



Mkongo v County Assembly of Taita Taveta & 2 others (Petition E001 of 2024) [2024] KEELRC 1568 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1568 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E001 OF 2024**

**M MBARÚ, J
JUNE 13, 2024**

BETWEEN

HON. ELIZABETH MKONGO PETITIONER

AND

THE COUNTY ASSEMBLY OF TAITA TAVETA 1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF TAITA TAVETA ... 2ND RESPONDENT

**GOVERNOR COUNTY GOVERNMENT OF TAITA TAVETA 3RD
RESPONDENT**

JUDGMENT

1. The petitioner is seeking the following;
 1. A declaration that the proceedings for the removal of the petitioner as the County Executive Committee Member in charge of Lands, Physical Planning, Mining and Energy Taita Taveta County was conducted in violation of Articles 10, 25, 47 and 50 of the constitution hence unconstitutional, illegal, null and void.
 2. An order of certiorari removing into this court and quashing the 1st respondent’s proceedings from the removal of the petitioner from the position of the County Executive Member in charge of Lands, Physical Planning, Mining and Energy and the resolutions passed by the 1st respondent on the 27 march 2024.
 3. An order of injunction restraining the 3rd respondent, Governor Taita Taveta County from dismissing the petitioner from her current position of Count Executive Committee member in charge of Lands, Physical Planning, Mining and Energy based on resolutions passed by the 1st respondent.
 4. Costs of the petition be provided for.

2. The petition is that the petitioner is a member of the County Executive Committee (CEC) under Section 32(3) of the CGA assigned the Lands, Physical Planning, Mining and Energy portfolio. The 1st respondent is established under Articles 176, and 177 of the Constitution and Sections 7 and 8 of the County Government Act (CGA). The 2nd respondent is established under Article 178 of the Constitution and Section 7(1) (b) of the CGA. The 3rd respondent is elected under Article 180 of the constitution with the power to appoint and remove members of the County Executive Committee under Article 179 of the Constitution and Section 40 of the CGA.
3. The petition is filed under the provisions of articles 22, 23 and 165(3) of the constitution which allow the court to determine the question as to whether a fundamental right or freedom in the Bill of Rights has been denied, violated, infringed or threatened.
4. The 2nd respondent convened the assembly hearing on 27 March 2024 to deliberate the motion by way of voting, to adopt the report of the select committee on the impeachment of the petitioner as a CEC member in charge of lands, physical planning, mining and energy. The 1st and 2nd respondents were legally bound to appoint members of the select committee to investigate the petitioner, members who were not biased by the virtue of stands they had taken before the establishment of the committee.
5. The select committee proceeded to conduct procedural and biased investigations against the petitioner by disallowing her from cross-examining the witnesses and further failing to supply her with witness statements thereby occasioning great injustice to the petitioner. The petitioner was entitled to a fair hearing by cross-examining the witnesses and being supplied with witness statements as part of the natural justice principles.
6. The effect was that the petitioner was denied a fair hearing and the resulting report of the select committee lacked an analysis of all the allegations made against the petitioner and hence cannot be applied to condemn her and justify loss of employment. Unless the decision of the select committee is quashed, the 3rd respondent will proceed to remove her from office under the provisions of Section 40(6) (b) of the CGA. The petitioner is a state officer and entitled to the right to a fair hearing under Article 50 of the constitution on which premise Standing Orders 73(9) and 74(1) (b) and (2) are premised.
7. The petitioner has been deprived of her right to constitutional protection under article 236(b) of the constitution which protects her from an unfair disciplinary process devoid of due process. The omission of denying her the right to cross-examine witnesses or to be supplied with witness statements before testifying resulted in a compromise of the select committee findings and the petition should be allowed with costs.
8. The petition is supported by the petitioner's Supporting Affidavit and Further Affidavit and avers that the appointed members of the *ad hoc* committee to investigate the petitioner were members who were biased against her by their views as captured in the Hansard Report before they were appointed to the committee. The 1st respondent was legally bound to appoint members of the *ad hoc* committee to investigate the petitioner but should have been composed of members who were objective and not biased and hence the respondents failed to adhere to their constitutional duty.
9. The petitioner aver that having been notified of the impeachment motion against her, she had a legitimate expectation that the composition of the *ad hoc* committee would be fair and composed of persons who do not hold any prejudices against her. The *ad hoc* committee members except one Hon. Anselm Mwadime who was not in the Assembly at the time of the debate, expressed strong views on the floor on the need for impeachment. Out of 32 members of the Assembly, the 1st respondent concentrated on the impeachment motion and hence appointed biased members. They had pre-

