders and were therefore null and void. The trial court issued an order of *certiorari* and quashed the impeachment proceedings against the 1st appellant. It is that decision that has instigated this appeal based on the aforementioned grounds of appeal.

13. The appeal proceeded before us by way of both written and oral submissions. The appellants were

represented by senior counsel, Mr. Paul Muite and Mr. Ahmednasir Abdullahi and Mr. David Njoroge. There was no appearance for the 1st, 2nd & 4th respondents. The 5th and 6th respondents were represented by Mr. Ndegwa.

Appellants' submissions

14. It was the appellants' submission that pursuant to **Article 165 (3) (d) (ii) & (iii)** of the **Constitution** the High Court had the jurisdiction to determine the constitutionality of the impeachment process of the 1st appellant and to make a finding whether the process was in accordance with **Article 181** of the **Constitution**. According to the appellants, the learned Judges of the High Court erred in the interpretation of the **Constitution** by holding that the County Assembly and the Senate were best placed to determine the constitutionality of the impeachment process; that as a result of the said misinterpretation, the learned Judges abdicated their judicial duty by failing to determine whether the grounds for impeachment of the 1st appellant met the constitutional threshold.

15. Mr. Muite argued that courts ought to take care not to be intimidated when an issue with political dimension is raised; that courts must jealously execute the sacred responsibility and mandate entrusted to the judiciary by the people; that courts should not allow the political question doctrine to stop inquiry into the conduct of the executive or legislature; that courts should be robust in interpreting the **Constitution**.

16. It was the appellants' contention that the learned Judges rightly held that the standard to be used to measure what constitutes gross violation does not involve a mathematical formula but a consideration of the intention of **Article 181(1)** of the **Constitution**. It was submitted that the learned Judges correctly held that there ought to be a nexus between the Governor and the alleged gross violation of the **Constitution** or any other law. Counsel submitted that despite the foregoing, the learned Judges failed to subject the impeachment process and the charges leveled against the 1st appellant to the law that they had correctly espoused. According to Mr. Muite, it was upon the High Court to establish the threshold of what amounts to gross violation. He urged this Court to set out the guidelines on the applicable threshold of gross violation under **Article 181** of the **Constitution**.

17. The appellants argued that had the learned Judges subjected the impeachment process to the law, they would have found that there was no nexus between the 1st appellant and the charges leveled against him. This is because the County Assembly's intention was to probe the 4th appellant on the refurbishment of the stadium and on the maize seeds supplied to the farmers. It was submitted that the 1st appellant was not involved in the procurement process and there was no nexus between the allegations leveled against the 4th appellant and the 1st appellant. According to the appellants, the 1st appellant's woes began when he did not implement the 6th respondent's recommendation to suspend the 4th appellant. Mr. Muite argued that there was no gross violation of the **Constitution** by the 1st appellant. According to him, gross violation has to have an element of *mens rea* or wrongful conduct analogous to *mens rea*.

18. The appellants further submitted that the **Constitution** intended the removal process of a person elected to the office of Governor be at par with the removal of Member of County Assembly as provided under **Section 33(9)** of the **County Governments Act**. Counsel submitted that the threshold for removal of a Governor under **Article 181** of the **Constitution** should be the same threshold for removal of the President under **Article 145** of the **Constitution**. It was submitted that pursuant to **Article 27** of the **Constitution** which guarantees equal protection and equal benefit of the law and **Article 38 (3) (c)** of the **Constitution** which guarantees every citizen the right, if elected to hold office, the removal of a Governor under the **Constitution** could not be subjected to a process that is discriminatory to other elected offices and to a member of a County Assembly or member of Parliament. The appellants urged this Court to allow the appeal.

5th & 6th respondents' submissions:

19. It was submitted on behalf of the respondents that the County Assembly and the Senate were best

placed to determine whether a motion for removal of a Governor was in accordance with the **Constitution**. Counsel for the respondents submitted that the High Court by virtue of **Article 165** of the **Constitution** could not assume jurisdiction it did not have; that where the **Constitution** has granted a specific organ a mandate, the courts cannot interfere. To the respondents, the instant appeal has no merit and is aimed at shielding the 1st appellant from scrutiny and accountability by the organs of the government that are mandated to have oversight over a public office.

20. Mr. Njenga argued that the present appeal had been overtaken by events and was purely academic; that the issue before the High Court was the question of validity of the impeachment of the 1st appellant by a decision made in February, 2014. Since then the 1st appellant was impeached by a second process and a decision made on 15th May, 2014. Counsel submitted that the second impeachment decision cannot be affected by this appeal. He submitted that the judgment of this Court could not apply retroactively to the second impeachment.

21. The respondents submitted that **Article 174** of the **Constitution** provides for the objects and principles of devolution. Of paramount consideration is **Article 174(a)** which make the following provisions “**to promote democratic and accountable exercise of power**”. The intention of the said provision is to place a Governor subject to the oversight role of the County Assembly and the Senate. This ensures that in the context of a County, a Governor executes his functions and mandate as provided under **Section 30** of the **County Governments Act** in a manner that promotes the welfare and general interest of the people. It was the respondents’ case that the removal of a Governor under **Article 181** of the **Constitution** and **Section 33** of the **County Governments Act** is a right provided to the people exercisable through their elected representatives. This right becomes exercisable when a presumption arises that the continued tenure of a Governor would not be in the best interest of the County due to gross violation of the **Constitution** and the law.

22. It was the respondents’ contention that in the report of the special committee of Senate there was a clear exposition of how the charges and the facts founding these charges relate to the Governor including his own actions in procuring condemned maize seeds and distributing it to farmers for planting and a further determination that in the context of **Article 181** of the **Constitution** these charges and threshold had been substantiated.

23. On the issue of equal protection of the law in respect of removal of the 1st appellant under **Article 181**, the respondents submitted that equal protection before the law was never an issue for determination by the High Court and ought not be raised and considered in this appeal. Without prejudice to the aforementioned submission, the respondents argued that a court’s jurisdiction is limited to applying the law as it is; that unless and until the **Constitution** is amended together with **Section 33** of the **County Governments Act**, those provisions have the power and force of the law; and a court cannot expand or limit the scope therein as suggested by the appellants. The respondents submitted that there was no basis in law for the court to declare that the provisions relating to impeachment of a Governor should be construed in the same way as the provisions obtaining for the removal of the President under **Article 145** of the **Constitution**.

24. According to Mr. Njenga, the 1st appellant as the Governor was responsible for the actions of the County Executive Committee and the Senate properly applied the principle of collective responsibility. It was submitted that the present appeal was tantamount to seeking a review by this Court of the findings of the Senate made on 14th February, 2014. Counsel emphasized that the judiciary and courts have no jurisdiction to hear an appeal over a decision made by the Senate.

25. We have considered the rival submissions by counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123; Jabane – vs- Olenja, [1986] KLR 661, 664; Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278** and **Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870**).

26. It is our considered view that the following issues arise for determination:

- 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?***
- iv. ***Was impeachment and removal of the 1st appellant as governor in accord with the Constitution and the County Governments Act?***

Forum for removal of Governor:

27. The respondents submitted that the County Assembly and the Senate is the exclusive and best placed forum to determine whether a motion for the removal of a Governor is in accordance with the **Constitution**. It was submitted that the court’s role cannot precede the County Assembly’s inquiry role; and the role of the court is not to conduct a merit review of the Assembly’s actions. The respondent cited the case of ***Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others - Civil Appeal No. 290 of 2012*** in support of the submission.

28. The pertinent issues for consideration in this appeal is to determine if the County Assembly and the Senate have exclusive mandate and jurisdiction to remove a Governor from office and the threshold for removal of a Governor from Office. The core function test is the guiding principle where no organ should interfere with the core functions of another. As was stated in the case of ***Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others, (supra)***, the doctrine of separation of powers does not proscribe organs of government from interfering with the other’s functions; it also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over the functions vested elsewhere.

29. The procedure for removal of a governor from office is stipulated in **Section 33** of the **County Governments Act (No. 17 of 2012)**.

The Section provides:

“33. Removal of a governor

(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.

(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—

(a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and

(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.