- determined the process and outcome. The committee proceedings were therefore a mere matter of course and an abuse of due process.
10. The petitioner avers that she only availed Peter Chozi Sholo as her witness and is not aware of Richard Mghosi Mwasaru who is claimed to be her witness. Her advocate raised objections on the need for cross-examination of the witnesses whose objections are captured in the Hansard report but were not allowed to cross-examine witnesses. Such was a violation of fair hearing principles and the due process and the petition should be allowed.
 11. In reply, the 1st and 2nd respondents filed the Replying Affidavit of Gadiel M Maganga the Clerk, County Assembly of Taita Taveta and aver that the petitioner was until her impeachment the CEC Member in charge of lands, physical planning, mining and energy. On 14 February 2024, the 2nd respondent passed a resolution to remove the petitioner from the position of CEC as per the provisions of *the constitution* and the law.
 12. The motion mover Hon. Anisa Hope Mwakio who is the chairperson, of the lands, housing and human-wildlife conflict resolution committee moved the motion for the removal of the petitioner on grounds of incompetence and gross misconduct. The particulars of incompetence being that the petitioner failed to complete and develop the County land valuation roll whose public participation had been done more than a year ago.
 13. Another ground of incompetence was that the petitioner had not proposed any policies, legislative proposals and regulations for consideration by the 2nd respondent that would guide the County Government in the management and protection of its County Public Land. The petitioner was incompetent for failure to make policy or legislative proposals on account of the County Mining Section for consideration by the 2nd respondent disputing the same being a crucial economic sector for the unemployed in the County. The petitioner had failed to make any Policy or Legislative proposal to guide the County's energy agenda for consideration by the 2nd respondent and due to this incompetence the respondents had not earned any revenue on account of this sector.
 14. Maganga aver that the petitioner was incompetent for failure to observe the chain of command in her department where she blatantly chose to work without the County Chief Officer for lands, physical planning mining and energy and instead worked with the assistant director. This set up the department for failures as cases of insubordination and non-adherence to processes set in.
 15. The petitioner was incompetent for failure to respond to statements on the floor of the Assembly in particular on 27 September 2023 Hon. Patricia Mwashighadi sought a statement on the status of the Voi Municipality show ground plot which statement remains without a response despite the petitioner getting several reminders.
 16. Maganga aver that another ground of incompetence on the part of the petitioner was that she failed to implement her department programmes for the financial year 2022-2023 which had a budget of Ksh.117, 581,858 and ended up spending Ksh. 63, 394,338 leaving unutilized funds. It was a ground of incompetence for failure to provide leadership and offer solutions to challenges facing the people of Taita Taveta on land matters including those facing threats of evictions.
 17. The petitioner failed to initiate boundary verification between Sagalla Ranch and the community which resulted in tension and confusion between the rancher owners and the community leaving to the institution of Voi ELC No.E005 of 2023.
 18. Maganga aver that the petitioner was impeached on the grounds of gross misconduct in that she failed to honour the 2nd respondent's invitations on diverse dates thus curtailing the mandate of oversight