(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—

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

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

(4) A special committee appointed under subsection (3)(b) shall—

(a) investigate the matter; and

(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

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

(6) If the special committee reports that the particulars of any allegation against the governor—

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

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

(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

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

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

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

30. The appellants’ case is founded on the interpretation of *Article 181* of the *Constitution* and *Section 33* of the *County Governments Act*. It is the appellant’s submission that the learned Judges erred in law in interpreting *Section 33* and making a finding that the County Assembly and the Senate are best placed to determine whether a motion for the removal of a Governor is in accordance with the *Constitution*. It is the appellants’ submission that the courts have the final say to determine whether a motion for the removal of a Governor is in accordance with the *Constitution*.

31. Our reading and interpretation of *Article 181* of the *Constitution* as read with *Section 33* of the *County Governments Act* shows that removal of a Governor is a constitutional and political process; it is a *sui generis* process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. 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.

32. In all the sequential steps identified above, courts have neither been vested with jurisdiction to initiate a motion, consider a resolution nor to hear the charges levied against the Governor. This position is in tandem with the core function test and the concept of separation of powers. The constitutional and statutory mandate to initiate and consider a motion to remove a County Governor is vested in the County Assembly and the Senate. **Section 33** of the **County Governments Act** which is an implementing legislation for **Article 181** of the **Constitution** does not vest the courts with the jurisdiction to hear charges relating to the removal of a Governor from office. From the dicta in **Marbury – vs- Madison, – 5 US. 137**, it is our considered view that in so far as the process of removal of a Governor from office is concerned; the province of the court is solely to decide on the rights of individuals and not to enquire how the County Assembly and Senate perform duties in which they have discretion.

Jurisdiction of the High Court in the process of removal of a Governor from office:

33. We have stated that the process of removal of a Governor from office is a constitutional and political process which is quasi-judicial. **In the Matter of the Interim Independent Electoral Commission (Applicant) - Constitutional Application No. 2 of 2011**, the Supreme Court stated that where the **Constitution** exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. In our view, the High Court has four distinct constitutional jurisdictional mandates relevant to the question of removal of a Governor from office. These are:

- a. **Article 165 (6) of the Constitution which vest upon the High Court supervisory jurisdiction over any body or authority exercising judicial or quasi-judicial functions.**
- b. **Article 165 (3) (d) (ii) which vest upon the High Court jurisdiction to hear any question whether anything said to be done under the authority of Constitution or any law is inconsistent with or in contravention with the Constitution.**
- c. **Article 165 (3) (d) (iii) that vest upon the High Court jurisdiction to hear and determine any matter relating to constitutional powers of State Organs in respect of county governments. (Article 260 of the Constitution defines a state organ to include any body established by the Constitution. It is our considered view that both the Senate and the County Assembly are state organs and are subject to the jurisdiction of the High Court as provided for in Article 165 (3) (d) (ii) and (iii).)**
- d. **Article 165 (3) (d) vests upon the High Court the jurisdiction to interpret the Constitution and in the instant case, the issue relates to interpretation of gross violation in Article 181 of the Constitution.**

34. Our reading of **Article 165 (6)** of the **Constitution** reveals that the role of the High Court for purposes of removal of a Governor from office is *inter alia* supervisory in nature to ensure that the procedure and threshold provided for in the **Constitution** and the **County Governments Act** are followed. If the process for removal of a Governor is unconstitutional, wrong, un-procedural or illegal, it cannot be said that the court has no jurisdiction to address the grievance arising therefrom. (See **Mumo Matemu – vs- Trusted Society of Human Rights Alliance & 5 Others (supra)**). In its supervisory role, the jurisdiction of the

High Court is dependent on the process and constitutionality of the action taken. In the instant case, in its supervisory role, the High Court is to examine whether any procedural law was violated by the County Assembly or Senate in arriving at their decision. We are of the view that **Article 181** of the **Constitution** as well as **Section 33** of the **County Governments Act** can neither be interpreted as clauses that oust the supervisory jurisdiction of the High Court, nor limit the power of the High Court to interpret **Article 181** nor be construed as provisions that prohibit the right of a citizen to access a court of law where there is an allegation of infringement of a constitutional right to hold a public office under **Article 38 (3) (c)** of the **Constitution**. In the case of **Tononoka Steels Limited –vs- Eastern and Southern Africa Trade Development Bank- Civil Appeal No. 255 of 1998**, Tunoi and Lakha, JJ.A. stated as follows:

“The right of access to courts can only be taken away by clear and unambiguous words of the Parliament of Kenya”.

Similarly, in **Davies & Another – vs- Mistry- 1973 EA 463** where Spry VP quoting the case of **Pyx Granite & Co. – vs- Ministry of Housing- 1960 AC 260** stated that:

“It is a principle not by any means to be whittled down that the subject’s recourse to Her Majesty’s Court for the determination of his rights is not to be excluded except by clear words.

Threshold and criteria for removal of County Governor:

35. Does the High Court have jurisdiction to determine if the facts proving the threshold for removal of a Governor from office have been established and proved? Can the High Court re-evaluate the evidence that was before the County Assembly and the Senate to determine if the threshold for removal of a Governor has been proved? In the exercise of its supervisory role, the High Court cannot replace the decision of the competent organ with its own decision; it can only find fault with it. The court should determine if the action taken is constitutional, rational and examine if there has been any procedural impropriety.

36. The threshold and criteria for removal of a County Governor is provided for in **Article 181** of the **Constitution**. The **Article** provides:

Removal of a county governor

(1)A county governor may be removed from office on any of the following grounds—

(a)gross violation of this Constitution or any other law;

(b)where there are serious reasons for believing that the county governor has committed a crime under national or international law;

(c)abuse of office or gross misconduct; or

(d)physical or mental incapacity to perform the functions of office of county governor”.

37. The appellants submitted that it is the duty of the court to ensure that the threshold and criteria for removal of a Governor from office has been established and proved; that in the instant case, the ground for removal of the 1st appellant was that he committed gross-violation of the **Constitution** and other laws. It is the appellants’ contention that the learned Judges erred in law in failing to find that there must be proof that the appellant personally committed the acts of gross-violation as alleged; that there must be nexus between the alleged acts of gross-violation of the **Constitution** and any other law and the conduct of the Governor who is to be removed; that there must be proof of personal wrongdoing in order to establish gross violation; that there has to be an element of *mens rea* or wrongful conduct analogous to *mens rea*.

Is nexus or conduct analogous to mens rea required for removal of a Governor?

38. The appellant submitted that the respondents erred in removing the 1st appellant from office based on acts and omissions which he did not personally commit and based on the concept of collective responsibility. It was submitted that there must be personal wrongdoing and an element analogous to *mens rea* in order to find that a Governor is liable for gross violation of the **Constitution** or any other law.

39. We have considered the submission by the appellant as to whether personal conduct and an element analogous to *mens rea* need to be established in order to remove a Governor from office. The process of removal of a Governor from office is neither a civil nor criminal trial; it is *sui generis* political and quasi-judicial process that must adhere to constitutional criteria and threshold. The process involves policy and political responsibility and is a tool for ensuring good governance. In the case of ***Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others (supra) at Para 54*** it was stated that when a court examines the constitutionality of any action, the courts will not be sitting in appeal over the opinion of the relevant organ but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purposes were taken into account in the actual process. The issue for consideration is whether the process had a clear nexus with the determination to meet the objective criteria established by law.

40. The learned Judges of the High Court held that there must be a nexus between the Governor and the alleged gross violation of the **Constitution** or any other written law. Kenya’s legal system is premised on the concept of individual and personal liability or responsibility; this means that the act or omission complained of must have been done or undertaken with the knowledge, consent or connivance of the person charged. The Senate in impeaching the 1st appellant adopted the concept of collective responsibility and cited **Article 226 (5)** of the **Constitution**. The Article stipulates that a holder of a public office who directs or approves the use of public funds contrary to law or instruction is liable for any ensuing loss.