- and representation. On 15 December, against the county's position on the inspection of plots in Voi Sofia went and supervised the beaconing of the plot which was used by the county to settle those who were already in occupation. The petitioner on several actions misled the members of the 2nd respondent including those of Kwale County during a visit to the County Department where she introduced Peter Shoo as the County Chief Officer in charge of mining which was contrary to Section 19 of the Public Officers and Ethics Act.
19. The motion for removal of the petitioner was supported by the requisite number of members of the 2nd respondent who appended their signatures as by law required. On 20 February 2024, the special motion for removal of the petitioner was tabled for debate before the 2nd respondent and was approved by the Assembly leading to the appointment of a select committee to investigate the grounds advanced and report to the house in 7 days.
 20. On 21st February 2024, the *ad hoc* committee investigating the petitioner was constituted comprising of Hon. Amos Makalo, Hon. Dorcas Mlungu, Hon. Isaac Matolo, Hon. Anselm Mwadime and Hon. Rose Shingira. As required under the rules of fair hearing, the deponent invited the petitioner to attend before the *ad hoc* committee. This was a matter of public interest, the deponent also caused it to be published in the local dailies wide circulation notice inviting members of the public to make submissions or comments.
 21. During investigations by the *ad hoc* committee, the petitioner was represented by two advocates. She called two witnesses, Peter Sholo and Richard Mghosi Mwasaru and hence she was allowed to make her representations. The *ad hoc* committee heard a complaint by a member of the public Idha Marie Ahmed a businessman whose complaint against the petitioner was that he had submitted residential building plans and after making the necessary payments of permit fees it took a long to be cleared. The complaint by this member of the public did not form the grounds for impeachment.
 22. The *ad hoc* committee did not entertain a complaint by Ferdinand Kombo Mwabnake who described himself as a member of Mkamenyi Farmers' Cooperative Society Limited. According to him, the petitioner had lodged a caveat against the suit land over land in Voi Point. He also complained that the petitioner had introduced them to an Advocate they paid the advocate Ksh.350, 000 but did not know how to recover their money. The complaint was that the petitioner was a member of the Mkamenyi Farmers' Cooperative Society Limited.
 23. Maganga aver that both complaints by Idha Marie Ahmed and Ferdinand Kombo were made in their capacities as members of the public following notice published on 24 February 2024. They were not witnesses for the respondents to support the motion for removal from office. The statements made by the two did not form the foundation for the motion of impeachment. Whether they were cross-examined or not did not impact the report of the 2nd respondent.
 24. The petitioner had 14 grounds for removal from office. The committee found 10 grounds to be substantiated. The petitioner was accorded all the opportunity to explain herself and was represented by her advocates. There was no question of bias and none arose during the proceedings. It is an afterthought to raise such matters and there is nothing to demonstrate that the petitioner raised these matters during the proceedings and the *ad hoc* committee failed to address them. The petitioner failed to utilize the opportunity given and cannot blame the respondents for her inaction.
 25. The 1st and 2nd respondent must represent and oversight the executive and comply with [the constitution](#) and the law. The petitioner was allowed a fair hearing and found culpable of 10 accusations out of 14. In some accusations, the petitioner admitted in her response. Some accusations were dismissed and some were unsubstantiated for reasons that the source of evidence presented could not be established.

26. The alleged biases and denial to cross-examine witnesses are unfounded. The petitioner had at all times been allowed the opportunity for a fair hearing. On the principles of separation of powers, the petitioner is inviting the court to exercise judicial power over the respondent in undertaking their mandate under the law. The petitioner has failed to demonstrate that she deserves the order sought and based on her admissions to the accusation made against her, the motion for removal from office had justification and the petition should be dismissed with costs.
27. The 3rd respondent **Andrew Mwadime** filed his **Replying Affidavit** and aver that the petition relates to matters between the petitioner and the 1st and 2nd respondent which are different arms of the County government – being the office of the Speaker and the County Assembly and both are not answerable to his office. The conduct of proceedings in the 2nd respondent is governed by standing orders. The 2nd respondent presides over the conduct of the business of the 1st respondent.
28. The 3rd respondent aver that his duties are enumerated in part V of the CGA; more so the mandatory duty under Section 31(b) to dismiss the petitioner if required of him to do so by a resolution of the County Assembly as provided under Section 40. Over and above these duties, he must serve the people of Taita Taveta.
29. In his office, the 3rd respondent received a letter dated 27 March 2024 from the 2nd respondent to discharge his duties under Section 31(b) of the CGA and was provided with an accompanying resolution of the 1st respondent for the removal of the petitioner from office. Before executing his duties as required in Section 31(b) a Court Order was served directing his office not to proceed with any further action and to maintain the status quo. Bound by the Court Order and directions of the court, the office is waiting conclusion of the petition.
30. Parties attended court and agreed to address the petition by way of written submissions and oral highlights. The 3rd respondent opted to abide by the decision of the court.
31. The petitioner submitted that the 1st and 2nd respondents did not follow the law in purporting to impeach her and recommending removal from office. Members of the *ad hoc* committee were biased to investigate her conduct and also failed to afford her time and facility to cross-examine the assembly witnesses and to be supplied with statements before testimonies were made before the select committee. Section 40(3) (a) of the CGA, the 1st respondent was to constitute a committee of 5 persons to investigate the petitioner and report findings. The petitioner legitimately expected a fair hearing but of the 5 members, 4 had already expressed themselves against the petitioner during the debate in the Assembly and were therefore prejudiced against the petitioner. To preside over investigations was with a pre-determined mind and bias.
32. Article 47 of [the constitution](#) provides that every person has the right to fair administrative action and if a right or fundamental freedom is likely to be adversely affected by administrative action, the person has the right to be given written reasons. In the case of **Francis Maliti v County Assembly of Machakos & 2 Others [2019] eKLR** the court held that for a hearing to be said to be fair, not only should the case that the respondent is called upon to meet be sufficiently brought home to him but adequate or reasonable notice should issue. The question should not only be whether the select committee was biased but whether a right-thinking person would have formed the impression that there was a likelihood of bias and justice would not have been done.
33. In the case of **Beatrice Wanjiru Kimani v Evanson Kimani Njoroge Civil Appeal No.79 of 1998 [1995-1998] 1 EA** the court held that in considering whether there is a likelihood of bias, the court does not look at the mind of the justice himself or the mind of the chairman of the Tribunal, or whether it may be, who sits in a judicial capacity. The court looks at the impression which would be given to