41. We are of the view that collective responsibility is a policy, governance and accountability concept and not a principle of personal liability or individual culpability. If it were so, in the instant case, collective responsibility would imply that all individual members of the various organs of the County Government would be personally responsible for acts or omissions of any person in the employ of the County Government. Collective responsibility does not mean that the leader/ head is individually responsible and politically liable for all acts or omissions of subordinates. If collective responsibility were to be a principle of culpability and liability, it would follow that all persons who are collectively bound must individually be held answerable, blameworthy and accountable; this is not the intendment and import of the concept of collective responsibility. We concur with the statement by the High Court that there must be nexus between the alleged gross violation and the conduct of a Governor. We agree with submission by counsel for the appellant that an element of personal knowledge that includes intentional, brazen or willful gross violation of the **Constitution** or other written law must be established. In the instant case, the High Court erred by not making a determination as to whether on the facts before it, nexus was established between the appellant and the alleged gross violation. Having found that nexus had to be proved, it was the duty of the High Court to make a determination whether nexus had been established on the facts of the case. We are fortified in this view by the provisions of **Article 165 (3) (d) (ii)** of the **Constitution** which vests the High Court with jurisdiction to determine if anything done under the authority of the **Constitution** or any law is inconsistent with or in contravention of the **Constitution**. (See ***Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others, (supra)*** at Para 87).

Standard of Proof:

42. What standard should be applied in implementing the threshold for removal of a Governor? The learned Judges of the High Court stated that there is need to maintain a high threshold for removal of the Governor and the need to ensure that the law is strictly followed. We do concur with the learned Judges and add that the standard of proof is neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves “*gross violation of the Constitution*”, we hold that the standard of proof required for removal of Governor is above a balance of probability but

below reasonable doubt.

Definition of gross violation of the Constitution:

43. The appellant contends that the High Court erred in that it did not interpret or define the term “gross-violation” in **Article 181** of the **Constitution**. We note that the **Constitution** does not define gross-violation. What amounts to gross violation must be considered on a case by case basis taking into account the peculiar facts and circumstances of each case. We concur with High Court’s statement that whether conduct is gross or not will depend on the facts of each case and not every violation of the **Constitution** or other law is gross violation. The Nigerian Supreme Court in the case of **Hon. Muiywa Inakoju & Others – vs- Hon. Abraham Adaeleke, S.C.272/2006** opined as follows:

The following constitute grave violation or breach of the Constitution:

- a. ***interference with the constitutional functions of the legislature and the judiciary by an exhibition of over constitutional executive power;***
- b. ***abuse of the fiscal provisions of the Constitution;***
- c. ***abuse of the Code of Conduct for public officers;***
- d. ***disregard and breach of the provisions on fundamental rights;***
- e. ***interference with local government funds and stealing from the funds, pilfering of the funds... for personal gains...;***
- f. ***instigation of military rule and military government and***
- g. ***any other subversive conduct which is directly inimical to the implementation of some other major sectors of the Constitution.***

44. As observed herein not each violation of the **Constitution** may amount to gross-violation. Consequently, the motion to remove a Governor from office and particulars of the charge must expressly state that the alleged violation is gross and give particulars of the alleged gross violation. We are minded to draw analogy in this Court’s decisions in criminal cases involving robbery with violence where it was stated where the charge against the accused person involves an allegation that the weapon used was offensive and dangerous; the charge sheet must expressly contain the words offensive and dangerous. In the case of **George Omondi –vs- R- Criminal Appeal No. 5 of 2005**, this Court citing the case of **Juma – vs – R, (2003) 2EA 471** stated as follows:

“Where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was a dangerous or offensive one”.

In the instant case, it is our view that if violation of the **Constitution** is alleged to be gross, the motion and charges against the Governor must expressly indicate the words “gross violation” in the charge and the specific particulars of the alleged gross violation must be given. The rationale for this is that where the violation is not gross, then the removal process under **Article 181** of the **Constitution** is not available. In the instant case, the word “gross” was omitted from the charges leveled against the Governor. A Governor is entitled to notice and particulars of the charges facing him and notice as to whether the allegation is merely an allegation of violation of the **Constitution** or other law or gross violation of the **Constitution** and other law.

45. Counsel for the appellant urged this Court to come up with guidelines for determining if the constitutional threshold for removal of a Governor has been attained. The High Court in its judgment at paragraph 252 agreed with the persuasive decision of the Nigerian Supreme Court as to what constitutes

grave violation or breach of the **Constitution**. (See case of **Hon. Muiwa Inakoju & Others – vs- Hon. Abraham Adaeleke (supra)**). We concur and adopt the following findings of the High Court as part of what constitutes gross violation:-

“253. The question therefore is how to measure what constitutes gross violation. We are of the view, that the standard to be used does not require a mathematical formula, but it must take into account the intendment of Article 181(1) of the Constitution. In our view therefore whatever is alleged against a Governor must;

- a. **Be serious, substantial and weighty.**
- b. **There must be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.**
- c. **The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.**
- d. **The charges as framed must state with degree of precision the Article(s) or even sub-article(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.”**

46. We reiterate that what constitutes gross violation of the **Constitution** is to be determined on a case by case basis. Gross violation of the **Constitution** includes violation of the values and principles enshrined under **Article 10** of the **Constitution** and violation of **Chapter six (Leadership & Integrity)** of the **Constitution**; or intentional and/or persistent violation of any Article of the **Constitution**; or intentional and blatant or persistent violation of the provisions of any other law. The rationale for this definition is that the values and principles embodied in the **Constitution** provide the bedrock and foundation of Kenya’s constitutional system and under **Article 10(1)** these values bind all state organs, state officers, public officers and all persons. We hasten to state that the facts that prove gross violation as defined above must be proved before the relevant constitutional organ. Examples of the constitutional Articles whose violation amounts to gross violation include:

- i. **Chapter 1 on the Sovereignty of the People and Supremacy of the Constitution more specifically Articles 1, 2, and 3 (2) of the Constitution.**
- ii. **Chapter 2- Article 4 that establishes Kenya as a sovereign multi-party Republic & Article 6 that establishes devolution and access to services.**
- iii. **Article 10 on national values and principles of good governance.**
- iv. **Chapter 4 on the Bill of Rights.**
- v. **Chapter 6- Articles 73 to 78 on Leadership and Integrity.**
- vi. **Chapter 12 - Article 201 on principles of public finance.**
- vii. **Chapter 13- Article 232 on values and principles of public service.**
- viii. **Chapter 14 - Article 238 on principles of national security.**
- ix. **Article 259 (11) on advice and recommendation.**
- x. **Any conduct that comes within the definition of the offence of treason in the Penal Code (Cap 63 of the Laws of Kenya).**

Does the High Court have jurisdiction to determine if the Constitutional threshold for removal

of a Governor has been proved?

47. At paragraphs 218 and 231 of the High Court judgment, the learned Judges correctly stated that the court has jurisdiction to determine whether the impeachment or removal of a Governor was done in accordance with the **Constitution**; it is not contested that the County Assembly and the Senate are the bodies constitutionally mandated to undertake the process leading to removal of a Governor from office. The appellants contend that the learned Judges of the High Court shied away and misdirected themselves in implementing the provisions of **Article 181** of the **Constitution**; that the High Court erred in finding that it is the County Assembly and Senate that are best placed to decide whether there has been a gross violation of the **Constitution**. It was submitted that it is the function of the High Court to determine whether a gross violation of the **Constitution** has been proved and it is also for the High Court to determine if any conduct amounts to gross violation; that since the **Constitution** requires gross violation to be proved, the final verdict as to whether gross violation exists is a determination by the court not the County Assembly or the Senate.

48. The appellant urged this Court to find that the learned Judges erred in law by failing to exercise their constitutional mandate under **Article 165 (3) (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**. Mr. Muite submitted that the High Court properly stated the law at paragraph 207 of the judgment where it is stated that the court cannot exercise restraint where the **Constitution** has been violated or is threatened with violation; that the appellant was not asking the High Court to conduct his impeachment trial but was asking the court to determine whether his impeachment by the County Assembly and the Senate violated the **Constitution** and **County Governments Act**. Counsel submitted that the High Court correctly appreciated the law and facts but erred in applying **Article 181** of the **Constitution** to the facts of the case; that the court erred by failing to determine if the threshold for removal of a Governor under **Article 181** had been proved.