- other people. Justice must be rooted in confidence and the confidence is destroyed when right-minded people go away thinking: the Judge was biased.
34. In this regard, the select committee of the 1st respondent should not have been seen to be biased. A fair hearing must be meaningful for it to meet the constitutional threshold.
 35. The petitioner submitted that the failure to cross-examine the witnesses and be supplied with their statement went contrary to Section 50(2) of *the Constitution*. In the case of **Lucy Wanjiru Kariuki v County Assembly of Nakuru & 2 others [2020] eKLR** the court held that the select committee locked out key and crucial evidence, this denied the petitioner the fair chance to cross-examine the witnesses called or call her witnesses and hence the findings of culpability became subjective and without basis. Without the due process of a fair administrative action, to proceed and recommend the impeachment of the petitioner under Section 40 of the CGA was premature.
 36. It is not a case that the petitioner is hiding behind technicalities but is addressing her rights under *the constitution* and the law. The rights under *the constitution* are not mere speculations and should be obeyed without exception and constitutional rights cannot be held to be mere technicalities. The petitioner is seeking for her petition to be allowed with costs.
 37. The 1st and 2nd respondents (respondents) submitted that on alleged biases of the select committee, under section 39(2) of the CGA, the 1st respondent may require a member of the executive committee to appear before it to answer any questions relating to its responsibilities. Under Section 40(2) of the CGA, the removal of a CEC should be upon a resolution of the 1st respondent supported by at least one-third of all members. Removal from office is on the grounds of incompetence, abuse of office, gross misconduct, failure to attend meetings, incapacity or gross violation of *the Constitution* or any other law. The select committee was appointed by the 1st respondent for this purpose to investigate whether the allegations made against the petition were justified. The petitioner appeared and made representations and the select committee established culpability.
 38. The respondents submitted that in this petition, the petitioner argues that the select committee was biased against her save for one member. The members of the County Assembly who supported the motion for removal of the petitioner include the mover Hon. Anisa Mwakio, Hon. Mohamed Omar, Ho. Stephen Mkala and none of the select committee members signed the motion. The allegations that Hon. Amos Makalo, Hon. Rose Shingira, Hon. Aslem Mwadime, Hon. Dorcas Mlungu and Hon. Isaac Matolo were biased against the petitioner are without evidence and hence unfounded. This element of the petition is without basis.
 39. Section 40 of the GCA has a five-tiered process for removal and is tantamount to a disciplinary process in tandem with the oversight role of the 1st respondent. The select committee only played an investigative role in that process. The select committee reported to the County Assembly concerning allegations made against the petitioner as substantiated. There was a recommendation for removal from office and the 1st respondent is not bound and whether or not the members were biased, the final decision is that of the County Assembly by way of voting after the presentation of the report.
 40. The respondents submitted that of the 14 grounds taken out by the motion mover for the impeachment of the petitioner, she was only found culpable in 10. This is evidence that the select committee was not biased as alleged.
 41. Section 108 of the *Evidence Act*, he who alleges must prove. There is no evidence of bias. Section 40 of the CGA mandated the 1st respondent to form a committee that would investigate and report its findings to the full assembly.

42. The petitioner admitted to some of the grounds forming the particulars of the motion for her removal. She cannot plead bias upon admitting that the grounds forming the foundation of the motion for her removal were true.
43. The respondents submitted that concerning an alleged failure to secure the right to cross-examine witnesses, under Section 40 of the CGA, the petitioner was invited to appear before the select committee and had her legal representatives. She was accorded time and facilities to make her representation including calling Peter Chozi Sholo and Richard Mwasaru as witnesses. Her rights under Article 47 of *the Constitution* and Section 40(4) of the CGA were read together with the Standing Orders No.65 (7). The allegations that the petitioner was denied her right to cross-examine witnesses are therefore factually incorrect. The respondents did not call any witnesses. The two persons who testified were members of the public whose testimony was irrelevant and unnecessary to the matters in question.
44. The first witness Idha Marie Ahmed related to a complaint that he had submitted building plans that had taken too long. The complaint by Ferdinand Kombo related to the fact that the petitioner was a member of Mkamenyi Farmers' Cooperative Society Limited and had lodged a caveat on the land. Their representations did not form the grounds for the removal of the petitioner.
45. Whether the petitioner was allowed to cross-examine the witnesses, there was no application to exercise that right. The proceedings for 28 February 2024 confirm that the petitioner did not make an application to cross-examine the respondents on any matter. The petitioner asked for clarifications on the issue of cross-examination and cannot rely on Articles 47 and 50(2) of *the Constitution* to claim her rights were violated.
46. In the case of **Judicial Service Commission v Hon. Justice Mbalu Mutava**, the court held that the right to fair administrative action is concerned with the control of the exercise of administrative powers by state organs and statutory bodies in the execution of their constitutional duties. The right, though constitutional is contextual and flexible in its application and as Article 24(1) provides, can be limited by law. The failure to accord the petitioner the opportunity to cross-examine the witnesses did not amount to a breach of rules on natural justice.
47. The respondents submitted that an investigation is not a trial and cross-examination of witnesses, if called, is a rare occurrence. The select committee had the sole discretion to regulate its hearings. Article 50 of *the constitution* relates to criminal proceedings and cannot apply to proceedings before the select committee.
48. in the case of **County Assembly of Bungoma v Stephen Nendela & others** the court held that whereas Section 40(4) of the CGA provides that a CEC member has the right to appear and be represented before the select committee, that does not translate or equate the nature of such proceedings to court proceedings for purposes of Article 50(2) of *the Constitution*. The CEC member is not before such a committee as an accused person who is entitled to the breadth of rights as an accused person under Article 50 of *the Constitution*.
49. In the case of **Judicial Service Commission v Gladys Boss Shollei & another**, the court held that the invocation of Article 50(2) of *the constitution* was misplaced. In this context, it did not apply to disciplinary proceedings and removal from office. In this case, the select committee had no obligation to allow the cross-examination of witnesses and none application of such matter did lead to an unfair hearing and the petition should be dismissed with costs.

DIVISION - Determination

50. The twin issues for determination in this petition are whether the proceedings and decision for the removal of the petitioner from office violated the constitution and hence the resolution passed by the 1st respondent on 27 March 2024 should be quashed, and whether the 3rd respondent should be restrained from dismissing the petitioner from her office based on the resolution passed by the 1st respondent.
51. From the proceedings, the court identified a further issue as to whether this is a proper petition.
52. On the issue identified by the court, in several matters before the court and affirmed by the Court of Appeal, it is the position that the court has jurisdiction to hear petitions concerning the alleged violation of the Bill of Rights and constitutional provisions. However, there exists the Employment and Labour Relations Court Act, 2011 the Employment Act, 2007 and the Employment and Labour Relations Court (Procedure) Rules, 2016 to regulate claims filed before the Court. Therefore, Article 41 of the Constitution rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms as held in **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR**.
53. The petition here directly relies on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act, the CGA does not seek any declaration of invalidity of the provision of any law or allege that the remedies provided therein are inadequate. Therefore for orderliness and securing of rights, good practice and procedure, the constitutional questions advanced by the Petitioner, if any, could have been raised in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016. Under the Rule, a party can raise any dispute regarding the enforcement of any constitutional rights and freedoms or any constitutional provision through a Memorandum of Claim without the needless invocation of the constitutional petition route. See **Malindi ELRC Petition No. E003 of 2024 Francis Hiribae Malibe v County Assembly of Tana River & others; Mombasa ELRC Petition No.E003 of 2024 John Mwani & 62 others v Steel Makers Limited; Mombasa ELRC Petition No.E019 of 2023 Lawrence Thoya Baya v Judicial Service Commission & another** – the above position is reiterated.
54. The above principles applied herein, this is not a proper petition.
55. At the core of the petition is that the *ad hoc* committee appointed by the 1st respondent to investigate the matters placed before it concerning the petitioner comprising 5 members had 4 members who were biased against her. The committee denied her the right to cross-examine the witnesses called or to provide their statements before their testimonies were taken.
56. Before the 1st respondent, a motion was moved by Hon. Anisa Mwakio for the removal from office of the petitioner on two main grounds of incompetence, and gross misconduct. The particulars of each ground are set out at length in the Hansard on 14 February 2024. In total, there were 14 grounds. In the final report to the 1st respondent, the petitioner was found culpable on 10 grounds.
57. The question of bias of a tribunal, quasi-judicial body and even the court has arisen in multiple cases. When raised, the court must look at the facts objectively and the attendant principles are addressed in the case of Gachuri v Attorney General & another; Kenya Judges Welfare Association & another (Interested Parties) (Constitutional Petition E0304 of 2023) [2024] KEHC that where bias is in issue before the court;

...The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office

taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they must sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

58. The test of whether there is bias or not is summarized In the case of **Attorney General of Kenya v Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007** when it was held that;

We think that 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 mind of the reasonable, fair-minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially? ...

59. Similarly, for the *ad hoc* committee appointed by the 1st respondent to investigate the petitioner concerning the motion for removal from office, these principles apply. whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that they did not have an impartial mind to bear on the investigations of the case is imperative. The petitioner’s case is that 4 of the *ad hoc* committee members had made comments on the floor of the County Assembly in support of the impeachment motion. Sitting in the *ad hoc* committee placed them with a predetermined mind hence prejudicial to her case.
60. The comments made on the floor of the County Assembly by Hon. Amos Makalo, Hon. Rose Shingira, Hon. Dorcas Mlungu and Hon. Isaac Matolo are well captured in the Hansard. This is not contested. The issue is that they did not sign the main resolution after the motion was passed by the full house.
61. However, under Section 39(2) of the CGA, the 1st respondent is allowed to receive take motions and requires a CEC member to appear before it to answer any questions relating to the portfolio;
- (2) A committee of the county assembly may require a member of the executive committee to—
- (a) attend or appear before the committee; and
- (b) answer any question relating to the member’s responsibilities.
62. This attendance concerns the CEC members being individually and collectively accountable to the governor in the exercise of their powers and performance of their duties and responsibilities. In **County Government of Garissa & another v Idriss Aden Mukhtar & 2 others [2020] eKLR** the court held that under the provisions of Article 179(6) of *the Constitution* and Section 39 of the CGA a CEC member is individually and collectively accountable and when called by the County Assembly must address as required. This position is reiterated in **Ali Maalim Dahir v Mandera County Government & 2 others; Ibrahim Adan Mohammed & 5 others (Interested Parties) [2021] eKLR**.
63. Under these provisions, the petitioner was called to account and before the *ad hoc* committee, of the 14 grounds made against her, 10 were found to have been substantiated. Of interest to the court concerning the alleged bias of the *ad hoc* committees is the following;

- a. On the alleged failure to propose policies, legislative proposals and regulations on account of the County Mining Sector; the petitioner admitted that no legislative or policy proposal had been presented to the 1st respondent. The justification was that the mandate of processing legislative proposals into bills was with the County government and not the petitioner;
 - b. Failure to respond to statements sought on the floor of the Assembly; the petitioner acknowledged that she had not responded to the quoted statement by Hon. Patricia Mwashighadi on 27 September 2023 and indicated that she would respond by close of business on 29 February 2024.
 - c. On the alleged gross misconduct and failure to honour County Assembly invitations, the petitioner acknowledged that on the stated invitations she had not made a follow-up for 26 July 2023, 8 August 2023 and 13 December 2023. The *ad hoc* committee found this to be contrary to Section 39(2) of the CGA.
 - d. On the failure to respond to statements sought on the floor of the County Assembly, the petitioner acknowledged that she had not responded to the quoted matters and would do so immediately.
64. All these facts and proceedings before the *ad hoc* committee put into perspective, objectively considered, the admissions and acknowledgements by the petitioner that she had failed to apply the personal and collective duty in her mandate as a CEC member, the case that the member in whole or in part was biased has no justification. The allegations against the petitioner were specifically gone into by the *ad hoc* committee and her responses were addressed objectively. To cite bias from the house proceedings cannot exonerate her from the noted admissions and acknowledgements.
 65. On the issue of the right to cross-examine witnesses and access statements before the testimonies, the application of Articles 47 and 50 of *the constitution* was invoked by the petitioner.
 66. On the application of article 47 of *the constitution*, findings above on the provisions of Section 39 of the CGA addressed, the petitioner was invited before the *ad hoc* committee and was allowed to make representations. The right to be accompanied by a legal representative was secured. The record and Hansard are replete with invitations for the petitioner to make her representations.
 67. The motions of Article 50(2) of *the Constitution* were gone into by the court apply to criminal proceedings. This motion cannot apply without negating the mandate of the 1st respondent and indeed the *ad hoc* committee appointed or the entirety of the County Assembly functions under the provisions of Section 40(2) of the CGA. Invoking the protections under Article 50(2) of *the Constitution* should be in context as to whether the issue relates to *fair hearing* or *fair trial* and the rights outlined under *the Constitution*.
 68. This is gone into at length by the Supreme Court in the case of **Gladys Boss shollei v Judicial Service Commission & Another Petition No. 34 of 2014 [2022]KESC5(KLR)** that;

... Article 50(1) of the Constitution referred to the right to a fair hearing for all persons, while Article 50(2) accorded all accused persons the right to a fair trial. Article 25(c) of the Constitution listed the right to a fair trial as a non-derogable fundamental right and freedom that could not be limited. Often the terms fair hearing and fair trial were used interchangeably, sometimes to define the same concept, and other times to connote a minor difference.

*Although the right to a fair trial was encompassed in the right to a fair hearing in the Constitution, a literal construction of articles 50(1) and 50(2) of the Constitution could be misconstrued in some quarters to mean that article 50(1) dealt with the right to fair hearing in any disputes including those of a civil, criminal or quasi-criminal nature whereas **article 50(2) was limited to accused persons thereby arguing that the protection of such right only related to criminal matters**. That was not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Constitution on the Bill of Rights, which called for an expansive and inclusive construction to give a right its full effect. [Underline and emphasis added].*

69. The Court is guided accordingly and returns that the respondents applied the provisions of the CGA and its Standing Orders in addressing the motion for the impeachment of the petitioner. Whether to call witnesses and be cross-examined or avail witness statements before the evidence is taken is not akin to a criminal hearing. This position is reiterated in the case of *Njuki v Independent Electoral and Boundaries Commission (Constitutional Petition E021 of 2023)* [2023] KEELRC.
70. The imperatives under Articles 41, 47 and 50 of the Constitution and the known rules of natural justice inevitably are engrained to ensure justice, fairness, reasonableness and proportionality in the conduct of that disciplinary process from the beginning to the end. Save, in the conduct of its constitutional and legal mandate, the respondents in addressing a motion for the impeachment of the petitioner would not be bound by the motions of criminal procedures such as outlined under Article 50(2) of the Constitution,
71. The 3rd respondent has retained a respectful and neutral position in this proceeding.
72. On the resolution by the 1st respondent dated 27 March 2024, the motions of Section 31(b) of the CGA come into effect. The court cannot restrain the 3rd respondent in this instance from undertaking its constitutional and legal mandate.
73. On the issue of costs, this is not a proper petition as outlined above. The petitioner has enjoyed interim orders pending these proceedings. The respondents have abided by the orders of the court. They are entitled to costs.
74. To this extent, the petition is found without merit and is hereby dismissed. Costs to the respondents. Orders accordingly.

Delivered in open court at Mombasa this 13 day of June 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

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