49. The appellants contend that the High Court erred in misapplying the principle in the case of **Nancy Barasa – vs- Judicial Service Commission & 9 Others- Petition No. 23 of 2012** where it was held that:

“It is not for this Court or the Commission to find that the allegations made against the Petitioner did not amount to gross misconduct. In fact according to Prof. Yash Pal Ghai’s “Kenya Constitution: An instrument for Change” cited by the Petitioner “whether a conduct is gross or not will depend on the matter as exposed by the facts which it is the duty of the tribunal to establish”.

The appellants submitted that the High Court erred in applying the dicta in the **Nancy Barasa case** and adopting the quote ***“that it is not for the Court or the Commission to find that the allegations made against the Petitioner did not amount to gross misconduct”***. It was submitted that the Nancy Barasa case is distinguishable from the present case. That the issue in the Nancy Barasa case was whether a prima facie case had been established to warrant the Judicial Service Commission to make a recommendation to the President to establish a Tribunal; that in the instant case, the issue was not whether a prima facie case had been made but a final decision had been made by the County Assembly and the Senate and for this reason, it was incumbent upon the High Court to make a determination to find out, in exercise of its supervisory jurisdiction, if the charges against the appellant amounted to a gross violation of the **Constitution** or other written law.

50. It is the appellants’ contention that the High Court further erred in paragraph 246 of the judgment when it stated,

“However, we are aware that Mr. Muite did not move this Court to make a determination on the merit or otherwise of the charges framed against the 1st Petitioner”.

Counsel for the appellant submitted that it was the duty of the High Court to review the decision of the County Assembly and the Senate to determine if facts had been laid to establish if the constitutional threshold for removal of the Governor had been attained; that the learned Judges erred in failing to make

the determination whether indeed facts had been laid to prove the threshold for removal of the 1st appellant as Governor.

51. On our part, we note that **Article 165 (3) (d) (iii) and (iv)** of the **Constitution** provides the High Court with jurisdiction to hear any question relating to the interpretation of the **Constitution** including the determination of any matter relating to constitutional powers of state organs in respect of county governments; any matter relating to the constitutional relationship between the levels of government and a question relating to conflict of laws under **Article 165**. It is the appellants' contention that the learned Judges erred in failing to exercise their mandate under the said **Article**.

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

53. It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove the threshold in **Article 181** of the **Constitution**. For example, was the 4th appellant an employee of the 1st appellant or of the County Government? Is a Governor to bear personal vicarious liability for the acts and omissions of officers of the County Government? We are of the view that **Article 181** and **Section 33** of the **County Governments Act** are not ouster clauses that limit or oust the jurisdiction of the High Court as conferred by **Article 165 (3) (d) (ii) and (iii)** of the **Constitution**. Though the process of removal of a governor from office is both a constitutional and a political process, the political question doctrine cannot operate to oust the jurisdiction vested on the High Court to interpret the **Constitution** or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the **Constitution**.

Equal Protection under the Law:

54. The appellant urged this Court to enforce the concept of equal protection of the law between the offices of Governor, Members of the County Assembly and the President. This Court was urged to hold that the constitutionality of the process of removal of a Governor is to be determined by considering the removal or recall process of a member of a County Assembly; a member of either houses of Parliament and the criteria for impeachment of the President under **Article 145** of the **Constitution**. It was submitted that the constitutional intendment is that the process of removal of a person elected to the office of Governor should be at par with the removal of the President in **Article 145 (1)** of the **Constitution**.

55. We have considered this submission and note that the grounds for removal of a Governor stipulated in **Article 181** of the **Constitution** is in *pari materia* with some of the criteria in **Article 145** of the **Constitution** for impeachment of the President. In both **Articles**, one of the criteria for removal of the President or Governor is gross violation of the **Constitution** or any other law or where there are serious reasons for believing that the office bearer has committed a crime under national or international law or if there is gross misconduct on the part of the office bearer.

56. It is a principle of interpretation that provisions in *pari materia* are construed to have the same meaning. We hold that the term “*gross violation of the Constitution or any other law*” and the meaning of the term “*gross misconduct*” in **Articles 145 (1) (a) & (c)** and **181 (1) (a) & (c)** of the **Constitution** is the same. The facts that give rise to invocation of the provisions of the respective Articles may differ but the meaning and import of the terms remain the same.

57. The appellant in support of the concept of equal protection of the law submitted that under **Section 27 (3)** of the **County Governments Act**, the process of recall of a member of County Assembly shall **only be initiated upon a judgment or finding by the High Court confirming the grounds specified in the Act**.

The appellant urged this Court to hold that the process of removal of a Governor shall only be constitutional if the grounds set out in **Article 181** of the **Constitution** are affirmed by a finding or judgment of the High Court. The appellant contend that since **Section 27 (3)** of the **County Governments Act** require the grounds of recall of a member of the County Assembly to be confirmed by the High Court, it follows that if the same standard is not applied in the removal of a Governor, this would amount to discriminatory treatment and violation of the equal treatment and equal protection before the law.

58. In **Charles Omanga & Another -vs- The Independent Electoral & Boundaries Commission & 2 Others - Nairobi Petition No 2 of 2012** it was stated that:-

“The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position... Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality”.

59. We are of the view that the office of Governor is different from the office of Member of County Assembly although both are subject to a competitive electoral process. The rule of differentiation is inherent in the doctrine of equality; different treatment of different offices is equality of treatment. Parliament through the County Government Act has prescribed different procedure and threshold for removal of Governors and Members of the County Assembly. In relation to members of the County Assembly, the High Court must confirm the grounds for removal. Whereas this is not the case with Governors, the supervisory jurisdiction of the High Court as well as the High Court’s jurisdiction to interpret the **Constitution** ensures that a Governor cannot be removed from office if the constitutional procedure has not been followed and the constitutional threshold established and proved. We find that the difference in procedure and grounds for removal of the President, Governor or Member of the County Assembly does not vitiate the constitutional process and threshold that must be fulfilled for each of the distinctive offices.

60. Finally, in their memorandum of appeal, the appellants urged this Court to issue orders in terms of prayers (c) (e) and (f) of the Amended Petition dated 7th March, 2014. In these prayers, the appellant sought declaratory orders that the proceedings before the Embu County Assembly that led to the removal of the 1st appellant be declared null and void as the said proceedings did not meet the threshold required under **Article 181** of the **Constitution**; and that a Governor cannot be removed from office under the principle of collective responsibility.

61. We have considered the appellants prayer as per the memorandum of appeal. A court of law cannot act in vain. The proceedings before the Embu County Assembly and the Senate that led to removal of the 1st appellant as Governor were declared null and void and quashed by the judgment of the High Court dated 16th April, 2014. No appeal was lodged to challenge the decision of the High Court in declaring the said proceedings to be null and void. We hold that the judgment by the High Court dated 16th April, 2014 on this issue stands.

62. In totality, we find this appeal has merit and is partly allowed. The final orders of this Court are as follows:

- I. ***Save as expressly stated in this judgment and as ordered here below, the judgment of the High Court dated 16th April, 2014, is hereby affirmed.***
- II. ***We find that the learned Judges did not err in law in holding that the County Assembly and the Senate were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution. However, this is subject to the supervisory and interpretation jurisdiction of the High Court under Article 165 of the Constitution.***
- III. ***We find that the learned Judges erred in law by failing to exercise their constitutional mandate under Article 165 (3) (d), (ii) and (iii) of the Constitution to determine whether the purported***

removal of the 1st appellant as Governor was inconsistent with or in contravention of the Constitution.

IV. We find that the learned Judges erred in law by failing to exercise the supervisory jurisdiction of the High Court under Article 165 (6) to determine the specific question whether the constitutional threshold for removal of the 1st appellant as Governor had been proved and if there was any nexus between the allegations in the motion tabled in the County Assembly and the 1st appellant.

V. The political question doctrine and the concept of separation of powers cannot oust the jurisdiction of courts to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution as per Article 165(3)(d)(iii).

VI. What constitutes gross violation of the Constitution is to be determined on a case by case basis. Gross violation of the Constitution includes violation of the values and principles enshrined under Article 10 of the Constitution and violation of Chapter Six (Leadership and integrity) of the Constitution; or intentional and/or persistent violation of any Article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law.

VII. The 5th and 6th respondents shall bear half the costs of this appeal.

Dated and delivered at Nyeri this 30th day of September, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO- ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR